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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2001

JUNE 10 THROUGH OCTOBER 3, 2002

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

OFFICERS OF THE COURT

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THEODORE B. OLSON, Solicitor General.
WILLIAM K. SUTER, Clerk.
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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 2000 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
ABATE of Ga., Inc. *v.* Georgia Dept. of Public Safety	924
Abdullah *v.* United States	977
Abdul-Muqsit *v.* Federated Department Stores, Inc.	964
Abdur'Rahman *v.* Tennessee	978
Abouhalima *v.* United States	967
Abraham; Stewart *v.*	958
Acevedo-Cruz *v.* U. S. Parole Comm'n	914
Acuna *v.* Ayers	927
Adair; Townsend *v.*	946
Adam *v.* Hawaii	907
Addleman *v.* Payne	966
Aguilar-Plata *v.* United States	948
Ahmed *v.* Warden, Federal Corrections Institution, Englewood	930
Aiello *v.* United States	961
Ainsworth *v.* Stanley	953
Akers *v.* Bishop	941
Alabama; Broadnax *v.*	964
Alabama; Brown *v.*	964
Alabama; Holladay *v.*	957
Alabama; Perkins *v.*	953
Alameda Books, Inc.; Los Angeles *v.*	921
Alameida; Blas *v.*	930
Alameida; Fries *v.*	973
Alameida; Hernandez *v.*	924
Alameida; Martin *v.*	928
Alcan Aluminum Corp. *v.* Prudential Assurance Co. Ltd.	959
Alderman; Chavez *v.*	946
Al-Hakim *v.* Bealls Department Store 32	909
Ali *v.* United States	915
Alim *v.* United States	950

Page
Allen *v.* California 944
Allen *v.* United States 953
Allfirst Bank; Progress Rail Services Corp. *v.* 905
Allmerica Financial Life Ins. Co.; Everhart *v.* 958
Altman *v.* Kapture 923
Altschuler, *In re* 974
Alvarez-Becerra *v.* United States 931
Al-Zubaidy *v.* United States 948
Amalfitano *v.* United States 939
Amaya-Matamoros *v.* United States 941
Amezcua *v.* United States 947
Amps *v.* Texas 919
Amstutz; Kniskern *v.* 918
Anderson; Buell *v.* 989
Anderson *v.* United States 913,971
Andujar *v.* United States 971
Angelo Flores *v.* United States 950
Angelone; Arrington *v.* 910
Angelone; Barrow *v.* 942
Anthony *v.* Gaspar 927
Anthony *v.* North Carolina 930
Antonelli, *In re* 938
Antonio Rodriguez *v.* United States 962
Aparco-Centeno *v.* United States 948
Appeals Judges of Mich.; Tidik *v.* 951
Appel; Danks *v.* 922
Archer *v.* Warner 938
Arctic Slope Reg. Corp. *v.* NextWave Personal Communications 955,989
Arizona; Bandusky *v.* 918
Arizona; Blanco Lerma *v.* 966
Arizona; Harrod *v.* 953
Arizona; Pandeli *v.* 953
Arizona; Ring *v.* 584
Arizona; Sansing *v.* 954
Arkansas; Hatfield *v.* 963
Arkansas; Jones *v.* 909
Arkansas Dept. of Ed.; Jackson *v.* 908
Arkansas Dept. of Human Services; Pugh *v.* 927
Armstrong *v.* Greensboro 930,978
Armstrong *v.* Steppes Apartments, Ltd. 951
Army Corps of Engineers; Borden Ranch Partnership *v.* 903,981
Arnett, *In re* 930
Arrington *v.* Angelone 910
Ashcroft; Blackburn *v.* 911,978

Page
Ashcroft; Cook *v.* 977
Ashcroft *v.* North Jersey Media Group, Inc. 954
Ashcroft; Tyler *v.* 945,986
Ashton *v.* United States 978
Aston Hotels & Resorts; Phonometrics, Inc. *v.* 904
Atkins *v.* Virginia 304
Atkinson *v.* Commissioner of Correction of Conn. 944
Attorney General; Blackburn *v.* 911,978
Attorney General; Cook *v.* 977
Attorney General *v.* North Jersey Media Group, Inc. 954
Attorney General; Tyler *v.* 945,986
Attorney General of Cal.; McCraw *v.* 965
Attorney General of Nev.; Rowell *v.* 964
Attorney General of Vt.; National Electrical Mfrs. Assn. *v.* 905
Atwell *v.* Mississippi 926
Atwood *v.* Burlington Northern 959
Avants *v.* United States 968
Aviles-Garcia *v.* United States 948
Ayers; Manuel Acuna *v.* 927
Azure *v.* United States 970
B., *In re* 942
B. *v.* West Virginia Dept. of Health and Human Resources 942
Bad Wound *v.* United States 911,986
Baez *v.* Hall 976
Baez *v.* Portuondo 929
Bagley *v.* Vance 973
Bagwell, *In re* 902
Bailey, *In re* 936
Bailey *v.* Lane 911
Bailey *v.* United States 961
Bain *v.* United States 948
Baker, P. C. *v.* Merrill Lynch, Pierce, Fenner & Smith Inc. 951
Baldauf; Mato *v.* 922
Balderas *v.* Texas 919
Balisok *v.* Washington 943
Ballard *v.* Kentucky 945
Ball-Foster Glass Container Co., L. L. C.; Middleton *v.* 924
Bandusky *v.* Arizona 918
Banks *v.* Horn 977
Banks; Horn *v.* 266,982
Barclay; Orin *v.* 958
Bar-Meir *v.* North American Die Casting Assn. 941
Barnes *v.* Gorman 181
Barnett *v.* Denver Publishing Co. 976

Page

Barnett *v.* Rocky Mountain News, Inc. 976
Barnhart *v.* Bellaire Corp. 955
Barnhart; Cunningham *v.* 973
Barnhart; Mitchell *v.* 976
Barnhart *v.* Peabody Coal Co. 955
Barreiro *v.* United States 976
Barrios *v.* Florida Bd. of Regents 940
Barrios *v.* United States 932
Barrow *v.* Angelone 942
Bartholomew; Wasserman *v.* 929
Basile, *In re* 979
Baskerville; Jones *v.* 966
Bass *v.* E. I. du Pont de Nemours & Co. 972
Bass; United States *v.* 862
Battle *v.* Roe 910
Beahm *v.* United States 914
Bealls Department Store 32; Al-Hakim *v.* 909
Beasley *v.* Stewart 966
Beaton *v.* Moore 927,973,983
Bebchick *v.* Holland America Line-Westours, Inc. 941
Becktel *v.* Court of Appeal of Cal., Second Appellate Dist. 967,983
Becktel *v.* Morissette 967,983
BE&K Construction Co. *v.* National Labor Relations Bd. 516
Belknap *v.* United States 911
Bell *v.* Cockrell 954
Bell *v.* Cone 976
Bell; Jenkins *v.* 909
Bell *v.* Larkins 951
Bell *v.* United States 950
Bellaire Corp.; Barnhart *v.* 955
Bellaire Corp.; Holland *v.* 955
Belsky, *In re* 902
Benitez *v.* Ellis 970
Benjamin, *In re* 937
Bennett; Mixon *v.* 928
Bennett *v.* United States 915,969
Bennings *v.* Kearney 951
Benton County; Kismet Investors, Inc. *v.* 904
Ben-Yisrayl *v.* Indiana 918
ben Yisrayl *v.* Norris 976
Berge; Campbell *v.* 986
Berge; Lee *v.* 986
Berrios *v.* Florida 909
Bhutani *v.* United States 922

Page
Bill's Wrecker Service; San Antonio *v.* 936
Bishop; Akers *v.* 941
Bishop *v.* Bookhard 920
Black *v.* Stewart 983
Black; ULLICO, Inc. *v.* 959
Blackburn *v.* Ashcroft 911,978
Blaine School Dist.; Lavine *v.* 959
Blair *v.* United States 947
Blanco; Burrier *v.* 924
Blanco Lerma *v.* Arizona 966
Blaney *v.* Illinois 908
Blas *v.* Alameida 930
Bledsoe *v.* Nucor-Yamato Steel Co. 904,982
Board *v.* United States 971
Boardley *v.* United States 969
Board of Ed. of Dist. 92 of Pottawatomie Cty. *v.* Earls 822
Bobbitt *v.* Walker 929
Bock; Simon *v.* 928
Boeing Co. *v.* United States 981
Boeing Sales Corp.; United States *v.* 981
Boettner *v.* Kirkwood 925,987
Bolton *v.* Moore 943
Booker; O'Quinn *v.* 928
Bookhard; Bishop *v.* 920
Borchardt *v.* Maryland 978
Borden Ranch Partnership *v.* Army Corps of Engineers 903,981
Boswell *v.* United States 932
Bottoson *v.* Florida 962
Bottoson; Moore *v.* 973
Bowen, *In re* 938
Bowen *v.* North Carolina 986
Bowen *v.* Rice 939
Bowles *v.* Florida 930
Bowman *v.* Illinois 968
Boyne *v.* Moore 960
Bradshaw, Fowler, Proctor & Fairgrave, P. C.; Winke *v.* 952
Branch *v.* Smith 903,981
Branch; Smith *v.* 903
Brandes, *In re* 937
Brandon Lee B., *In re* 942
Braxtonbrown-Smith *v.* United States 932
Breeze *v.* Florida 929
Brennan; Twillie *v.* 918
Brewer, *In re* 938

Page

Briley; Spaulding *v.* 966
Brinkley *v.* United States 915
Britten *v.* United States 932
Broadnax *v.* Alabama 964
Broadnax *v.* United States 912
Brotherhood. For labor union, see name of trade.
Brown, *In re* 952
Brown *v.* Alabama 964
Brown *v.* California Dept. of Corrections 936
Brown *v.* Legal Foundation of Wash. 903
Brown *v.* United States 947
Brown *v.* Wilmington 906,976
Bryant *v.* Johnson 909
Bryant; Jones *v.* 918
Bryson *v.* United States 963
Buckeye Community Hope Foundation; Cuyahoga Falls *v.* 938
Buell, *In re* 989
Buell *v.* Anderson 989
Bunnery *v.* California 943
Burgess *v.* San Francisco Dept. of Elections 951
Burghuis; Mayberry *v.* 938
Burl *v.* United States 911
Burlington Northern; Atwood *v.* 959
Burnett *v.* Lutheran Medical Center 978
Burnett *v.* Tenet Healthsystem Hospitals, Inc. 978
Burrier *v.* Blanco 924
Burrier *v.* Superior Court of Cal., Los Angeles County 924
Burt *v.* Illinois 925
Bushlow, *In re* 936
Bustamonte *v.* Springfield 908
Buster's Bar *v.* Mankato 904
Butler; Menchaca *v.* 977
Butner *v.* United States 932
BZAPS, Inc. *v.* Mankato 904
C. *v.* Pennsylvania 923
Caballero Rivera *v.* Chase Manhattan Bank 905
Caffey *v.* Illinois 944
Cain; Guy *v.* 945
Cain *v.* United States 971
California; Allen *v.* 944
California; Bunnery *v.* 943
California; Davis *v.* 964
California; Dey *v.* 946
California; Nelson *v.* 927

Page
California; Parra *v.* 946
California; Post *v.* 943
California; Silva *v.* 947
California; Taylor *v.* 967
California; Toward *v.* 908
California; Trejo Paulino *v.* 928
California Dept. of Corrections; Brown *v.* 936
California Dept. of Youth Authority *v.* Douglas 924
Callen, *In re* 938,987
Camel Rock Gaming Center; Gallegos *v.* 990
Campbell *v.* Berge 986
Campbell *v.* Peters 972
Campbell; Taylor *v.* 965,983
Campos *v.* United States 973
Canal Ins. Co. *v.* U. S. District Court 987
Cannon *v.* Norris 976
Cannon *v.* Oklahoma 974
Cano-Garcia *v.* United States 912
Cantrell *v.* United States 937
Capano *v.* Delaware 958
Caraveo-Prieto *v.* United States 948
Card *v.* Florida 963
Cardenas-Lopez *v.* United States 949
Carey *v.* Saffold 214
Carl *v.* United States 932
Carlton *v.* Carlton 944
Caro; Woodford *v.* 951
Carobine; Herbert *v.* 944
Caron, *In re* 902
Carpenter *v.* North Carolina 967,983
Carr; Cole *v.* 977
Carranza Chavez *v.* United States 912
Carrie Q. B. *v.* West Virginia Dept. of H. H. R. 942
Carrillo *v.* Desanto 927
Carroll *v.* Pfeffer 907,978
Carson *v.* News-Journal Corp. 923
Carter *v.* United States 931
Cartwright *v.* Mosley 943
Cassata *v.* Weston 923
Cassidy, *In re* 902
Castelan Mondragon *v.* United States 970
Castelan-Perez *v.* United States 970
Castille *v.* Compliance Solutions 910,983
Castro *v.* Chandler 914,987

Page
Caterina *v.* Unified Judicial System of Pa. 982
Ceceno *v.* United States 949
Celtronix Telemetry, Inc. *v.* Federal Communications Comm'n . . . 923
Central States Pension Fund; Hunt Truck Lines, Inc. *v.* 904
Cervantes-Nava *v.* United States 914
Chambers *v.* Stern 940
Chambers *v.* Turley 977
Chambers *v.* United States 912
Chandler; Castro *v.* 914,987
Chandler; Cook County *v.* 956,985
Charlotte Mecklenburg Hospital Authority; Murphy *v.* 906
Charluisant-Pagan *v.* Vasquez 914
Chase Manhattan Bank; Caballero Rivera *v.* 905
Chavez *v.* Alderman 946
Chavez *v.* United States 912
Chelmsford; Kelly *v.* 963
Cheverie; Wall *v.* 972
Chevron U. S. A. Inc. *v.* Echazabal 73
Choctaw County District Attorney; Easterwood *v.* 965
Christopher *v.* Harbury 403
Christopher *v.* United States 964
Ciarlo; Naturalite *v.* 943
Circle K Corp.; Houlihan, Lokey, Howard & Zukin, Inc. *v.* 959
City. See name of city.
Clackamas Gastroenterology Associates, P. C. *v.* Wells 990
Clanton *v.* Greenwood Trust Co. 982
Clarendon County Sheriff's Dept.; McFadden *v.* 909
Clark *v.* Illinois 940
Clark *v.* Moore 944
Clark *v.* United States 951
Clay *v.* United States 957,974,981
Cleveland State Univ.; Cook *v.* 951
Clopton *v.* Illinois 947
Cloud *v.* United States 960
Cockrell; Bell *v.* 954
Cockrell; De La Rosa *v.* 946
Cockrell; Duhon *v.* 946
Cockrell; Hedrick *v.* 976
Cockrell; Heine *v.* 944
Cockrell; Horner *v.* 977
Cockrell; Huffman *v.* 943
Cockrell; Ingle *v.* 982
Cockrell; King *v.* 989
Cockrell; Kutzner *v.* 978

Page
Cockrell; Ledford *v.* 927
Cockrell; Mays *v.* 987
Cockrell; Morris *v.* 977
Cockrell; Patrick *v.* 987
Cockrell; Patterson *v.* 967
Cockrell; Powell *v.* 990
Cockrell; Reneau *v.* 910
Cockrell; Rhodes *v.* 925
Cockrell; Shamburger *v.* 986
Cockrell; Suarez Medina *v.* 972
Cockrell; Williams *v.* 908
Coe *v.* United States 931
Coffman *v.* Jones 966
Cohen *v.* United States 922
Cole *v.* Carr 977
Cole; Dallas *v.* 936
Coleman *v.* DeWitt 914
Coleman *v.* Preussag Aktiengesellschaft 923
Colkitt *v.* GFL Advantage Fund, Ltd. 923
Collins *v.* United States 962
Colon *v.* Moore 927
Colorado; Maynes *v.* 906
Columbia Gas of Ohio, Inc.; McBroom *v.* 935
Columbus *v.* Ours Garage and Wrecker Service, Inc. 424
Colwick *v.* Texas 918
Commissioner; House *v.* 960
Commissioner; Sinyard *v.* 904
Commissioner of Correction of Conn.; Atkinson *v.* 944
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Communist Party of U. S.; Long *v.* 926
Compaq Computer Corp.; Hagenbuch *v.* 976
Compliance Solutions; Castille *v.* 910,983
Concannon; Pharmaceutical Research and Mfrs. of America *v.* . . . 956
Cone; Bell *v.* 976
Connecticut; Mordowanec *v.* 910
Connecticut Dept. of Public Safety *v.* Doe 985
Connelly *v.* Leahey & Johnson 935
Conroy; Morrison *v.* 928
Conroy; Pardee *v.* 947
Continental Airlines, Inc.; Packard *v.* 923
Continental Casualty Co.; IDG, Inc. *v.* 940
Cook *v.* Ashcroft 977
Cook *v.* Cleveland State Univ. 951

Page
Cook County *v.* United States *ex rel.* Chandler 956,985
Copeland *v.* United States 934
Corbin *v.* Florida Bar 927
Corcoran; Woodland *v.* 908
Cordova-Gonzalez *v.* Gonzalez 913
Cordova-Gonzalez *v.* United States 913
Cornell Corrections; McDowell *v.* 978
Cornog *v.* United States 970
Corporate Health Ins.; Montemayor *v.* 935
Corrections Commissioner. See name of commissioner.
Cortes *v.* United States 912,932
Cosby *v.* United States 969
Costa *v.* McCullough 905
Couch *v.* Roe 921
Coulson *v.* Texas 952
County. See name of county.
Court of Appeal of Cal., Fourth Appellate Dist., Div. One; Zamos *v.* 906
Court of Appeal of Cal., Second Appellate Dist.; Becktel *v.* 967,983
Court of Appeal of Cal., Second Appellate Dist.; Post *v.* 943
Court of Appeal of Cal., Third Appellate Dist.; Harrison *v.* 945
Court of Common Pleas of Philadelphia County; Wheeler *v.* 929
Cox; Vaughan *v.* 953
Coyle; Williams *v.* 947
Crestar Securities Corp.; Price *v.* 966,983
Crumbaker *v.* Regence BlueCross BlueShield of Ore. 930
Cunningham *v.* Barnhart 973
Curry *v.* Illinois 944
Curtis *v.* Kemna 946
Cuyahoga Falls *v.* Buckeye Community Hope Foundation 938
Dahlz *v.* State Bar of Cal. 940
Dahmer *v.* Idaho 926
Daigle; Wright *v.* 940
Dallas *v.* Cole 936
Daniels *v.* United States 970
Danks *v.* Appel 922
Darling *v.* United States 934
Davis *v.* California 964
Davis *v.* Davis 976
Davis *v.* Euclid 906
Davis; New York City Housing Authority *v.* 904
Davis *v.* Texas 967
Dawson *v.* United States 925
Dead Sea Bromine Co. *v.* Patrickson 956
Dean Witter Reynolds, Inc.; Howsam *v.* 985

Page

Deavault *v.* United States 978
DeBardeleben *v.* Pugh 920
Deese, *In re* 903
De La Fuente *v.* Illinois 965
De La Rosa *v.* Cockrell 946
Delaware; Capano *v.* 958
DeLong *v.* Department of Health and Human Services 958
Del Papa; Rowell *v.* 964
Demore *v.* Kim 956
Denver Publishing Co.; Barnett *v.* 976
Deorle; Rutherford *v.* 958
Department of Army; Handy *v.* 968
Department of Health and Human Services; DeLong *v.* 958
Department of Housing and Urban Development; Tilli *v.* 951
Department of Justice; Lee *v.* 933
Department of Labor; Mumme *v.* 934
Department of Treasury; Marbly *v.* 901
Desanto; Carrillo *v.* 927
Deshields *v.* United States 931
Desiderio-Meza *v.* United States 921
Dethlefs, *In re* 938
Detroit *v.* Lac Vieux Band of Lake Superior Chippewa Indians . . 923
Detroit Bd. of Ed.; Knubbe *v.* 960
Devlin *v.* Scardelletti 1
DeVries *v.* Iowa 960
DeWitt; Coleman *v.* 914
Dey *v.* California 946
Diaz *v.* United States 957,970
Diaz-Valencia *v.* United States 970
Dickerson *v.* United States 957,983
Diecast Corp.; Porter *v.* 978
Dillards Texas Operating Ltd. Partnership; Fentroy *v.* 958
Dinsio *v.* New York 942
Director of penal or correctional institution. See name or title of director.
Disney Pictures & Television, Inc.; Thurlwell *v.* 940
District Court. See U. S. District Court.
Dix *v.* United States 913,978
Dixon, *In re* 956
Dixon *v.* Hardimon 986
Dixon *v.* Minneapolis Water Dept. 986
Dixon *v.* United States 968
Dodrill; Lee *v.* 945
Doe; Connecticut Dept. of Public Safety *v.* 985

Page

Doe; Godfrey *v.* 921,955
Doe; Gonzaga Univ. *v.* 273
Doerr *v.* Redlands 977
Dole Food Co. *v.* Patrickson 956
Doncses *v.* United States 963
Donner *v.* Donner 918
Donoghue *v.* Illinois Civil Service Comm'n 945
Dopp *v.* Saffle 927
Dormire; Miller *v.* 928,983
Douglas; California Dept. of Youth Authority *v.* 924
Douglas; Tyler *v.* 906
Douglas *v.* United States 963
Dow Chemical Co.; Lee *v.* 973
Downs *v.* United States 933
Dragovich; Horton *v.* 943
Drayton; United States *v.* 194
DuBose *v.* Kelly 977
DuFrain; Johnson *v.* 927
Duhon *v.* Cockrell 946
Duhon *v.* Police Jury of Vermillion Parish 940
Duke *v.* United States 961
Duke Univ. *v.* Milon 979
Duncan; Johnson *v.* 986
Duncan *v.* Louisiana 907
Duncan *v.* Potter 911
Dunn *v.* Kean 940,982
Du Pont de Nemours & Co.; Bass *v.* 972
Duvall *v.* United States 950
Earls; Board of Ed. of Dist. 92 of Pottawatomie Cty. *v.* 822
Early *v.* Miller 946
Early *v.* Thompson 918
Easley *v.* Texas 967
Easterwood *v.* Choctaw County District Attorney 965
Echazabal; Chevron U. S. A. Inc. *v.* 73
Echols *v.* Illinois 944
Edgars; Swoyer *v.* 976
Edmonds, *In re* 980
Edmonds *v.* Virginia 929
Edwards *v.* Florida 966
E. I. du Pont de Nemours & Co.; Bass *v.* 972
Elagamy *v.* Immigration and Naturalization Service 922
Eldridge *v.* Portuondo 908
Electrical Workers *v.* Pennsylvania Power Co. 959
Eliecer Palacio *v.* United States 971

Page
Elliott, *In re* 974
Ellis; Benitez *v.* 970
Ellis *v.* Newland 965
Ellis *v.* United States 957
Emerson *v.* United States 907
Engel *v.* Pennsylvania 946,983
Enlow *v.* Texas 964
Enterprise Lou-Tex NGL Pipeline L. P.; Francois *v.* 960
Environmental Protection Agency; Michigan Peat *v.* 939
Epilepsy Foundation of Northeast Ohio *v.* NLRB 904
Epps *v.* Moore 986
Equitable Life Assurance Society of U. S.; Leonard *v.* 923
Ernsley *v.* United States 964
Ervin *v.* Pennsylvania 939
Escaf; Rodriguez *v.* 901
Escobedo *v.* Texas 903
Eslinger; Rowsey *v.* 928
Estrada *v.* United States 950
Etheridge, *In re* 980
Euclid; Davis *v.* 906
Evans *v.* United States 912
Evans; Utah *v.* 452
Everhart *v.* Allmerica Financial Life Ins. Co. 958
Everhart *v.* State Mut. Life Assurance Co. of America 958
Farina *v.* Florida 910
Farrior *v.* Waterford Bd. of Ed. 958
FCC; Celtronix Telemetry, Inc. *v.* 923
FCC *v.* NextWave Personal Communications Inc. 955,989
FCC; Satellite Broadcasting and Communications Assn. *v.* 922
Federal Deposit Ins. Corp.; Presutti *v.* 939
Federal Deposit Ins. Corp.; Rhoads *v.* 952
Federal Deposit Ins. Corp.; Zarrilli *v.* 983
Federal-Mogul Global, Inc., *In re* 978
Federal Trade Comm'n; Trans Union LLC *v.* 915
Federated Department Stores, Inc.; Abdul-Muqsit *v.* 964
Fentroy *v.* Dillards Texas Operating Ltd. Partnership 958
Ferguson *v.* United States 934
Ferguson *v.* Wm. Wrigley Jr. Co. 929
Fernandez *v.* United States 960
Fielder; UAL Corp. *v.* 919
Fielder; United Airlines *v.* 919
Fields; Lane *v.* 943
Fields *v.* United States 942
Fin Control Systems Pty., Ltd. *v.* Surfco Hawaii 939

Page
Fior D'Italia, Inc.; United States *v.* 238
Fiore *v.* United States 972
Firestone *v.* Southern Cal. Gas Co. 958
Fitzgerald; Potter *v.* 922
Flanigan's Enterprises, Inc. of Ga.; Fulton County *v.* 904,976
Flores *v.* United States 950
Florida; Berrios *v.* 909
Florida; Bottoson *v.* 962
Florida; Bowles *v.* 930
Florida; Breeze *v.* 929
Florida; Card *v.* 963
Florida; Edwards *v.* 966
Florida; Farina *v.* 910
Florida; Hertz *v.* 963
Florida; Kijewski *v.* 961
Florida; King *v.* 962
Florida; Looney *v.* 966
Florida; Lugo *v.* 909,983
Florida; New *v.* 942
Florida *v.* Pullen 915
Florida; Thompson *v.* 951
Florida Bar; Corbin *v.* 927
Florida Bd. of Regents; Barrios *v.* 940
Florida Dept. of Corrections; Jackson *v.* 908
Ford *v.* Illinois 963
Ford *v.* Marion County Sheriff's Dept. 945
Ford Motor Co. *v.* McCauley 955,987
Forman *v.* Small 958
Foster *v.* Fulkerson 950
Foster *v.* Kemna 945
Foster *v.* United States 913
Francis *v.* United States 949
Francis; Valentine *v.* 942
Francois *v.* Enterprise Lou-Tex NGL Pipeline L. P. 960
Franconia Associates *v.* United States 129
Frejlich, *In re* 975
Friedman; Smith *v.* 976
Fries *v.* Alameida 973
Friesen, *In re* 974
Fuell *v.* United States 932
Fuentes-Picon *v.* United States 948
Fugate, *In re* 979
Fugate *v.* Georgia Bd. of Pardons and Paroles 980
Fugate *v.* Georgia Dept. of Corrections 980

Page
Fugate *v.* Head 935
Fuji Photo Film Co. *v.* Jazz Photo Corp. 950
Fulkerson; Foster *v.* 950
Fulton County *v.* Flanigan's Enterprises, Inc. of Ga. 904,976
Fulton County *v.* Lambert 906
Furfaro *v.* Seattle 922
Furfaro; Seattle *v.* 922
G. *v.* Superior Court of D. C., Family Division 951
Gallegos *v.* Camel Rock Gaming Center 990
Gallegos *v.* Pueblo of Tesuque 990
Galley; Tilghman *v.* 967
Galvin; McClure *v.* 988
Garceau; Woodford *v.* 990
Garcia Rodriguez *v.* United States 913
Gardner *v.* Seabold 951
Garland; Wright-Dean *v.* 924
Gary *v.* Holt 950
Gaspar; Anthony *v.* 927
Gaudineer and Comito, L. L. P. *v.* Gesaman 925
Gavlick, *In re* 975
GE Capital *v.* Thiessen 934
General *v.* United States 950
General American Life Ins. Co.; Henderson *v.* 919
General Electric Capital Corp. *v.* Thiessen 934
George; McClure *v.* 941
George *v.* U. S. Postal Service 956
Georgia; King *v.* 957,982
Georgia; Rhode *v.* 925,983
Georgia *v.* South Carolina 979
Georgia Bd. of Pardons and Paroles; Fugate *v.* 980
Georgia Dept. of Corrections; Fugate *v.* 980
Georgia Dept. of Public Safety; ABATE of Ga., Inc. *v.* 924
Gerlinski; Ramirez *v.* 909
Gesaman; United States *ex rel.* Gaudineer and Comito, L. L. P. *v.* 925
GFL Advantage Fund, Ltd.; Colkitt *v.* 923
Gholston *v.* Kansas 963
Gibbs *v.* Shannon 907
Gibbs *v.* Snyder 907,983
Gibson; Jump *v.* 966
Gibson *v.* United States 932,972
Gila River Indian Community; Linneen *v.* 939
Gilliland, *In re* 975
Gladstone *v.* Merrill Lynch, Pierce, Fenner & Smith Inc. 936
Glasscock *v.* United States 906

Page
Glore *v.* United States 932
Godek *v.* Grayson 929
Godfrey *v.* Doe 921,955
Goelz *v.* Paul Revere Life Ins. Co. 982
Gomez-Lepe *v.* United States 968
Gomez-Romero *v.* United States 949
Gomez-Solano *v.* United States 972
Gonzaga Univ. *v.* Doe 273
Gonzalez; Cordova-Gonzalez *v.* 913
Gonzalez Lora *v.* United States 983
Gonzalez Perez *v.* United States 970
Gonzalez-Rivera *v.* United States 972
Goord; Wells *v.* 946
Gordon *v.* United States 932
Gorman; Barnes *v.* 181
Governor of S. C.; Hodges *v.* 980
Governor of Tex.; Shaw *v.* 986
Grabelle; Weinstein *v.* 966
Grace & Co.-Conn.; Zapata Industries, Inc. *v.* 990
Graham *v.* United States 948
Grass Valley Terrace *v.* United States 129
Graves *v.* United States 962
Gray *v.* United States 963
Grayson, *In re* 981
Grayson; Godek *v.* 929
Grayson *v.* Thompson 964
Green *v.* Hodges 980
Green; Howard *v.* 925
Green *v.* Maynard 980
Green *v.* Newell 942,983
Green *v.* New York 926
Green *v.* United States 932,968
Greensboro; Armstrong *v.* 930,978
Greenwood Trust Co.; Clanton *v.* 982
Greiner; James *v.* 966
Greiner; Ortiz *v.* 909
Greyhound Lines, Inc.; Peltier *v.* 943
Grider, *In re* 936
Grimes *v.* Navigant Consulting, Inc. 920
Guida; Lovera *v.* 910
Guo *v.* United States 971
Guy *v.* Cain 945
Hadix *v.* Wilson 965
Hafner *v.* Hubbard 930

Page
Hagenbuch *v.* Compaq Computer Corp. 976
Haley; Thompson *v.* 942
Hall; Baez *v.* 976
Hall; Miller *v.* 909,986
Hall *v.* Nevada 944
Hall *v.* Texas 955
Hall; Trice *v.* 977
Hall *v.* United States 931,942,961,971
Halpern, *In re* 975
Hambly; Simmons *v.* 909
Hamilton *v.* Reed 971
Hamm *v.* United States 913,984
Hammonds *v.* North Carolina 907
Handy *v.* Department of Army 968
Haney *v.* United States 907
Hanks; Pannell *v.* 928
Hannah *v.* United States 932
Hanna Perkins School *v.* Simmons-Harris 639
Hansen *v.* Mississippi 973
Hansen *v.* Sparkman 930
Harbeston; Rodriguez *v.* 924
Harbury; Christopher *v.* 403
Hardimon; Dixon *v.* 986
Harley, *In re* 975
Harper *v.* United States 931
Harrington *v.* United States 933
Harris, *In re* 921
Harris *v.* United States 545,969
Harrison *v.* Court of Appeal of Cal., Third Appellate Dist. 945
Harrison *v.* Mahaffey 926
Harrod *v.* Arizona 953
Hart; Sienkiewicz *v.* 976
Hatcher *v.* Hopkins 926
Hatcher *v.* Smith 945
Hatfield *v.* Arkansas 963
Hawaii; Adam *v.* 907
Hawkins *v.* United States 971
Hawkins *v.* Vastar Resources, Inc. 934,984
Hawk Sawyer; Jordan *v.* 931
Haworth *v.* Office of Personnel Management 982
Haywood *v.* Mazzuca 943
Hazbun Escaf; Rodriguez *v.* 901
Head; Fugate *v.* 935
Head; Mobley *v.* 968

Page

Hedrick *v.* Cockrell 976
Hegwood *v.* Moore 977
Heine *v.* Cockrell 944
Helwig; Vencor, Inc. *v.* 935
Henderson *v.* General American Life Ins. Co. 919
Henley *v.* Stegall 907
Henson; Syngenta Crop Protection, Inc. *v.* 955
Herbert *v.* Carobine 944
Herdt *v.* Uphoff 944
Hernandez *v.* Alameida 924
Hernandez *v.* Moore 943
Hernandez *v.* Swope 969
Hernandez-Lopez *v.* Iowa 959
Hernandez-Pesina *v.* United States 942
Herrera-Ramirez *v.* United States 969
Herrero *v.* Illinois 967
Hertz *v.* Florida 963
Hetsell; Looney *v.* 926
Hibbs; Nevada Dept. of Human Resources *v.* 938
Hickman *v.* Nash 969
Hicks *v.* Snyder 976
Hicks; Weger *v.* 926
Hill *v.* Texas 929
Hill *v.* United States 949,962
Hill *v.* U. S. Trustee 930
Hilton *v.* Moore 982
Hinckley Township Trustees *v.* Wershing 989
Hirschler; Rhodes *v.* 926
Hizbullahankhamon *v.* Walker 925
Hodges; Green *v.* 980
Holiday Inn Express; Teague *v.* 977
Holladay, *In re* 956
Holladay *v.* Alabama 957
Holland *v.* Bellaire Corp. 955
Holland *v.* Norris 910
Holland America Line-Westours, Inc.; Bebchick *v.* 941
Holley *v.* Mitchem 907
Hollingsworth, *In re* 903
Holt; Gary *v.* 950
Holub *v.* United States 978
Hood; Walgreen Co. *v.* 951
Hoosman *v.* Iowa 909
Hoover *v.* United States 958,987
Hope *v.* Pelzer 730

Page
Hopkins; Hatcher *v.* 926
Hopkins *v.* Newman 915
Horn *v.* Banks 266,982
Horn; Banks *v.* 977
Horn *v.* Jones 907
Horner *v.* Cockrell 977
Horton *v.* Dragovich 943
Hoskins *v.* United States 933
Hotel Corporation of Pacific; Phonometrics, Inc. *v.* 904
Houlihan, Lokey, Howard & Zukin, Inc. *v.* Circle K Corp. 959
House *v.* Commissioner 960
Housing Auth. and Urban Redev. Agcy., Atlantic City *v.* Taylor . . 955
Hovell, *In re* 937
Howard *v.* Green 925
Howard *v.* Newland 955
Howsam *v.* Dean Witter Reynolds, Inc. 985
Hubbard, *In re* 983
Hubbard; Hafner *v.* 930
Huffman *v.* Cockrell 943
Hughes, *In re* 902
Hughes *v.* Illinois 946
Hunter; Tidik *v.* 954
Hunter *v.* Yukins 965
Hunt Truck Lines, Inc. *v.* Central States Pension Fund 904
Hutchins *v.* Wilentz, Goldman & Spitzer 906
IBM Corp.; Pilipshen *v.* 940
IBP, Inc.; Madison *v.* 919
Idaho; Dahmer *v.* 926
Idaho; Stuart *v.* 907
IDG, Inc. *v.* Continental Casualty Co. 940
Iheke *v.* United States 947
Illinois; Blaney *v.* 908
Illinois; Bowman *v.* 968
Illinois; Burt *v.* 925
Illinois; Caffey *v.* 944
Illinois; Clark *v.* 940
Illinois; Clopton *v.* 947
Illinois; Curry *v.* 944
Illinois; De La Fuente *v.* 965
Illinois; Echols *v.* 944
Illinois; Ford *v.* 963
Illinois; Herrero *v.* 967
Illinois; Hughes *v.* 946
Illinois; Jinadu *v.* 947

Page
Illinois; McGee *v.* 967
Illinois; Moss *v.* 967
Illinois; Pearson *v.* 925
Illinois; Pierce *v.* 946
Illinois; Robinson *v.* 967
Illinois Civil Service Comm'n; Donoghue *v.* 945
Immigration and Naturalization Service; Elagamy *v.* 922
Immigration and Naturalization Service; Podoprigora *v.* 973
Immigration and Naturalization Service; Sol *v.* 941
Indiana; Ben-Yisrayl *v.* 918
Indiana; Manley *v.* 976
Indiana; McCoy *v.* 925,978
Indiana; Woodford *v.* 973
Indiana Bd. of Tax Comm'rs; Oetting *v.* 924
Indian River Estates *v.* Preferred Properties, Inc. 959
Ingle *v.* Cockrell 982
Ingram; Osterback *v.* 906
In re. See name of party.
International. For labor union, see name of trade.
International Trade Comm'n; Jazz Photo Corp. *v.* 950
Iowa; DeVries *v.* 960
Iowa; Hernandez-Lopez *v.* 959
Iowa; Hoosman *v.* 909
Isko *v.* New Jersey 960
Israel *v.* Stender 925
Jackson *v.* Arkansas Dept. of Ed. 908
Jackson *v.* Florida Dept. of Corrections 908
Jackson; Pfeiffer-El *v.* 965,983
Jackson *v.* United States 911
Jackson *v.* U. S. District Court 908
Jacobson *v.* Veneman 924
James *v.* Greiner 966
James *v.* Mobile City Police Dept. 907
Jaramillo *v.* Pinkerton 976
Jazz Photo Corp.; Fuji Photo Film Co. *v.* 950
Jazz Photo Corp. *v.* International Trade Comm'n 950
Jean *v.* United States 942
Jemison *v.* White 943
Jenkins *v.* Bell 909
Jenkins *v.* United States 934,968
Jett *v.* Washington County School Bd. 921,982
Jimenez-Hernandez *v.* United States 948
Jimenez-Pineda *v.* United States 963
Jimenez Recio; United States *v.* 921

Page

Jinadu *v.* Illinois 947
Johnson; Bryant *v.* 909
Johnson *v.* DuFrain 927
Johnson *v.* Duncan 986
Johnson; Rauls *v.* 945
Johnson *v.* Scott County Soil and Water Conservation Dist. 928
Johnson; Smith *v.* 909
Johnson *v.* United States 913,914,933,949
Johnston; Simmons *v.* 919
Joiner *v.* United States 931
Jones *v.* Arkansas 909
Jones *v.* Baskerville 966
Jones *v.* Bryant 918
Jones; Coffman *v.* 966
Jones; Horn *v.* 907
Jones *v.* Luebbers 977
Jones *v.* United States 912,914,934,935,983
Jordan *v.* Hawk Sawyer 931
Jordan *v.* Jordan 924
Jordan *v.* Luebbers 926
Jorgensen; Vargas *v.* 982
Journal Sentinel, Inc.; Schultz *v.* 960
JPMorgan Chase Bank *v.* Traffic Stream Infrastructure Ltd. 88
Judge, Superior Court of Wash., Thurston County; Weger *v.* 926
Jump *v.* Gibson 966
Kankakee; Pitts *v.* 922
Kansas; Gholston *v.* 963
Kansas; Sanders *v.* 963
Kantor, *In re* 974
Kaplan *v.* Ludwig 905
Kapture; Altman *v.* 923
Kapture; Whire *v.* 945
Kean; Dunn *v.* 940,982
Kearney; Bennings *v.* 951
Kelly, *In re* 918
Kelly *v.* Chelmsford 963
Kelly; DuBose *v.* 977
Kelly *v.* Nortel Networks Corp. 956
Kemna; Curtis *v.* 946
Kemna; Foster *v.* 945
Kemna; Vivone *v.* 977
Kemna; Whitfield *v.* 927
Kemp *v.* United States 962
Kentucky; Ballard *v.* 945

Page
Kentucky; Taylor *v.* 945
Kentucky Assn. of Health Plans, Inc. *v.* Miller 956
Kercher; Swoyer *v.* 976
Kijewski *v.* Florida 961
Kim; Demore *v.* 956
Kinder *v.* Luebbers 921
King *v.* Cockrell 989
King *v.* Florida 962
King *v.* Georgia 957,982
King; Moore *v.* 973
Kinnaird *v.* Tennessee 908
Kirk *v.* Louisiana 635
Kirkwood; Boettner *v.* 925,987
Kismet Investors, Inc. *v.* Benton County 904
Kittrell, *In re* 923
Kniskern *v.* Amstutz 918
Knoblauch *v.* New York 944
Knox *v.* Mississippi 965
Knox *v.* Sickles 972
Knox County Bd. of Ed.; Wright *v.* 965,986
Knubbe *v.* Detroit Bd. of Ed. 960
Koch *v.* Potter 911,986
Kotecki; Taylor *v.* 929,986
Krilich *v.* United States 904,976
Kruk; Weichert *v.* 905
Kutzner *v.* Cockrell 978
Kyler; Oliver *v.* 982
Labor Union. See name of trade.
LaCedra *v.* United States 947
Lacorse *v.* United States 968
Lac Vieux Band of Lake Superior Chippewa Indians; Detroit *v.* 923
Lake Mich. Contractors, Inc.; Rutherford *v.* 905
Lambert; Fulton County *v.* 906
Lane; Bailey *v.* 911
Lane *v.* Fields 943
Lane *v.* United States 957
Larkins; Bell *v.* 951
Lavine *v.* Blaine School Dist. 959
L. C. *v.* Pennsylvania 923
Leahey & Johnson; Connelly *v.* 935
Ledezma-Lopez *v.* United States 970
Ledford *v.* Cockrell 927
Lee *v.* Berge 986
Lee *v.* Department of Justice 933

Page
Lee *v.* Dodrill 945
Lee *v.* Dow Chemical Co. 973
Lee; Oregon Arena Corp. *v.* 905
Lee *v.* Peters 972
Lee *v.* United States 949
Lee B., *In re* 942
Legal Foundation of Wash.; Brown *v.* 903
Leonard *v.* Equitable Life Assurance Society of U. S. 923
Leonardo, *In re* 937
Leon C. Baker, P. C. *v.* Merrill Lynch, Pierce, Fenner & Smith . . 951
Lerma *v.* Arizona 966
Lester, *In re* 981
Levine *v.* United States 962
Levy *v.* Swift Transportation Co. 959
Lewis *v.* Rader 908,986
Lewis; Rodriguez *v.* 908
Lewis *v.* Smith 952
Leyva *v.* United States 912
Lifaite *v.* United States 932
Lile; McKune *v.* 24
Lilly *v.* United States 939
Linneen *v.* Gila River Indian Community 939
Littlejohn *v.* United States 912
Livingston *v.* United States 982
Local. For labor union, see name of trade.
Lockenvitz, *In re* 975
Lockett *v.* United States 915,978
Lockyer; McCraw *v.* 965
Long *v.* Communist Party of U. S. 926
Longworth *v.* South Carolina 928
Looney *v.* Florida 966
Looney *v.* Hetsell 926
Lopez *v.* Romine 948
Lopez *v.* United States 951
Lopez-Lopez *v.* United States 949
Lopez-Torres *v.* United States 968
Lora *v.* United States 983
Los Angeles *v.* Alameda Books, Inc. 921
Loudon *v.* United States 910
Lough *v.* United States 964
Louisiana; Duncan *v.* 907
Louisiana; Kirk *v.* 635
Louisiana; Sinclair *v.* 910
Louisiana; White *v.* 946

Page
Louisville and Jefferson County Bd. of Health; Voit *v.* 905
Lovera *v.* Guida 910
Lowe; Richardson *v.* 942
Lua-Garcia *v.* United States 948
Lualemaga *v.* United States 949
Ludwig; Kaplan *v.* 905
Luebbers; Jones *v.* 977
Luebbers; Jordan *v.* 926
Luebbers; Kinder *v.* 921
Luebbers; Richardson *v.* 957
Luebbers; Stevenson *v.* 943
Lugo *v.* Florida 909,983
Lugo *v.* Sham 929
Lutheran Medical Center; Burnett *v.* 978
Luzardo *v.* United States 962
Madison *v.* IBP, Inc. 919
Magnotti, *In re* 974
Mahaffey; Harrison *v.* 926
Maine Dept. of Human Services; Marcello *v.* 920,952,978
Malloy *v.* United States 915
Manchin; Unger *v.* 935
Mandanici *v.* United States 961
Mankato; Buster's Bar *v.* 904
Mankato; BZAPS, Inc. *v.* 904
Manley *v.* Indiana 976
Manley *v.* Monroe County Sheriff's Dept. 977
Mann *v.* Moore 962
Mann *v.* Upjohn Co. 905
Manuel *v.* United States 972
Manuel Acuna *v.* Ayers 927
Marbly *v.* Department of Treasury 901
Marcello *v.* Maine Dept. of Human Services 920,952,978
March *v.* United States 962
Marino *v.* United States 948
Marion County Sheriff's Dept.; Ford *v.* 945
Marks, *In re* 936
Marmolejo-Hernandez *v.* United States 968
Marshall, *In re* 901
Martin *v.* Alameida 928
Martin *v.* United States 933
Martinez-Vargas *v.* United States 913
Maryland; Borchardt *v.* 978
Maryland; Munson *v.* 926
Maryland; Oken *v.* 978

Page

Maryland; Tshiwala *v.* 977
Maryland; Virginia *v.* 903
Maryland; Young-Bey *v.* 952
Mason, *In re* 903
Mason *v.* Mitchell 901
Mason *v.* United States 962
Massaro *v.* United States 990
Massey *v.* Moore 966
Mathison *v.* United States 930
Mato *v.* Baldauf 922
Mayberry, *In re* 938
Mayberry *v.* Burghuis 938
Mayfield *v.* Texas 919
Maynard; Green *v.* 980
Maynes *v.* Colorado 906
Mays *v.* Cockrell 987
Mazzuca; Haywood *v.* 943
Mazzuca; Murphy *v.* 926
McAfee *v.* United States 932
McBroom *v.* Columbia Gas of Ohio, Inc. 935
McBroom *v.* Moore 922
McCain *v.* United States 957
McCarthy; Texas *v.* 972
McCauley; Ford Motor Co. *v.* 955,987
McClure *v.* Galvin 988
McClure *v.* George 941
McCoy *v.* Indiana 925,978
McCoy *v.* United States 906
McCraw *v.* Lockyer 965
McCullough; Costa *v.* 905
McDowell *v.* Cornell Corrections 978
McDowell *v.* Varner 910
McDuffie *v.* United States 911
McFadden *v.* Clarendon County Sheriff's Dept. 909
McGee *v.* Illinois 967
McGee *v.* United States 933
McGee *v.* West Virginia 928
McGeorge *v.* United States 912
McGonegal *v.* Ohio 961
McGovern *v.* McGovern 959
McHan *v.* United States 918
McKinney *v.* Texas 968
McKune *v.* Lile 24
McLachlan *v.* Simon 941,982

Page

McMillon *v.* United States 971
McQueen *v.* Scott 913
McVay *v.* United States 933
Medical Assurance of W. Va., Inc. *v.* Pizarro 940
Medina *v.* Cockrell 972
Medina *v.* Texas 979
Meegan *v.* Nevada 929
Mejias Negron *v.* United States 978
Memphis Light, Gas & Water Division; Nickell *v.* 922
Menchaca *v.* Butler 977
Merchants Bank; Swoyer *v.* 976
Mercury Marine; Sprietsma *v.* 921
Merit Systems Protection Bd.; Wright *v.* 931
Merrill Lynch, Pierce, Fenner & Smith Inc.; Gladstone *v.* 936
Merrill Lynch, Pierce, Fenner & Smith Inc.; Leon C. Baker, P. C. *v.* 951
Methodist Hospitals, Inc.; Moreno *v.* 976
Mett *v.* United States 961
Metts *v.* North Carolina Dept. of Revenue 977
Mexican American Legislative Caucus *v.* Texas 919
MFS Securities Corp.; New York Stock Exchange, Inc. *v.* 924
Michigan *v.* Schwesing 923
Michigan; Yellow Transportation, Inc. *v.* 921
Michigan Peat *v.* Environmental Protection Agency 939
Middleton *v.* Ball-Foster Glass Container Co., L. L. C. 924
Mid State Homes, Inc.; Olmstead *v.* 935
Milano *v.* North Carolina 930,983
Milczart; Nicolaison *v.* 910,978
Miller *v.* Dormire 928,983
Miller; Early *v.* 946
Miller *v.* Hall 909,986
Miller; Kentucky Assn. of Health Plans, Inc. *v.* 956
Miller *v.* Tennessee 927
Miller *v.* Turner 928
Milon; Duke Univ. *v.* 979
Mineta; Wendt *v.* 941
Minneapolis Water Dept.; Dixon *v.* 986
Minnesota Senior Federation, Metro. Region *v.* United States . . . 939
Miranda *v.* United States 933
Mississippi; Atwell *v.* 926
Mississippi; Hansen *v.* 973
Mississippi; Knox *v.* 965
Missouri Director of Revenue; Sprint Communications Co. *v.* . . . 960
Mitchell *v.* Barnhart 976
Mitchell; Mason *v.* 901

Page
Mitchem; Holley *v.* 907
Mixon *v.* Bennett 928
Mobile City Police Dept.; James *v.* 907
Mobley *v.* Head 968
Modden *v.* Texas 918,954
Molina-Morales *v.* United States 948
Molina-Navarrate *v.* United States 971
Molina-Portillo *v.* United States 950
Mondragon *v.* United States 970
Monroe County Sheriff's Dept.; Manley *v.* 977
Montemayor *v.* Corporate Health Ins. 935
Montoya *v.* United States 971
Moody *v.* United States 931
Moore; Beaton *v.* 927,973,983
Moore; Bolton *v.* 943
Moore *v.* Bottoson 973
Moore; Boyne *v.* 960
Moore; Clark *v.* 944
Moore; Colon *v.* 927
Moore; Epps *v.* 986
Moore; Hegwood *v.* 977
Moore; Hernandez *v.* 943
Moore; Hilton *v.* 982
Moore *v.* King 973
Moore; Mann *v.* 962
Moore; Massey *v.* 966
Moore; McBroom *v.* 922
Moore; Richardson *v.* 983
Moore *v.* Texas 966
Moore *v.* United States 957,970
Moore; Weatherspoon *v.* 945,986
Moore; Yon *v.* 976
Morales *v.* United States 941,971
Morales *v.* Vaughn 907
Moran; Rush Prudential HMO, Inc. *v.* 355
Mordowanec *v.* Connecticut 910
Moreno *v.* Methodist Hospitals, Inc. 976
Moreno *v.* United States 969
Moreno-Aguilar *v.* United States 969
Morgan; National Railroad Passenger Corp. *v.* 101
Morgan *v.* United States 913
Morissette; Becktel *v.* 967,983
Morris *v.* Cockrell 977
Morris; Reynolds *v.* 915

Page
Morris *v.* United States 933
Morrison *v.* Conroy 928
Moskowitz; Redic *v.* 926,983
Mosley; Cartwright *v.* 943
Moss *v.* Illinois 967
Moultrie *v.* United States 978
Mulcahy *v.* Washington 905
Mumme *v.* Department of Labor 934
Munda *v.* United States 911
Munoz *v.* Munoz 902
Munson *v.* Maryland 926
Murphy *v.* Charlotte Mecklenburg Hospital Authority 906
Murphy *v.* Mazzuca 926
Nabelek, *In re* 977
Nabelek *v.* Texas 977
Nagy *v.* United States 978
Najjor *v.* United States 961
Nash; Hickman *v.* 969
Natera-Sosa *v.* United States 978
National Electrical Mfrs. Assn. *v.* Sorrell 905
NLRB; BE&K Construction Co. *v.* 516
NLRB; Epilepsy Foundation of Northeast Ohio *v.* 904
NLRB; USA Polymer Corp. *v.* 939
National Organization for Women, Inc.; Operation Rescue *v.* 981
National Organization for Women, Inc.; Scheidler *v.* 981
National Railroad Passenger Corp. *v.* Morgan 101
Naturalite *v.* Ciarlo 943
Nava-Hernandez *v.* United States 913
Navigant Consulting, Inc.; Grimes *v.* 920
Negron *v.* United States 978
Nelson *v.* California 927
Nelson *v.* United States 968
Nevada; Hall *v.* 944
Nevada; Meegan *v.* 929
Nevada; Rowell *v.* 977
Nevada Dept. of Human Resources *v.* Hibbs 938
New *v.* Florida 942
Newell; Green *v.* 942,983
New Hampshire; Townes *v.* 955
New Jersey; Isko *v.* 960
New Jersey Dept. of Env. Prot.; S. Camden Citizens In Action *v.* . . 939
Newland; Ellis *v.* 965
Newland; Howard *v.* 955
Newman; Hopkins *v.* 915

Page
News-Journal Corp.; Carson *v.* 923
Newsome *v.* Phelps Memorial Hospital Center 967
New York; Dinsio *v.* 942
New York; Green *v.* 926
New York; Knoblauch *v.* 944
New York City; Sudarsky *v.* 918,976
New York City Housing Authority *v.* Davis 904
New York Comm'r of Temp. & Disability Assistance; Nicolau *v.* 930
New York Stock Exchange, Inc. *v.* MFS Securities Corp. 924
NextWave Personal Communications; Arctic Slope Reg. Corp. *v.* 955,989
NextWave Personal Communications; FCC *v.* 955,989
Nickell *v.* Memphis Light, Gas & Water Division 922
Nicolaison *v.* Milczart 910,978
Nicolau *v.* New York Comm'r of Temp. & Disability Assistance . . 930
Nihiser; Ohio Environmental Protection Agency *v.* 922
Nixon *v.* United States 978
Nolberto Pena *v.* United States 935
Norman; Watts *v.* 976
Norris; ben Yisrayl *v.* 976
Norris; Cannon *v.* 976
Norris; Holland *v.* 910
Norris *v.* United States 949
Nortel Networks Corp.; Kelly *v.* 956
North American Die Casting Assn.; Bar-Meir *v.* 941
North Carolina; Anthony *v.* 930
North Carolina; Bowen *v.* 986
North Carolina; Carpenter *v.* 967,983
North Carolina; Hammonds *v.* 907
North Carolina; Milano *v.* 930,983
North Carolina Dept. of Revenue; Metts *v.* 977
North Jersey Media Group, Inc.; Ashcroft *v.* 954
Northshore International Ins. Services, Inc.; O'Connor *v.* 919
Nubine, *In re* 920
Nucor-Yamato Steel Co.; Bledsoe *v.* 904,982
Nunez-Rodriguez *v.* United States 970
Obando *v.* White 945
O'Brien, *In re* 975
Ochoa-Olivas *v.* United States 914
O'Connor *v.* Northshore International Ins. Services, Inc. 919
Odiodio *v.* United States 914
Odum; Smith *v.* 905
Oetting *v.* Indiana Bd. of Tax Comm'rs 924
Office of Personnel Management; Haworth *v.* 982
Ohio; McGonegal *v.* 961

Page
Ohio; Reed *v.* 983
Ohio *v.* Reiner 940
Ohio; Shingleton *v.* 933,984
Ohio Environmental Protection Agency *v.* Nihiser 922
Oken *v.* Maryland 978
Oklahoma; Cannon *v.* 974
Oklahoma; Payne *v.* 928
Oklahoma; Pickens *v.* 961
Oliver *v.* Kyler 982
Olmstead *v.* Mid State Homes, Inc. 935
Olmstead *v.* Walter Industries, Inc. 935
Olympia Fields; Sparing *v.* 958
Operation Rescue *v.* National Organization for Women, Inc. 981
O'Quinn *v.* Booker 928
Oregon; Terry *v.* 910
Oregon Arena Corp. *v.* Lee 905
Orin *v.* Barclay 958
Orlando Fernandez *v.* United States 960
Ortiz *v.* Greiner 909
Osayande *v.* United States 976
Osterback *v.* Ingram 906
Ott *v.* United States 969
Ouimette *v.* Rhode Island 906
Ours Garage and Wrecker Service, Inc.; Columbus *v.* 424
Owens *v.* Stine 965
Owens *v.* United States 931
Packard *v.* Continental Airlines, Inc. 923
Padilla *v.* United States 948
Padilla-Vela *v.* United States 948
Palacio *v.* United States 971
Pandeli *v.* Arizona 953
Pannell *v.* Hanks 928
Pardee *v.* Conroy 947
Parham *v.* United States 913
Parisian, Inc.; Quincy Mall, Inc. *v.* 905
Parker; Turner *v.* 965
Parker *v.* United States 971
Parra *v.* California 946
Partida-Ramirez *v.* United States 970
Patrick, *In re* 988
Patrick *v.* Cockrell 987
Patrick *v.* Texas 988
Patrick *v.* UNUM Life Ins. Co. of America 939
Patrickson; Dead Sea Bromine Co. *v.* 956

Page
Patrickson; Dole Food Co. *v.* 956
Patterson, *In re* 984
Patterson *v.* Cockrell 967
Patterson *v.* Texas 984
Paulino *v.* California 928
Paul Revere Life Ins. Co.; Goelz *v.* 982
Payne; Addleman *v.* 966
Payne *v.* Oklahoma 928
Peabody Coal Co.; Barnhart *v.* 955
Pearson *v.* Illinois 925
Pelayo-Jiminez *v.* United States 911
Pellegrino *v.* Weber 982
Peltier *v.* Greyhound Lines, Inc. 943
Pelzer; Hope *v.* 730
Pena *v.* United States 935,960
Pennsylvania; Engel *v.* 946,983
Pennsylvania; Ervin *v.* 939
Pennsylvania; L. C. *v.* 923
Pennsylvania; Philistin *v.* 907
Pennsylvania Hospital Ins. Co.; U. S. Healthcare Systems of Pa. *v.* 938
Pennsylvania Power Co.; Electrical Workers *v.* 959
Perez *v.* United States 933,948,970,971
Perez-Colon *v.* United States 932
Perez-Garcia *v.* United States 915
Perez-Oviedo *v.* United States 969
Perkins *v.* Alabama 953
Perkins School *v.* Simmons-Harris 639
Perry; Shaw *v.* 986
Peters; Campbell *v.* 972
Peters; Lee *v.* 972
Peters *v.* United States 934
Peterson, *In re* 938,983
Petrovich *v.* Sands Casino & Hotel 902
Pettus *v.* United States 961
Pfeffer; Carroll *v.* 907,978
Pfeiffer-El *v.* Jackson 965,983
Pfizer, Inc.; Rosmer *v.* 979
Pharmaceutical Research and Mfrs. of America *v.* Concannon . . . 956
Phelps *v.* United States 947
Phelps Memorial Hospital Center; Newsome *v.* 967
Philistin *v.* Pennsylvania 907
Phillips *v.* United States 961
Phonometrics, Inc. *v.* Aston Hotels & Resorts 904
Phonometrics, Inc. *v.* Hotel Corporation of Pacific 904

Page

Pickens *v.* Oklahoma 961
Pierce *v.* Illinois 946
Pierce *v.* Price 973
Pilart *v.* United States 912
Pilipshen *v.* IBM Corp. 940
Pinkerton; Jaramillo *v.* 976
Pitcher *v.* United States 961
Pitts *v.* Kankakee 922
Pizarro; Medical Assurance of W. Va., Inc. *v.* 940
Podoprigora *v.* Immigration and Naturalization Service 973
Police Jury of Vermillion Parish; Duhon *v.* 940
Politz; Riccardo *v.* 925
Porter *v.* Diecast Corp. 978
Portuondo; Baez 929
Portuondo; Eldridge *v.* 908
Post *v.* California 943
Post *v.* Court of Appeal of Cal., Second Appellate Dist. 943
Postmaster General; Duncan *v.* 911
Postmaster General *v.* Fitzgerald 922
Postmaster General; Koch *v.* 911,986
Potter; Duncan *v.* 911
Potter *v.* Fitzgerald 922
Potter; Koch *v.* 911,986
Potts *v.* Potts 959
Pound *v.* Williams 986
Powell, *In re* 921
Powell *v.* Cockrell 990
Powell *v.* United States 912
Preferred Properties, Inc.; Indian River Estates *v.* 959
Presutti *v.* Federal Deposit Ins. Corp. 939
Preussag Aktiengesellschaft; Coleman *v.* 923
Price *v.* Crestar Securities Corp. 966,983
Price; Pierce *v.* 973
Price *v.* United States 912
Principi; Scarborough *v.* 920
Progress Rail Services Corp. *v.* Allfirst Bank 905
Proskauer Rose LLP; Sage Realty Corp. *v.* 924
Prudential Assurance Co. Ltd.; Alcan Aluminum Corp. *v.* 959
Pueblo of Tesuque; Gallegos *v.* 990
Pugh *v.* Arkansas Dept. of Human Services 927
Pugh; DeBardeleben *v.* 920
Pullen; Florida *v.* 915
Purpura *v.* Purpura 944
Quincy Mall, Inc. *v.* Parisian, Inc. 905

Page
Rackley; Tyler *v.* 926
Rader; Lewis *v.* 908,986
Ramirez *v.* Gerlinski 909
Ramirez *v.* United States 969
Ramirez-Partida *v.* United States 970
Ramos *v.* United States 947
Ramsey *v.* United States 949
Randolph *v.* United States 970
Rauls *v.* Johnson 945
Rawls *v.* United States 962
Recio; United States *v.* 921
Reddish; Taylor *v.* 977
Redic *v.* Moskowitz 926,983
Redlands; Doerr *v.* 977
Reed; Hamilton *v.* 971
Reed *v.* Ohio 983
Reed; Swoyer *v.* 976
Reeks, *In re* 901
Reeves *v.* St. Mary's County 965
Regence BlueCross BlueShield of Ore.; Crumbaker *v.* 930
Reiner; Ohio *v.* 940
Rendon-Leobos *v.* United States 970
Reneau *v.* Cockrell 910
Renne; Servantes *v.* 939
Republican Party of Minn. *v.* White 765
Reynolds, *In re* 937
Reynolds *v.* Morris 915
Reynolds; Taylor *v.* 908,983
Rhoads *v.* Federal Deposit Ins. Corp. 952
Rhode *v.* Georgia 925,983
Rhode Island; Ouimette *v.* 906
Rhodes *v.* Cockrell 925
Rhodes *v.* Hirschler 926
Riano *v.* United States 915
Riccardo *v.* Politz 925
Rice; Bowen *v.* 939
Rice *v.* United States 934
Richards *v.* United States 914
Richardson, *In re* 956
Richardson *v.* Lowe 942
Richardson *v.* Luebbers 957
Richardson *v.* Moore 983
Richardson *v.* United States 972
Richey, *In re* 901

Page

Riggs, *In re* 981
Rinaldi *v.* United States 925
Ring *v.* Arizona 584
Rios-Araiza *v.* United States 962
Rith Energy, Inc. *v.* United States 958
Ritter *v.* Stanton 904
Riva, *In re* 938
Rivera *v.* Chase Manhattan Bank 905
Rivera-Garcia *v.* United States 934
River Falls School Dist.; Wrencher *v.* 965
Riverfront State Prison; White *v.* 968
Roberts; Thomas *v.* 953
Robinson *v.* Illinois 967
Robinson *v.* United States 933
Rocky Mountain News, Inc.; Barnett *v.* 976
Rodgers *v.* United States 961
Rodriguez, *In re* 974
Rodriguez *v.* Harbeston 924
Rodriguez *v.* Hazbun Escaf 901
Rodriguez *v.* Lewis 908
Rodriguez *v.* Texas 928
Rodriguez *v.* Texas Dept. of Protective Services 941
Rodriguez *v.* United States 913,962
Rodriguez-Lazcano *v.* United States 947
Rodriguez Perez *v.* United States 948
Roe; Battle *v.* 910
Roe; Couch *v.* 921
Romero *v.* United States 948
Romero-Ramirez *v.* United States 948
Romine; Lopez *v.* 948
Rosales-Garay *v.* United States 934
Rosario *v.* United States 911
Rosas-Zuloaga *v.* United States 947
Rosmer *v.* Pfizer, Inc. 979
Rossotti; Sinyard *v.* 904
Rostan *v.* United States 970
Rowell *v.* Del Papa 964
Rowell *v.* Nevada 977
Rowsey *v.* Eslinger 928
Ruelas *v.* United States 969
Ruiz; United States *v.* 622
Rumaro *v.* United States 914
Rush Prudential HMO, Inc. *v.* Moran 355
Russ *v.* United States 964

Page

Rutherford *v.* Deorle 958
Rutherford *v.* Lake Mich. Contractors, Inc. 905
Saenz *v.* United States 912
Saffle; Dopp *v.* 927
Saffold; Carey *v.* 214
Sage Realty Corp. *v.* Proskauer Rose LLP 924
St. Mary's County; Reeves *v.* 965
Sale *v.* United States 949
Sampson *v.* United States 913
San Antonio *v.* Bill's Wrecker Service 936
San Antonio *v.* Stucky 936
Sanchez *v.* United States 949
Sanchez-Calderon *v.* United States 948
Sanchez-Espinosa *v.* United States 969
Sanchez-Perez *v.* United States 948
Sanchez-Rodriguez *v.* United States 948
Sanders *v.* Kansas 963
Sands Casino & Hotel; Petrovich *v.* 902
San Francisco Dept. of Elections; Burgess *v.* 951
Sansing *v.* Arizona 954
Santos-De La Rosa *v.* United States 947
Satellite Broadcasting and Communications Assn. *v.* FCC 922
Saunders, *In re* 903
Sawyer; Jordan *v.* 931
Scarborough *v.* Principi 920
Scardelletti; Devlin *v.* 1
Schaefer, *In re* 954
Scheidler *v.* National Organization for Women, Inc. 981
Schettler *v.* United States 972
Schultz *v.* Journal Sentinel, Inc. 960
Schultz *v.* Sykes 941
Schweitzer *v.* United States 948
Schwesing; Michigan *v.* 923
Scott; McQueen *v.* 913
Scott; Tayborn *v.* 976
Scott County Soil and Water Conservation Dist.; Johnson *v.* 928
Seabold; Gardner *v.* 951
Searles *v.* Van Bebber 904
Seattle *v.* Furfaro 922
Seattle; Furfaro *v.* 922
Secretary of Agriculture; Jacobson *v.* 924
Secretary of Commerce; Utah *v.* 452
Secretary of Commonwealth of Mass.; McClure *v.* 988
Secretary of Health and Human Services; Early *v.* 918

Page
Secretary of State of W. Va.; Unger *v.* 935
Secretary of Transportation; Wendt *v.* 941
Secretary of Veterans Affairs; Scarborough *v.* 920
Seese *v.* Springs 926
Seitz *v.* Speagle 923
Senffner *v.* United States 934
Servantes *v.* Renne 939
Shackleford *v.* United States 914
Sham; Lugo *v.* 929
Shamburger, *In re* 988
Shamburger *v.* Cockrell 986
Shanahan, *In re* 981
Shannon; Gibbs *v.* 907
Sharaf *v.* United States 969
Shaw *v.* Perry 986
Sherman *v.* United States 963
Shingleton *v.* Ohio 933,984
Sickles; Knox *v.* 972
Sienkiewicz *v.* Hart 976
Silva *v.* California 947
Simmons *v.* Hambly 909
Simmons *v.* Johnston 919
Simmons-Harris; Hanna Perkins School *v.* 639
Simmons-Harris; Taylor *v.* 639
Simmons-Harris; Zelman *v.* 639
Simon *v.* Bock 928
Simon; McLachlan *v.* 941,982
Simpson, *In re* 903
Sinclair *v.* Louisiana 910
Singletary *v.* United States 964
Sinyard *v.* Rossotti 904
Sisk *v.* Virginia 906
Small; Forman *v.* 958
Smith, *In re* 938
Smith *v.* Branch 903
Smith; Branch *v.* 903,981
Smith *v.* Friedman 976
Smith; Hatcher *v.* 945
Smith *v.* Johnson 909
Smith; Lewis *v.* 952
Smith *v.* Odum 905
Smith; Stewart *v.* 856,982
Smith; Switzer *v.* 966
Smith *v.* Tallahassee Democrat 951

Page
Smith *v.* United States 914,933,964,983
Smith *v.* Waterman S. S. Corp. 906
Smith *v.* Williams 960
Snavely, *In re* 938
Snyder; Gibbs *v.* 907,983
Snyder; Hicks *v.* 976
Sol *v.* Immigration and Naturalization Service 941
Solomon *v.* Supreme Court of Fla. 959
Sorrell; National Electrical Mfrs. Assn. *v.* 905
South Camden Citizens In Action *v.* N. J. Dept. of Env. Prot. 939
South Carolina; Georgia *v.* 979
South Carolina; Longworth *v.* 928
Southern Cal. Gas Co.; Firestone *v.* 958
Spanagel *v.* Supportive Care Services, Inc. 976
Sparing *v.* Olympia Fields 958
Sparkman; Hansen *v.* 930
Spaulding *v.* Briley 966
Speagle; Seitz *v.* 923
Spitzer, *In re* 902
Sprietsma *v.* Mercury Marine 921
Springfield; Bustamonte *v.* 908
Springs; Seese *v.* 926
Sprint Communications Co. *v.* Missouri Director of Revenue 960
Stalder; Thomas *v.* 929
Stanley; Ainsworth *v.* 953
Stanton; Ritter *v.* 904
State. See also name of State.
State Bar of Cal.; Dahlz *v.* 940
State Mut. Life Assurance Co. of America; Everhart *v.* 958
Stegall; Henley *v.* 907
Steinbrecher *v.* Steinbrecher 911,983
Stender; Israel *v.* 925
Steppes Apartments, Ltd.; Armstrong *v.* 951
Sterling *v.* United States 931
Stern; Chambers *v.* 940
Stevens, *In re* 975
Stevenson *v.* Luebbers 943
Stevenson *v.* United States 934
Stewart *v.* Abraham 958
Stewart; Beasley *v.* 966
Stewart; Black *v.* 983
Stewart *v.* Smith 856,982
Stine; Owens *v.* 965
Stokes *v.* United States 918

Page
Stone; Thomas *v.* 960
Stover, *In re* 903
Stover *v.* United States 948
Stratton; Watchtower Bible & Tract Society of N. Y., Inc. *v.* 150
Stuart *v.* Idaho 907
Stucky; San Antonio *v.* 936
Suarez Medina *v.* Cockrell 972
Suarez Medina *v.* Texas 979
Sudarsky *v.* New York City 918,976
Suleman *v.* United States 914
Summersett *v.* United States 949
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., Los Angeles County; Burrier *v.* 924
Superior Court of Cal., Riverside County; Wade *v.* 929
Superior Court of D. C., Family Division; Z. G. *v.* 951
Supportive Care Services, Inc.; Spanagel *v.* 976
Supreme Court of Fla.; Solomon *v.* 959
Surfo Hawaii; Fin Control Systems Pty., Ltd. *v.* 939
Swift Transportation Co.; Levy *v.* 959
Swint *v.* United States 949
Switzer *v.* Smith 966
Swope; Hernandez *v.* 969
Swoyer *v.* Edgars 976
Swoyer *v.* Kercher 976
Swoyer *v.* Merchants Bank 976
Swoyer *v.* Reed 976
Sykes; Schultz *v.* 941
Syngenta Crop Protection, Inc. *v.* Henson 955
Tallahassee Democrat; Smith *v.* 951
Tayborn *v.* Scott 976
Taylor, *In re* 921
Taylor *v.* California 967
Taylor *v.* Campbell 965,983
Taylor; Housing Auth. and Urban Redev. Agcy., Atlantic City *v.* 955
Taylor *v.* Kentucky 945
Taylor *v.* Kotecki 929,986
Taylor *v.* Reddish 977
Taylor *v.* Reynolds 908,983
Taylor *v.* Simmons-Harris 639
Taylor *v.* United States 933
Taylor *v.* Veterans Administration Medical Center 942
Teague *v.* Holiday Inn Express 977
Telesco *v.* United States 970

Page
Tenet Healthsystem Hospitals, Inc.; Burnett *v.* 978
Tennessee; Abdur'Rahman *v.* 978
Tennessee; Kinnaird *v.* 908
Tennessee; Miller *v.* 927
Terry *v.* Oregon 910
Tesuque; Gallegos *v.* 990
Texas; Amps *v.* 919
Texas; Balderas *v.* 919
Texas; Colwick *v.* 918
Texas; Coulson *v.* 952
Texas; Davis *v.* 967
Texas; Easley *v.* 967
Texas; Enlow *v.* 964
Texas; Escobedo *v.* 903
Texas; Hall *v.* 955
Texas; Hill *v.* 929
Texas; Mayfield *v.* 919
Texas *v.* McCarthy 972
Texas; McKinney *v.* 968
Texas; Mexican American Legislative Caucus *v.* 919
Texas; Modden *v.* 918,954
Texas; Moore *v.* 966
Texas; Nabelek *v.* 977
Texas; Patrick *v.* 988
Texas; Patterson *v.* 984
Texas; Rodriguez *v.* 928
Texas; Suarez Medina *v.* 979
Texas *v.* Vicioso 915
Texas; Williams *v.* 952
Texas Dept. of Protective Services; Rodriguez *v.* 941
Thiessen; GE Capital *v.* 934
Thiessen; General Electric Capital Corp. *v.* 934
Thomas *v.* Roberts 953
Thomas *v.* Stalder 929
Thomas *v.* Stone 960
Thomas *v.* United States 931,964
Thomas *v.* Wichita 944
Thompson, *In re* 903
Thompson; Early *v.* 918
Thompson *v.* Florida 951
Thompson; Grayson *v.* 964
Thompson *v.* Haley 942
Thompson *v.* United States 950,968
Thurlwell *v.* Walt Disney Pictures & Television, Inc. 940

Page
Tidik *v.* Appeals Judges of Mich. 951
Tidik *v.* Hunter 954
Tilghman *v.* Galley 967
Tilli *v.* Department of Housing and Urban Development 951
Toman *v.* United States 969
Tony *v.* United States 964
Topete-Hernandez *v.* United States 931
Toward *v.* California 908
Town. See name of town.
Townes *v.* New Hampshire 955
Townsend *v.* Adair 946
Traffic Stream Infrastructure Ltd.; JPMorgan Chase Bank *v.* . . . 88
Trans Union LLC *v.* Federal Trade Comm'n 915
Treasurer of Oswego County; Weichert *v.* 905
Trejo *v.* United States 972
Trejo Paulino *v.* California 928
Tribble *v.* United States 972
Trice *v.* Hall 977
Trujillo *v.* Williams 946
Tshiwala *v.* Maryland 977
Tucker, *In re* 974
Turley; Chambers *v.* 977
Turner; Miller *v.* 928
Turner *v.* Parker 965
Twillie *v.* Brennan 918
Tyler *v.* Ashcroft 945,986
Tyler *v.* Douglas 906
Tyler *v.* Rackley 926
UAL Corp. *v.* Fielder 919
ULLICO, Inc. *v.* Black 959
Unger *v.* Manchin 935
Unified Judicial System of Pa.; Caterina *v.* 982
Union. For labor union, see name of trade.
United Airlines *v.* Fielder 919
United States. See name of other party.
U. S. District Court; Canal Ins. Co. *v.* 987
U. S. District Court; Jackson *v.* 908
U. S. Healthcare Systems of Pa. *v.* Pennsylvania Hospital Ins. Co. 938
U. S. Parole Comm'n; Acevedo-Cruz *v.* 914
U. S. Postal Service; George *v.* 956
U. S. Postal Service; Zeitschik *v.* 910
U. S. Trustee; Hill *v.* 930
UNUM Life Ins. Co. of America; Patrick *v.* 939
Uphoff; Herdt *v.* 944

Page
Upjohn Co.; Mann *v.* 905
Urena *v.* United States 969
Urias-Escobar *v.* United States 913
USA Polymer Corp. *v.* National Labor Relations Bd. 939
Utah *v.* Evans 452
Valdez-Escobedo *v.* United States 970
Valentine *v.* Francis 942
Valenzuela-Urias *v.* United States 947
Van Bebber; Searles *v.* 904
Vance; Bagley *v.* 973
Vargas *v.* Jorgensen 982
Vargas de Almeida *v.* United States 930
Varner; McDowell *v.* 910
Vasquez; Charluisant-Pagan *v.* 914
Vasquez *v.* United States 931
Vastar Resources, Inc.; Hawkins *v.* 934,984
Vaughan *v.* Cox 953
Vaughn; Morales *v.* 907
Vazquez *v.* United States 963
Vela-Padilla *v.* United States 948
Velez *v.* United States 963
Vencor, Inc. *v.* Helwig 935
Veneman; Jacobson *v.* 924
Vera *v.* United States 911
Veterans Administration Medical Center; Taylor *v.* 942
Vicioso; Texas *v.* 915
Village. See name of village.
Vinyard *v.* United States 922
Virginia; Atkins *v.* 304
Virginia; Edmonds *v.* 929
Virginia *v.* Maryland 903
Virginia; Sisk *v.* 906
Visa U. S. A. Inc. *v.* Wal-Mart Stores, Inc. 917
Vivone *v.* Kemna 977
Voit *v.* Louisville and Jefferson County Bd. of Health 905
Wade *v.* Superior Court of Cal., Riverside County 929
Wade; Williams *v.* 909
Wagenknecht *v.* United States 941
Walgreen Co. *v.* Hood 951
Walker, *In re* 973
Walker; Bobbitt *v.* 929
Walker; Hizbullahankhamon *v.* 925
Walker *v.* United States 986
Wall *v.* Cheverie 972

Page
Wallace *v.* United States 924,949
Wal-Mart Stores, Inc.; Visa U. S. A. Inc. *v.* 917
Walt Disney Pictures & Television, Inc.; Thurlwell *v.* 940
Walter Industries, Inc.; Olmstead *v.* 935
Warden. See also name of warden.
Warden, Federal Corrections Institution, Englewood; Ahmed *v.* 930
Warner; Archer *v.* 938
Warren, *In re* 938,987
Warren *v.* United States 913
Washington; Balisok *v.* 943
Washington; Mulcahy *v.* 905
Washington County School Bd.; Jett *v.* 921,982
Wasserman *v.* Bartholomew 929
Watchtower Bible & Tract Society of N. Y., Inc. *v.* Stratton 150
Waterford Bd. of Ed.; Farrior *v.* 958
Waterman S. S. Corp.; Smith *v.* 906
Watts *v.* Norman 976
Watts *v.* United States 947,962
Wauqua, *In re* 952
Wayne *v.* United States 961,987
Weatherspoon *v.* Moore 945,986
Weaver *v.* United States 961
Weber; Pellegrino *v.* 982
Weger *v.* Hicks 926
Weichert *v.* Kruk 905
Weinberger *v.* United States 934
Weinstein *v.* Grabelle 966
Weinstock, *In re* 975
Weiss, *In re* 975
Welker *v.* United States 914
Wells; Clackamas Gastroenterology Associates, P. C. *v.* 990
Wells *v.* Goord 946
Wendt *v.* Mineta 941
Wersching; Hinckley Township Trustees *v.* 989
Westby, *In re* 937
Weston; Cassata *v.* 923
West Virginia; McGee *v.* 928
West Virginia Dept. of H. H. R.; Carrie Q. B. *v.* 942
Wheeler *v.* Court of Common Pleas of Philadelphia County 929
White; Jemison *v.* 943
White *v.* Kapture 945
White *v.* Louisiana 946
White; Obando *v.* 945
White; Republican Party of Minn. *v.* 765

Page
White *v.* Riverfront State Prison 968
White *v.* United States 925,961
White Mountain Apache Tribe; United States *v.* 981
Whitfield *v.* Kemna 927
Whooten *v.* United States 913
Wichita; Thomas *v.* 944
Wilcox, *In re* 974
Wilcox *v.* United States 963
Wilentz, Goldman & Spitzer; Hutchins *v.* 906
Williams, *In re* 903,952,977
Williams *v.* Cockrell 908
Williams *v.* Coyle 947
Williams; Pound *v.* 986
Williams; Smith *v.* 960
Williams *v.* Texas 952
Williams; Trujillo *v.* 946
Williams *v.* United States 952,964,977,978
Williams *v.* Wade 909
Wm. Wrigley Jr. Co.; Ferguson *v.* 929
Wilmington; Brown *v.* 906,976
Wilson; Hadix *v.* 965
Wilson *v.* United States 957
Winke *v.* Bradshaw, Fowler, Proctor & Fairgrave, P. C. 952
Wischkaemper, *In re* 921
Wittenberg, *In re* 974
Wojciechowski, *In re* 956
Wood *v.* United States 962
Woodard, *In re* 938
Woodford *v.* Caro 951
Woodford *v.* Garceau 990
Woodford *v.* Indiana 973
Woodland *v.* Corcoran 908
Wrencher *v.* River Falls School Dist. 965
W. R. Grace & Co.-Conn.; Zapata Industries, Inc. *v.* 990
Wright, *In re* 975
Wright *v.* Daigle 940
Wright *v.* Knox County Bd. of Ed. 965,986
Wright *v.* Merit Systems Protection Bd. 931
Wright *v.* United States 941
Wright-Dean *v.* Garland 924
Wrigley Jr. Co.; Ferguson *v.* 929
Yellow Transportation, Inc. *v.* Michigan 921
Yirkovsky *v.* United States 964
Yon *v.* Moore 976

Page

Young *v.* United States 971
Young-Bey *v.* Maryland 952
Yukins; Hunter *v.* 965
Zamos *v.* Court of Appeal of Cal., Fourth Appellate Dist., Div. One 906
Zamudio-Hinojosa *v.* United States 948
Zapata-Diaz *v.* United States 970
Zapata Industries, Inc. *v.* W. R. Grace & Co.-Conn. 990
Zapata-Robles *v.* United States 948
Zarrilli *v.* Federal Deposit Ins. Corp. 983
Zeitschik *v.* U. S. Postal Service 910
Zelman *v.* Simmons-Harris 639
Z. G. *v.* Superior Court of D. C., Family Division 951
Zogby, *In re* 937
Zuniga-Solis *v.* United States 931

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2001

DEVLIN *v.* SCARDELLETTI ET AL.

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

No. 01–417. Argued March 26, 2002—Decided June 10, 2002

Petitioner retiree participates in a defined benefits pension plan (Plan) that was amended in 1991 to add a cost of living increase (COLA). Because the Plan could not support such a large benefits increase, its trustees ultimately eliminated the COLA in 1997 and filed a class action in the Maryland Federal District Court, seeking a declaratory judgment that the 1997 amendment was binding on all Plan members or that the 1991 COLA was void. Petitioner's separate challenge to the 1997 amendment was dismissed by a New York Federal District Court, which found that the Maryland court should resolve the matter. By this time, the Maryland court had already conditionally certified a class under Federal Rule of Civil Procedure 23(b)(1). After the trustees asked the court to approve their settlement with the class representatives, petitioner moved to intervene. The District Court denied his motion as untimely. It then heard objections to the settlement, including those advanced by petitioner, and approved the settlement. Petitioner appealed. The Fourth Circuit affirmed the District Court's denial of intervention and held that, because petitioner was not a named class representative and because he had been properly denied the right to intervene, he lacked standing to challenge the settlement.

Held: Nonnamed class members like petitioner who have objected in a timely manner to approval of a settlement at a fairness hearing have the power to bring an appeal without first intervening. Pp. 6–14.

Syllabus

(a) This issue, though framed by the Fourth Circuit as one of standing, does not implicate the jurisdiction of the courts, as petitioner satisfies both constitutional and prudential standing requirements. What is at issue is whether petitioner is a "party" for purposes of appealing the settlement approval, for only a lawsuit's parties, or those that properly become parties, may appeal an adverse judgment. This Court has never restricted the right to appeal to named parties. Petitioner's interest in the settlement approval is similar to those of the nonnamed parties this Court has allowed to appeal in the past. He objected to the settlement at the fairness hearing, as permitted by the Federal Rules of Civil Procedure. And the settlement's approval notwithstanding his objections amounted to a final decision of his right or claim sufficient to trigger his right to appeal. That right cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over the petitioner's objections, petitioner's interests diverge from those of the class representative. *Marino* v. *Ortiz*, 484 U. S. 301, in which white police officers who were not members of the class of minority officers who had brought a racial discrimination suit were not allowed to appeal the settlement, is not to the contrary. Although the settlement affected them, the District Court's decision did not dispose of any right or claim they might have had because they were not class members. Nor does considering nonnamed class members as parties for the purpose of bringing an appeal conflict with any other aspect of class action procedure. Such members may be parties for some purposes and not for others. What is important here is that they are parties in the sense of being bound by the settlement. Allowing them to appeal a settlement approval when they have objected at the fairness hearing preserves their own interests in a settlement that will bind them, despite their expressed objections before the trial court. Allowing such appeals will not undermine the class action goal of preventing multiple suits. Restricting the power to appeal to those members who objected at the fairness hearing limits the class of potential appellants considerably. Pp. 6–11.

(b) This Court rejects the Government's argument that class members should be required to intervene for purposes of appeal. Nor does the Court agree with the Government that the structure of class action procedural rules requires intervention for purposes of appeal. A procedure that allows nonnamed class members to object to a settlement at the fairness hearing without first intervening should similarly allow them to appeal the district court's decision to disregard their objections. Moreover, no statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the

right to appeal from an action that finally disposes of one's rights has a statutory basis. 28 U. S. C. § 1291. Pp. 11–14.

265 F. 3d 195, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 15.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Erik S. Jaffe* and *Brian Wolfman*.

Laurence Gold argued the cause for respondents. With him on the brief were *Andrew D. Roth*, *David L. Shapiro*, *William F. Hanrahan*, and *Kenneth M. Johnson*.

Patricia A. Millett argued the cause for the United States et al. as *amici curiae* urging affirmance. On the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Gregory G. Garre*, *Marleigh D. Dover*, *Irene M. Solet*, *David M. Becker*, *Jacob H. Stillman*, and *Eric Summergrad*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, a nonnamed member of a class certified under Federal Rule of Civil Procedure 23(b)(1), sought to appeal the approval of a settlement over objections he stated at the fairness hearing. The Court of Appeals for the Fourth Circuit held that he lacked the power to bring such an appeal because he was not a named class representative and because

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*Briefs of *amici curiae* urging reversal were filed for the Council of Institutional Investors by *Mark C. Hansen* and *Neil M. Gorsuch;* and for Charles C. Yeomans by *Katherine K. Yunker*.

Seth P. Waxman, *Edward C. DuMont*, and *Christopher R. Lipsett* filed a brief for Citibank (South Dakota), N. A., as *amicus curiae* urging affirmance.

Thaddeus Holt filed a brief for Charles L. Grimes et al. as *amici curiae*.

he had not successfully moved to intervene in the litigation. We now reverse.

I

Petitioner Robert Devlin, a retired worker represented by the Transportation Communications International Union (Union), participates in a defined benefits pension plan (Plan) administered by the Union. In 1991, on the recommendation of the Plan's trustees, the Plan was amended to add a cost of living adjustment (COLA) for retired and active employees. As it turned out, however, the Plan was not able to support such a large benefits increase. To address this problem, the Plan's new trustees sought to freeze the COLA. Because they were concerned about incurring Employee Retirement Income Security Act of 1974 (ERISA) liability by eliminating the COLA for retired workers, see 29 U. S. C. § 1054(g)(1) (1994 ed.) (providing that accrued benefits "may not be decreased by an amendment of the plan"), the trustees froze the COLA only as to active employees. Because the Plan still lacked sufficient funds, the new trustees obtained an equitable decree from the United States District Court for the District of Maryland in 1995 declaring that the former trustees had breached their fiduciary duties and that ending the COLA for retired workers would not violate ERISA. *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (Md. 1995); *Scardelletti* v. *Bobo*, No. JFM–95–52 (D. Md., Sept. 8, 1997). Accordingly, in a 1997 amendment, the new trustees eliminated the COLA for all Plan members.

In October 1997, those trustees filed the present class action in the United States District Court for the District of Maryland, seeking a declaratory judgment that the 1997 amendment was binding on all Plan members or, alternatively, that the 1991 COLA amendment was void. Originally, petitioner was proposed as a class representative for a subclass of retired workers because of his previous involvement in the issue. He refused to become a named representative, however, preferring to bring a separate action in

the United States District Court for the Southern District of New York, arguing, among other things, that the 1997 Plan amendment violated the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1994 ed. and Supp. V). The New York District Court dismissed petitioner's claim involving the 1997 amendment, which was later affirmed by the Second Circuit because:

> "The exact COLA issue that the appellants are pursuing . . . is being addressed by the district court in Maryland. . . . It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue." *Devlin* v. *Transportation Communications Int'l Union*, 175 F. 3d 121, 132 (CA2 1999).

At the time petitioner's claim was dismissed, the District Court in Maryland had already conditionally certified a class under Federal Rule of Civil Procedure 23(b)(1), dividing it into two subclasses: a subclass of active employees and a subclass of retirees. On April 20, 1999, petitioner's attorney sent a letter to the District Court informally seeking to intervene in the class action. On May 12, 1999, petitioner sent another letter repeating this request. He did not, however, formally move to intervene at that time.

Also in May, the Plan's trustees and the class representatives agreed on a settlement whereby the COLA benefits would be eliminated in exchange for the addition of other benefits. On August 27, 1999, the trustees filed a motion for preliminary approval of the settlement. On September 10, 1999, petitioner formally moved to intervene pursuant to Federal Rule of Civil Procedure 24. On November 12, 1999, the District Court denied petitioner's intervention motion as "absolutely untimely." *Scardelletti* v. *Debarr*, 265 F. 3d 195, 201 (CA4 2001). It then heard objections to the settlement, including those advanced by petitioner, and, concluding that the settlement was fair, approved it. App. C to Pet. for Cert. 1–3.

Shortly thereafter, petitioner noted his appeal, challenging the District Court's dismissal of his intervention motion as well as its decision to approve the settlement. The Court of Appeals for the Fourth Circuit affirmed the District Court's denial of intervention under an abuse of discretion standard. 265 F. 3d, at 203–204. It further held that, because petitioner was not a named representative of the class and because he had been properly denied the right to intervene, he lacked standing to challenge the fairness of the settlement on appeal. *Id.*, at 208–210.

Petitioner sought review of the Fourth Circuit's holding that he lacked the ability to appeal the District Court's approval of the settlement. We granted certiorari, 534 U. S. 1064 (2001), to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement. Compare *Cook* v. *Powell Buick, Inc.*, 155 F. 3d 758, 761 (CA5 1998) (holding that nonnamed class members who have not successfully intervened may not appeal settlement approval); *Gottlieb* v. *Wiles*, 11 F. 3d 1004, 1008–1009 (CA10 1993) (same); *Guthrie* v. *Evans*, 815 F. 2d 626, 628–629 (CA11 1987) (same); *Shults* v. *Champion Int'l Corp.*, 35 F. 3d 1056, 1061 (CA6 1994) (same), with *In re PaineWebber Inc. Ltd. Partnerships Litigation*, 94 F. 3d 49, 53 (CA2 1996) (any nonnamed class member who objected at the fairness hearing may appeal); *Carlough* v. *Amchem Prods., Inc.*, 5 F. 3d 707, 710 (CA3 1993) (same); *Marshall* v. *Holiday Magic, Inc.*, 550 F. 2d 1173, 1176 (CA9 1977) (same).

II

Although the Fourth Circuit framed the issue as one of standing, 265 F. 3d, at 204, we begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution. As a member of the retiree class, petitioner has an interest in the settlement that creates a "case or controversy" sufficient to satisfy the constitutional

requirements of injury, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992); see also *In re Navigant Consulting, Inc., Securities Litigation*, 275 F. 3d 616, 620 (CA7 2001).

Nor do appeals by nonnamed class members raise the sorts of concerns that are ordinarily addressed as a matter of prudential standing. Prudential standing requirements include:

> "[T]he general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

Because petitioner is a member of the class bound by the judgment, there is no question that he satisfies these three requirements. The legal rights he seeks to raise are his own, he belongs to a discrete class of interested parties, and his complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members. Fed. Rule Civ. Proc. 23(e).

What is at issue, instead, is whether petitioner should be considered a "party" for the purposes of appealing the approval of the settlement. We have held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U. S. 301, 304 (1988) *(per curiam)*. Respondents argue that, because petitioner is not a named class representative and did not successfully move to intervene, he is not a party for the purposes of taking an appeal.

We have never, however, restricted the right to appeal to named parties to the litigation. In *Blossom* v. *Milwaukee & Chicago R. Co.*, 1 Wall. 655 (1864), for instance, we allowed a bidder for property at a foreclosure sale, who was not a

named party in the foreclosure action, to appeal the refusal of a request he made during that action to compel the sale. In *Hinckley* v. *Gilman, C., & S. R. Co.*, 94 U. S. 467 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order "relat[ing] to the settlement of his accounts," reasoning that "[f]or this purpose he occupies the position of a party to the suit." *Id.*, at 469. More recently, we have affirmed that "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72, 76 (1988), given the binding nature of that adjudication upon the interested nonparty.

JUSTICE SCALIA attempts to distinguish these cases by characterizing them as appeals from collateral orders to which the appellants "*were* parties." *Post*, at 16 (dissenting opinion). But it is difficult to see how they were parties in the sense in which JUSTICE SCALIA uses the term—those "'named as a party to an action,'" usually "'in the caption of the summons or complaint.'" *Post*, at 15 (quoting Restatement (Second) of Judgments § 34(1), p. 345 (1980); *id.*, Comment *a*, Reporter's Note, at 347). Because they were not named in the action, the appellants in these cases were parties only in the sense that they were bound by the order from which they were seeking to appeal.

Petitioner's interest in the District Court's approval of the settlement is similar. Petitioner objected to the settlement at the District Court's fairness hearing, as nonnamed parties have been consistently allowed to do under the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs"); see also 2 H. Newberg & A. Conte, Class Actions § 11.55, p. 11–132 (3d ed. 1992) (explaining that Rule 23(e) entitles all class members

to an opportunity to object). The District Court's approval of the settlement—which binds petitioner as a member of the class—amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal. See *Williams* v. *Morgan*, 111 U. S. 684, 699 (1884) (describing the cases discussed above). And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order that affects him—the District Court's decision to disregard his objections. Cf. *supra*, at 6. Petitioner's right to appeal this aspect of the District Court's decision cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative.

Marino v. *Ortiz*, *supra*, is not to the contrary. In that case, we refused to allow an appeal of a settlement by a group of white police officers who were not members of the class of minority officers that had brought a racial discrimination claim against the New York Police Department. Although the settlement affected them, the District Court's decision did not finally dispose of any right or claim they might have had because they were not members of the class.

Nor does considering nonnamed class members parties for the purposes of bringing an appeal conflict with any other aspect of class action procedure. In a related case, the Seventh Circuit has argued that nonnamed class members cannot be considered parties for the purposes of bringing an appeal because they are not considered parties for the purposes of the complete diversity requirement in suits under 28 U. S. C. § 1332. See *Navigant Consulting*, 275 F. 3d, at 619; see also *Snyder* v. *Harris*, 394 U. S. 332, 340 (1969). According to the Seventh Circuit, "[c]lass members cannot have it both ways, being non-parties (so that more cases can come to federal court) but still having a party's ability to litigate independently." 275 F. 3d, at 619. Nonnamed class mem-

bers, however, may be parties for some purposes and not for others. The label "party" does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.

Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated. The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation. Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1755, pp. 63–64 (2d ed. 1986). Perhaps more importantly, considering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect.

What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court. Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only

means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

JUSTICE SCALIA rightly notes that other nonnamed parties may be bound by a court's decision, in particular, those in privity with the named party. See *post,* at 18. True enough. It is not at all clear, however, that such parties may not themselves appeal. Although this Court has never addressed the issue, nonnamed parties in privity with a named party are often allowed by other courts to appeal from the order that affects them. 5 Am. Jur. 2d, Appellate Review § 265 (1995).

Respondents argue that, nonetheless, appeals from nonnamed parties should not be allowed because they would undermine one of the goals of class action litigation, namely, preventing multiple suits. See *Guthrie* v. *Evans,* 815 F. 2d, at 629 (arguing that allowing nonnamed class members' appeals would undermine a "fundamental purpose of the class action": "to render manageable litigation that involves numerous members of a homogenous class, who would all otherwise have access to the court through individual lawsuits"). Allowing such appeals, however, will not be as problematic as respondents claim. For one thing, the power to appeal is limited to those nonnamed class members who have objected during the fairness hearing. This limits the class of potential appellants considerably. As the longstanding practice of allowing nonnamed class members to object at the fairness hearing demonstrates, the burden of considering the claims of this subset of class members is not onerous.

III

The Government, as *amicus curiae,* admits that nonnamed class members are parties who may appeal the approval of a settlement, but urges us nonetheless to require class members to intervene for purposes of appeal. See Brief for

United States et al. as *Amici Curiae* 12–27. To address the fairness concerns to objecting nonnamed class members bound by the settlement they wish to appeal, however, the Government also asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded. Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right:

> "Upon timely application . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

According to the Government, nonnamed class members who state objections at the fairness hearing should easily meet these three criteria. For one thing, it claims, a settlement binding on them will establish the requisite interest in the action. Moreover, it argues, any intervention motion filed "within the time period in which the named plaintiffs could have taken an appeal" should be considered "timely filed" for the purposes of such limited intervention. *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 396 (1977). Finally, it asserts, the approval of a settlement over a nonnamed class member's objection, and the failure of a class representative to appeal such an approval, should "invariably" show that the class representative does not adequately represent the nonnamed class member's interests on appeal. Brief for United States et al. as *Amici Curiae* 20.

Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the Government's suggested requirement. It identifies only

a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members. *Id.*, at 23–25. In such situations, the Government argues, a district court can disallow such problematic and unnecessary appeals.

This seems to us, however, of limited benefit. In the first two of these situations, the objector stands to gain nothing by appeal, so it is unlikely such situations will arise with any frequency. JUSTICE SCALIA argues that if such objectors were undeterred by this fact at the time they filed their original objections, they will be undeterred at the appellate level. See *post*, at 21–22. This misunderstands the point. As to the first group—those who are not actually entitled to relief—one would not expect them to have filed objections in the district court in the first place. The few irrational persons who wish to pursue one round of meaningless relief will, we agree, probably be irrational enough to pursue a second. But there should not be many of such persons in any case. As for the second—those whose objections were successful at the district court level—they were far from irrational in the filing of their initial objections, and they should not generally be expected to lose this level of sensibility when faced with the prospect of a meaningless appeal. Moreover, even if such cases did arise with any frequency, such concerns could be addressed by a standing inquiry at the appellate level.

The third situation—dealing with untimely objections—implicates basic concerns about waiver and should be easily addressable by a court of appeals. A court of appeals also has the ability to avoid the fourth by consolidating cases rais-

ing duplicative appeals. Fed. Rule App. Proc. 3(b)(2). If the resolution of any of these issues should turn out to be complex in a given case, there is little to be gained by requiring a district court to consider these issues, which are the type of issues (standing to appeal, waiver of objections below, and consolidation of appeals) typically addressed only by an appellate court. As such determinations still would most likely lead to an appeal, such a requirement would only add an additional layer of complexity before the appeal of the settlement approval may finally be heard.

Nor do we agree with the Government that, regardless of the desirability of an intervention requirement for effective class management, the structure of the rules of class action procedure requires intervention for the purposes of appeal. According to the Government, intervention is the method contemplated under the rules for nonnamed class members to gain the right to participate in class action proceedings. We disagree. Just as class action procedure allows nonnamed class members to object to a settlement at the fairness hearing without first intervening, see *supra*, at 8–9, it should similarly allow them to appeal the District Court's decision to disregard their objections. Moreover, no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to appeal from an action that finally disposes of one's rights has a statutory basis. 28 U. S. C. § 1291.

IV

We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening. We therefore reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino* v. *Ortiz*, 484 U. S. 301, 304 (1988) *(per curiam);* Fed. Rule App. Proc. 3(c)(1) ("The notice of appeal must . . . specify the party or parties taking the appeal"). This is one well-settled rule that, thankfully, the Court leaves intact. Other chapters in the hornbooks are not so lucky.

I

The Court holds that petitioner, a nonnamed member of the class in a class action litigated by a representative member of the class, is a "party" to the judgment approving the class settlement. This is contrary to well-established law. The "parties" to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as "[o]ne who [though] not an original party . . . become[s] a party by intervention, substitution, or third-party practice," *Karcher* v. *May*, 484 U. S. 72, 77 (1987). As the Restatement puts it, "[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action," Restatement (Second) of Judgments § 34(1), p. 345 (1980) (hereinafter Restatement); "[t]he designation of persons as parties is usually made in the caption of the summons or complaint but additional parties may be named in such pleadings as a counterclaim, a complaint against a third party filed by a defendant, or a complaint in intervention," *id.*, § 34, Comment *a*, Reporter's Note, at 347. As was the case here, the only members of a class who are typically named in the complaint are the class representatives; thus, it is only these members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgment. This is confirmed by the application of those Federal Rules of Civil Procedure that confer upon

"parties" to the litigation the rights to take such actions as conducting discovery and moving for summary judgment, *e. g.*, Fed. Rules Civ. Proc. 30(a)(1), 31(a)(1), 33(a), 34(a), 36(a), 45(a)(3), 56(a), 56(b), 56(e). It is undisputed that the class representatives are the only members of the class who have such rights.

Petitioner was offered the opportunity to be named the class representative, but he declined; nor did he successfully intervene. *Ante*, at 4, 5. Accordingly, he is not a party to the class judgment.

A

The Court does not deny that, at least as a general matter, only those persons named as such are the "parties." Rather, it contends that persons "may be parties for some purposes and not for others," *ante*, at 10, and that petitioner is a party to the class judgment at least for the "purposes of appealing," *ante*, at 7.[1] The Court bases these contentions on three of our precedents, which it says stand for the proposition that "[w]e have never . . . restricted the right to appeal to named parties to the litigation." *Ibid.* These precedents stand for nothing of the sort.

All of these precedents are perfectly consistent with the rule that only named parties to a judgment can appeal the judgment because they involved appeals not from judgments but from collateral orders. The appellants were allowed to appeal from the collateral orders to which they *were* parties,

[1] The Court provides only one other example of a purpose for which a nonnamed class member is purportedly a "party": we have, it says, tolled the statute of limitations for such a person between the time the class action is filed and the time class certification is denied. *Ante*, at 10 (citing *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974)). Not even petitioner, however, is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.* Brief for Petitioner 24–26. This lonesome example is, in other words, entirely irrelevant to the question of party status.

even though they were *not* named parties to (and hence would not have been able to appeal from) the underlying judgments. We made this distinction between appealing the judgment and appealing a collateral order quite explicit in *Blossom* v. *Milwaukee & Chicago R. Co.*, 1 Wall. 655 (1864). In that case, the appellant was not a named party to the underlying foreclosure decree, from which it was therefore "certainly true that he [could not] appeal," yet he was a party (obviously, as the movant) to the motion he filed asking the court to complete the foreclosure sale, and therefore could appeal from *the order denying that motion. Ibid.* Our decisions in *Hinckley* v. *Gilman, C., & S. R. Co.*, 94 U. S. 467 (1877), and *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72 (1988), are to the same effect. In the former, the appellant was not a named party to the underlying foreclosure decree, from which we said he "cannot and does not attempt to appeal," but he was obviously a party to the collateral order directing him by name to transfer funds to the court, from which we said he could appeal. 94 U. S., at 469. In the latter, witnesses who had been dismissed as named parties to the underlying litigation, 487 U. S., at 75, were allowed to appeal from a collateral order holding them in contempt for their failure to comply with a subpoena addressed to them (and to which they were therefore obviously parties), *id.*, at 76. These cases demonstrate why, even though petitioner should not be able to appeal the District Court's judgment approving the class settlement, there is no dispute that petitioner could (and did) appeal the District Court's collateral order denying his motion to intervene; as the movant, he was a party to the latter. See *Marino*, 484 U. S., at 304 ("[S]uch motions are, of course, appealable").[2]

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[2] The Court finds it "difficult" to understand how the appellants in these cases can be considered parties in the traditional sense because they were not named in the "summons or complaint." *Ante*, at 8 (internal quotation marks omitted). Quite so. Our whole point *is* that, in order to appeal a

B

The Court's other grounds for holding that petitioner is a party to the class judgment are equally weak. First, it contends that petitioner should be considered a party to the judgment because, as a member of the class, he is bound by it. *Ante*, at 10 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement"). This will come as news to law students everywhere. There are any number of persons who are not parties to a judgment yet are nonetheless bound by it. See Restatement § 41(1), at 393 (listing examples); *id.*, § 75, Comment *a*, at 210 ("A person is bound by a judgment in an action to which he is not a party if he is in 'privity' with a party"). Perhaps the most prominent example is precisely the one we have here. Nonnamed members of a class are bound by the class judgment, even though they are not parties to the judgment, because they are represented by class members who are parties:

> "A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is . . . [t]he representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." *Id.*, § 41(1)(e), at 393.

Accord, *id.*, § 75, Comment *a*, at 210 ("Persons bound through representation by virtue of a relationship with a party are to be contrasted with persons bound by a judgment because they are parties . . ."). Petitioner here, in the words of the Restatement, "is not a party" but "is bound by [the] judg-

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collateral order, one need not be a party to the underlying litigation (and therefore need not be named in the complaint giving rise to that litigation), but need only be a party to the *collateral proceedings* (and therefore need only be named in the filings giving rise to those proceedings).

ment as though he were a party." Because our "well-settled" rule allows only "parties" to appeal from a judgment, petitioner may not appeal the class settlement.[3]

Second, the Court contends that petitioner should be considered a party to the judgment because he filed an objection to the class settlement. We have already held, however, that filing an objection does *not* make one a party if he does not also intervene. *Marino*, *supra*, at 304.

II

The most pernicious aspect of today's decision, however, is not its result, but its reasoning. I mentioned in a recent dissent the Court's "penchant for eschewing clear rules that might avoid litigation," *US Airways, Inc.* v. *Barnett*, 535 U. S. 391, 412 (2002). Today's opinion not only eschews such

[3] The Court contends that those in privity with the parties to a judgment are "often allowed by other courts" to appeal by mere virtue of the fact that they are bound by the judgment. *Ante*, at 11 (citing 5 Am. Jur. 2d § 265 (1995)). I should think that the significant datum on this point is not that such appeals have been "often allowed by other courts," but that they have *never* been allowed by this Court. Indeed, the "other courts" whose opinions are cited by the authority on which the Court relies consist *entirely* of state courts, with the exception of one federal case decided before our decision in *Marino* v. *Ortiz*, 484 U. S. 301 (1988) *(per curiam)*, which affirmed the "well-settled" rule that in federal court "only parties to a lawsuit . . . may appeal an adverse judgment." *Id.*, at 304. While this difference between the procedures of federal and state courts seemingly escapes the Court's attention, it was well enough recognized (and the clear federal rule acknowledged) in the very next paragraph of the American Jurisprudence annotation on which the Court relies:

"*Caution:* Applicable rules of procedure may bar a nonparty from taking an appeal notwithstanding his or her interest in the subject matter of the case. Thus, the United States Supreme Court has, under the Federal Rules of Appellate Procedure, rejected the principle of permitting appeal by a nonparty who has an interest affected by the trial court's judgment, stating that the better practice is for such nonparty to seek intervention for the purposes of appeal." 5 Am. Jur. 2d, Appellate Review § 265, at 40 (citing *Marino*, *supra*).

a rule; it destroys one that previously existed. It abandons the bright-line rule that only those persons named as such are parties to a judgment, in favor of a vague inquiry "based on context." *Ante*, at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context"). Although the Court does not say how one goes about selecting the result-determinative "context" for its oh-so-sophisticated new inquiry, I gather from its repeated invocation of this phrase that the relevant context in the present case is the "goals of class action litigation," *ante*, at 10, 11. This means, I suppose, that, in a labor case, who are the parties to a judgment will depend on the goals of the labor laws, and, in a First Amendment case, who are the parties to a judgment will depend on the goals of the First Amendment. Or perhaps not.

What makes this exponential increase in indeterminacy especially unfortunate is the fact that it is utterly unnecessary. Despite the Court's assertion in one breath that treating nonnamed class members as parties is the "only means" by which they would not be "deprive[d] . . . of the power to preserve their . . . interests," *ante*, at 10, the Court in the next breath concedes that there is another—and very easy—means for nonnamed class members to do just that: becoming parties to the judgment by moving to intervene. *Ante*, at 12 (noting "the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal"). The Court does not dispute that nonnamed class members will typically meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24, including intervention only for the purpose of appeal, and even after the class judgment has been entered.[4] *Ante*, at 11–12.

[4] It is true that petitioner's motion to intervene was denied as untimely by the District Court. Even if this decision was correct, a question on which petitioner did not seek certiorari, it does not cast doubt on the

The Court *does* dispute whether there is any "value" in requiring nonnamed class members who object to the settlement to intervene in order to take an appeal. *Ante*, at 12. In my view, avoiding the reduction to indeterminacy of the hitherto clear rule regarding who is a party is "value" enough. But beyond that, it makes sense to require objectors to intervene before appealing, for the reason advanced by the Government: to enable district courts "to perform an important screening function." Brief for United States et al. as *Amici Curiae* 23. For example, when considering whether to allow an objector to intervene, a district court can verify that the objector does not fall outside the definition of the settlement class and is otherwise entitled to relief in the class action, that the objection has not already been resolved in favor of the objector in the approved settlement, and that the objection was presented in a timely manner. *Id.*, at 23–24. The Court asserts that there is no "value" to these screening functions because a court of appeals can pass on those matters just as easily, and in any event an objector who is unable to obtain relief from the class settlement will not seek to appeal "with any frequency," as he "stands to gain nothing by appeal." *Ante*, at 13.

As to the last point: The person who has nothing to gain from an appeal also had nothing to gain from filing his objection in the first place, but was undeterred (as many are), see, *e. g.*, *Shaw* v. *Toshiba American Information Systems, Inc.*, 91 F. Supp. 2d 942, 973–974, and nn. 17–18 (ED Tex. 2000). The belief that meritless objections, undeterred the first time, will be deterred the second, surely suggests the tri-

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ability of the ordinary nonnamed class member to intervene for purposes of appeal. Petitioner was *not* the ordinary nonnamed class member seeking intervention for purposes of appeal. He moved to intervene *generally*, Brief for Petitioner 6, despite having rejected invitations to participate in the litigation until after the settlement was preliminarily approved.

umph of hope over experience.[5] And as for the suggestion that the court of appeals can pass on these questions just as easily: Since when has it become a principle of our judicial administration that what *can* be left to the appellate level *should* be left to the appellate level? Quite the opposite is true. District judges, who issue their decrees in splendid isolation, can be multiplied *ad infinitum.* Courts of appeals cannot be staffed with too many judges without destroying their ability to maintain, through en banc rehearings, a predictable law of the circuit. In any event, the district court, being intimately familiar with the facts, *is* in a better position to rule initially upon such questions as whether the objections to the settlement were procedurally deficient, late filed, or simply inapposite to the case. If it denies interventions on such grounds, and if the denials are not appealed, the court of appeals will be spared the trouble of considering those objections altogether. And even when the denials are appealed, the court of appeals will have the benefit of the district court's opinion on these often fact-bound questions. (Typically, the only occasion the district court would have had to pass on these questions is in the course of considering the motion to intervene; when considering whether to approve the class settlement, district courts typically do not treat objections individually even on substance, let alone form. *E. g., id.*, at 973–974.) Finally, it is worth observing that the Court's assertions regarding the merits of allowing objectors to appeal a class settlement without intervening apply with equal force to the objectors who sought to appeal

[5] The Court assures us that these appeals will be "few" because, like the objections on which they are based, they are "irrational." *Ante*, at 13. To say that the substance of an objection (and of the corresponding appeal) is irrational is not to say that it is irrational to make the objection and file the appeal. See *Shaw*, 91 F. Supp. 2d, at 973–974, and n. 18 (noting " 'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"). The Court cites nothing to support its sunny surmise that the appeals will be few.

the class judgment in *Marino*. Yet there we concluded (no doubt for the reasons discussed above) that "the better practice" is to require objectors "to seek intervention for purposes of appeal." 484 U. S., at 304.

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

Syllabus

McKUNE, WARDEN, ET AL. *v.* LILE

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

No. 00–1187. Argued November 28, 2001—Decided June 10, 2002

Respondent was convicted of rape and related crimes. A few years before his scheduled release, Kansas prison officials ordered respondent to participate in a Sexual Abuse Treatment Program (SATP). As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, regardless of whether the activities constitute uncharged criminal offenses. The information obtained from SATP participants is not privileged, and might be used against them in future criminal proceedings. There is no evidence, however, that incriminating information has ever been disclosed under the SATP. Officials informed respondent that if he refused to participate in the SATP, his prison privileges would be reduced, resulting in the automatic curtailment of his visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges. He also would be transferred to a potentially more dangerous maximum-security unit. Respondent refused to participate in the SATP on the ground that the required disclosures of his criminal history would violate his Fifth Amendment privilege against compelled self-incrimination. He brought this action for injunctive relief under 42 U. S. C. § 1983. The District Court granted him summary judgment. Affirming, the Tenth Circuit held that the compelled self-incrimination prohibited by the Fifth Amendment can be established by penalties that do not constitute deprivations of protected liberty interests under the Due Process Clause; ruled that the automatic reduction in respondent's prison privileges and housing accommodations was such a penalty because of its substantial impact on him; declared that respondent's information would be sufficiently incriminating because an admission of culpability regarding his crime of conviction would create a risk of a perjury prosecution; and concluded that, although the SATP served Kansas' important interests in rehabilitating sex offenders and promoting public safety, those interests could be served without violating the Constitution by treating inmate admissions as privileged or by granting inmates use immunity.

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

224 F. 3d 1175, reversed and remanded.

Syllabus

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that the SATP serves a vital penological purpose, and that offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment. Pp. 32–48.

(a) The SATP is supported by the legitimate penological objective of rehabilitation. The SATP lasts 18 months; involves substantial daily counseling; and helps inmates address sexual addiction, understand the thoughts, feelings, and behavior dynamics that precede their offenses, and develop relapse prevention skills. Pp. 32–34.

(b) The mere fact that Kansas does not offer legal immunity from prosecution based on statements made in the course of the SATP does not render the program invalid. No inmate has ever been charged or prosecuted for any offense based on such information, and there is no contention that the program is a mere subterfuge for the conduct of a criminal investigation. Rather, the refusal to offer use immunity serves two legitimate state interests: (1) The potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation; and (2) the State confirms its valid interest in deterrence by keeping open the option to prosecute a particularly dangerous sex offender. Pp. 34–35.

(c) The SATP, and the consequences for nonparticipation in it, do not combine to create a compulsion that encumbers the constitutional right not to incriminate oneself. Pp. 35–47.

(1) The prison context is important in weighing respondent's constitutional claim: A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those lawfully convicted. The limitation on prisoners' privileges and rights also follows from the need to grant necessary authority and capacity to officials to administer the prisons. See, *e. g.*, *Turner* v. *Safley*, 482 U. S. 78. The Court's holding in *Sandin* v. *Conner*, 515 U. S. 472, 484, that challenged prison conditions cannot give rise to a due process violation unless they constitute "atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life," may not provide a precise parallel for determining whether there is compelled self-incrimination, but does provide useful instruction. A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against compelled self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life. Cf., *e. g.*, *Baxter* v. *Palmigiano*, 425 U. S. 308, 319–320. Pp. 35–38.

Syllabus

(2) Respondent's decision not to participate in the SATP did not extend his prison term or affect his eligibility for good-time credits or parole. He instead complains about his possible transfer from the medium-security unit where the program is conducted to a less desirable maximum-security unit. The transfer, however, is not intended to punish prisoners for exercising their Fifth Amendment rights. Rather, it is incidental to a legitimate penological reason: Due to limited space, inmates who do not participate in their respective programs must be moved out of the facility where the programs are held to make room for other inmates. The decision where to house inmates is at the core of prison administrators' expertise. See *Meachum* v. *Fano*, 427 U. S. 215, 225. Respondent also complains that his privileges will be reduced. An essential tool of prison administration, however, is the authority to offer inmates various incentives to behave. The Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit. See *Hewitt* v. *Helms*, 459 U. S. 460, 467, n. 4. Respondent fails to cite a single case from this Court holding that the denial of discrete prison privileges for refusal to participate in a rehabilitation program amounts to unconstitutional compulsion. Instead, he relies on the so-called penalty cases, see, *e. g.*, *Spevack* v. *Klein*, 385 U. S. 511, which involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood, see, *e. g.*, *id.*, at 516. Those cases did not involve legitimate rehabilitative programs conducted within prison walls, and they are not easily extended to the prison context, where inmates surrender their rights to pursue a livelihood and to contract freely with the State. Pp. 38–41.

(3) Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not. The *Sandin* framework provides a reasonable means of assessing whether the response of prison administrators to correctional and rehabilitative necessities are so out of the ordinary that one could sensibly say they rise to the level of unconstitutional compulsion. P. 41.

(d) Prison context or not, respondent's choice is marked less by compulsion than by choices the Court has held give no rise to a self-incrimination claim. The cost to respondent of exercising his Fifth Amendment privilege—denial of certain perquisites that make his life in prison more tolerable—is much less than that borne by the defendant in, *e. g.*, *McGautha* v. *California*, 402 U. S. 183, 217, where the Court upheld a procedure that allowed statements made by a criminal defend-

ant to mitigate his responsibility and avoid the death penalty to be used against him as evidence of his guilt. The hard choices faced by the defendants in, *e. g.*, *Baxter* v. *Palmigiano*, *supra*, at 313; *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 287–288; and *Minnesota* v. *Murphy*, 465 U. S. 420, 422, further illustrate that the consequences respondent faced did not amount to unconstitutional compulsion. Respondent's attempt to distinguish the latter cases on dual grounds—that (1) the penalty here followed automatically from his decision to remain silent, and (2) his participation in the SATP was involuntary—is unavailing. Neither distinction would justify departing from this Court's precedents. Pp. 41–45.

(e) Were respondent's position to prevail, there would be serious doubt about the constitutionality of the federal sex offender treatment program, which is comparable to the Kansas program. Respondent is mistaken as well to concentrate on a so-called reward/penalty distinction and an illusory baseline against which a change in prison conditions must be measured. Finally, respondent's analysis would call into question the constitutionality of an accepted feature of federal criminal law, the downward adjustment of a sentence for acceptance of criminal responsibility. Pp. 45–47.

JUSTICE O'CONNOR acknowledged that the Court is divided on the appropriate standard for evaluating compulsion for purposes of the Fifth Amendment privilege against self-incrimination in a prison setting, but concluded that she need not resolve this dilemma because this case indisputably involves burdens rather than benefits, and because the penalties assessed against respondent as a result of his failure to participate in the Sexual Abuse Treatment Program (SATP) are not compulsive on any reasonable test. The Fifth Amendment's text does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony. The Court's so-called "penalty cases" establish that the potential loss of one's livelihood through, *e. g.*, the loss of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280, and the loss of the right to participate in political associations and to hold public office, *Lefkowitz* v. *Cunningham*, 431 U. S. 801, are capable of coercing incriminating testimony. Such penalties, however, are far more significant that those facing respondent: a reduction in incentive level and a corresponding transfer from medium to maximum security. In practical terms, these changes involve restrictions on respondent's prison privileges and living conditions that seem minor. Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated

Syllabus

by the reduction of his prison wages. While his visitation is reduced, he still retains the ability to see his attorney, his family, and clergy. The limitation on his possession of personal items, as well as the amount he is allowed to spend at the canteen, may make his prison experience more unpleasant, but seems very unlikely to actually compel him to incriminate himself. Because it is his burden to prove compulsion, it may be assumed that the prison is capable of controlling its inmates so that respondent's personal safety is not jeopardized by being placed in maximum security, at least in the absence of proof to the contrary. Finally, the mere fact that the penalties facing respondent are the same as those imposed for prison disciplinary violations does not make them coercive. Thus, although the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination is troubling, its determination that the decision below should be reversed is correct. Pp. 48–54.

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. 48. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 54.

Stephen R. McAllister, State Solicitor of Kansas, argued the cause for petitioners. With him on the briefs were *Carla J. Stovall*, Attorney General, *Jared S. Maag*, and *Timothy G. Madden.*

Gregory G. Garre argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Clement*, and *Vicki Marani.*

Matthew J. Wiltanger argued the cause for respondent. With him on the brief was *Paul W. Rebein.**

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*A brief of *amici curiae* urging reversal was filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *David M. Gormley*, State Solicitor, *Todd R. Marti*, Assistant Solicitor, *Mike McGrath*, Attorney General of Montana, *Jenifer Anders*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Steve*

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

Respondent Robert G. Lile is a convicted sex offender in the custody of the Kansas Department of Corrections (Department). A few years before respondent was scheduled to reenter society, Department officials recommended that he enter a prison treatment program so that he would not rape again upon release. While there appears to be some difference of opinion among experts in the field, Kansas officials and officials who administer the United States prison system have made the determination that it is of considerable importance for the program participant to admit having committed the crime for which he is being treated and other past offenses. The first and in many ways most crucial step in the Kansas rehabilitation program thus requires the participant to confront his past crimes so that he can begin to understand his own motivations and weaknesses. As this initial step can be a most difficult one, Kansas offers sex offenders incentives to participate in the program.

Respondent contends this incentive system violates his Fifth Amendment privilege against self-incrimination. Kansas' rehabilitation program, however, serves a vital penological purpose, and offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment.

I

In 1982, respondent lured a high school student into his car as she was returning home from school. At gunpoint, respondent forced the victim to perform oral sodomy on him

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Carter of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *Charles M. Condon* of South Carolina, *Mark L. Shurtleff* of Utah, *Randolph A. Beales* of Virginia, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming.

and then drove to a field where he raped her. After the sexual assault, the victim went to her school, where, crying and upset, she reported the crime. The police arrested respondent and recovered on his person the weapon he used to facilitate the crime. *State* v. *Lile*, 237 Kan. 210, 211–212, 699 P. 2d 456, 457–458 (1985). Although respondent maintained that the sexual intercourse was consensual, a jury convicted him of rape, aggravated sodomy, and aggravated kidnaping. Both the Kansas Supreme Court and a Federal District Court concluded that the evidence was sufficient to sustain respondent's conviction on all charges. See *id.*, at 211, 699 P. 2d, at 458; 45 F. Supp. 2d 1157, 1161 (Kan. 1999).

In 1994, a few years before respondent was scheduled to be released, prison officials ordered him to participate in a Sexual Abuse Treatment Program (SATP). As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form, in which they discuss and accept responsibility for the crime for which they have been sentenced. Participating inmates also are required to complete a sexual history form, which details all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses. A polygraph examination is used to verify the accuracy and completeness of the offender's sexual history.

While information obtained from participants advances the SATP's rehabilitative goals, the information is not privileged. Kansas leaves open the possibility that new evidence might be used against sex offenders in future criminal proceedings. In addition, Kansas law requires the SATP staff to report any uncharged sexual offenses involving minors to law enforcement authorities. Although there is no evidence that incriminating information has ever been disclosed under the SATP, the release of information is a possibility.

Department officials informed respondent that if he refused to participate in the SATP, his privilege status would be reduced from Level III to Level I. As part of this reduc-

tion, respondent's visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges automatically would be curtailed. In addition, respondent would be transferred to a maximum-security unit, where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment.

Respondent refused to participate in the SATP on the ground that the required disclosures of his criminal history would violate his Fifth Amendment privilege against self-incrimination. He brought this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, against the warden and the secretary of the Department, seeking an injunction to prevent them from withdrawing his prison privileges and transferring him to a different housing unit.

After the parties completed discovery, the United States District Court for the District of Kansas entered summary judgment in respondent's favor. 24 F. Supp. 2d 1152 (1998). The District Court noted that because respondent had testified at trial that his sexual intercourse with the victim was consensual, an acknowledgment of responsibility for the rape on the "Admission of Guilt" form would subject respondent to a possible charge of perjury. *Id.*, at 1157. After reviewing the specific loss of privileges and change in conditions of confinement that respondent would face for refusing to incriminate himself, the District Court concluded that these consequences constituted coercion in violation of the Fifth Amendment.

The Court of Appeals for the Tenth Circuit affirmed. 224 F. 3d 1175 (2000). It held that the compulsion element of a Fifth Amendment claim can be established by penalties that do not constitute deprivations of protected liberty interests under the Due Process Clause. *Id.*, at 1183. It held that the reduction in prison privileges and housing accommodations was a penalty, both because of its substantial impact

on the inmate and because that impact was identical to the punishment imposed by the Department for serious disciplinary infractions. In the Court of Appeals' view, the fact that the sanction was automatic, rather than conditional, supported the conclusion that it constituted compulsion. Moreover, because all SATP files are subject to disclosure by subpoena, and an admission of culpability regarding the crime of conviction would create a risk of a perjury prosecution, the court concluded that the information disclosed by respondent was sufficiently incriminating. *Id.*, at 1180. The Court of Appeals recognized that the Kansas policy served the State's important interests in rehabilitating sex offenders and promoting public safety. It concluded, however, that those interests could be served without violating the Constitution, either by treating the admissions of the inmates as privileged communications or by granting inmates use immunity. *Id.*, at 1192.

We granted the warden's petition for certiorari because the Court of Appeals has held that an important Kansas prison regulation violates the Federal Constitution. 532 U. S. 1018 (2001).

II

Sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide. U. S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 1 (1997) (hereinafter Sex Offenses); U. S. Dept. of Justice, Federal Bureau of Investigation, Crime in the United States, 1999, Uniform Crime Reports 24 (2000). Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime. See Sex Offenses 18. As in the present case, the victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible sexual offenses were committed against persons under 18 years of age. University of New Hampshire, Crimes Against Children Research Center, Fact Sheet 5; Sex Offenses 24. Nearly 4 in 10 imprisoned violent

sex offenders said their victims were 12 or younger. *Id.*, at *iii*.

When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. See *id.*, at 27; U. S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997). States thus have a vital interest in rehabilitating convicted sex offenders.

Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. See U. S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ("[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals"). An important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct. *Id.*, at 73. "Denial is generally regarded as a main impediment to successful therapy," and "[t]herapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviours need to be targeted in therapy." H. Barbaree, Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome, 3 Forum on Corrections Research, No. 4, p. 30 (1991). Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity. See B. Maletzky & K. McGovern, Treating the Sexual Offender 253–255 (1991).

The critical first step in the Kansas SATP, therefore, is acceptance of responsibility for past offenses. This gives inmates a basis to understand why they are being punished

and to identify the traits that cause such a frightening and high risk of recidivism. As part of this first step, Kansas requires each SATP participant to complete an "Admission of Responsibility" form, to fill out a sexual history form discussing their offending behavior, and to discuss their past behavior in individual and group counseling sessions.

The District Court found that the Kansas SATP is a valid "clinical rehabilitative program," supported by a "legitimate penological objective" in rehabilitation. 24 F. Supp. 2d, at 1163. The SATP lasts for 18 months and involves substantial daily counseling. It helps inmates address sexual addiction; understand the thoughts, feelings, and behavior dynamics that precede their offenses; and develop relapse prevention skills. Although inmates are assured of a significant level of confidentiality, Kansas does not offer legal immunity from prosecution based on any statements made in the course of the SATP. According to Kansas, however, no inmate has ever been charged or prosecuted for any offense based on information disclosed during treatment. Brief for Petitioners 4–5. There is no contention, then, that the program is a mere subterfuge for the conduct of a criminal investigation.

As the parties explain, Kansas' decision not to offer immunity to every SATP participant serves two legitimate state interests. First, the professionals who design and conduct the program have concluded that for SATP participants to accept full responsibility for their past actions, they must accept the proposition that those actions carry consequences. Tr. of Oral Arg. 11. Although no program participant has ever been prosecuted or penalized based on information revealed during the SATP, the potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation. If inmates know society will not punish them for their past offenses, they may be left with the false impression that society does not consider those crimes to be serious ones. The practical effect of guaran-

teed immunity for SATP participants would be to absolve many sex offenders of any and all cost for their earlier crimes. This is the precise opposite of the rehabilitative objective.

Second, while Kansas as a rule does not prosecute inmates based upon information revealed in the course of the program, the State confirms its valid interest in deterrence by keeping open the option to prosecute a particularly dangerous sex offender. Brief for 18 States as *Amici Curiae* 11. Kansas is not alone in declining to offer blanket use immunity as a condition of participation in a treatment program. The Federal Bureau of Prisons and other States conduct similar sex offender programs and do not offer immunity to the participants. See, *e. g.*, *Ainsworth* v. *Risley*, 244 F. 3d 209, 214 (CA1 2001) (describing New Hampshire's program).

The mere fact that Kansas declines to grant inmates use immunity does not render the SATP invalid. Asking at the outset whether prison administrators can or should offer immunity skips the constitutional inquiry altogether. If the State of Kansas offered immunity, the self-incrimination privilege would not be implicated. See, *e. g.*, *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972); *Brown* v. *Walker*, 161 U. S. 591, 610 (1896). The State, however, does not offer immunity. So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form; and the alternatives, as will be discussed, defeat the program's objectives.

The SATP does not compel prisoners to incriminate themselves in violation of the Constitution. The Fifth Amendment Self-Incrimination Clause, which applies to the States via the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." The "Amendment speaks of compulsion," *United States* v. *Monia*,

317 U. S. 424, 427 (1943), and the Court has insisted that the "constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony." *United States* v. *Washington*, 431 U. S. 181, 188 (1977). The consequences in question here—a transfer to another prison where television sets are not placed in each inmate's cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited—are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent. The fact that these consequences are imposed on prisoners, rather than ordinary citizens, moreover, is important in weighing respondent's constitutional claim.

The privilege against self-incrimination does not terminate at the jailhouse door, but the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis. *Sandin* v. *Conner*, 515 U. S. 472, 485 (1995) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system" (citation and internal quotation marks omitted)). A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction.

The Court has instructed that rehabilitation is a legitimate penological interest that must be weighed against the exercise of an inmate's liberty. See, *e. g.*, *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348, 351 (1987). Since "most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell* v. *Procunier*, 417 U. S. 817, 823 (1974). Acceptance of responsibility in turn demonstrates that an offender "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period

of time than might otherwise be necessary." *Brady* v. *United States*, 397 U. S. 742, 753 (1970).

The limitation on prisoners' privileges and rights also follows from the need to grant necessary authority and capacity to federal and state officials to administer the prisons. See, *e. g.*, *Turner* v. *Safley*, 482 U. S. 78 (1987). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.*, at 84–85. To respect these imperatives, courts must exercise restraint in supervising the minutiae of prison life. *Ibid.* Where, as here, a state penal system is involved, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Ibid.*

For these reasons, the Court in *Sandin* held that challenged prison conditions cannot give rise to a due process violation unless those conditions constitute "atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life." See 515 U. S., at 484. The determination under *Sandin* whether a prisoner's liberty interest has been curtailed may not provide a precise parallel for determining whether there is compelled self-incrimination, but it does provide useful instruction for answering the latter inquiry. *Sandin* and its counterparts underscore the axiom that a convicted felon's life in prison differs from that of an ordinary citizen. In the context of a legitimate rehabilitation program for prisoners, those same considerations are relevant to our analysis. The compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system. A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse

consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.

Along these lines, this Court has recognized that lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's privilege against self-incrimination. See, *e. g.*, *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976). *Baxter* declined to extend to prison disciplinary proceedings the rule of *Griffin* v. *California*, 380 U. S. 609 (1965), that the prosecution may not comment on a defendant's silence at trial. 425 U. S., at 319–320. As the Court explained, "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.*, at 319. The inmate in *Baxter* no doubt felt compelled to speak in one sense of the word. The Court, considering the level of compulsion in light of the prison setting and the State's interests in rehabilitation and orderly administration, nevertheless rejected the inmate's self-incrimination claim.

In the present case, respondent's decision not to participate in the Kansas SATP did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole. 224 F. 3d, at 1182. Respondent instead complains that if he remains silent about his past crimes, he will be transferred from the medium-security unit—where the program is conducted—to a less desirable maximum-security unit.

No one contends, however, that the transfer is intended to punish prisoners for exercising their Fifth Amendment rights. Rather, the limitation on these rights is incidental to Kansas' legitimate penological reason for the transfer: Due to limited space, inmates who do not participate in their respective programs will be moved out of the facility where the programs are held to make room for other inmates. As the Secretary of Corrections has explained, "it makes no

sense to have someone who's not participating in a program taking up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program." App. 99.

It is well settled that the decision where to house inmates is at the core of prison administrators' expertise. See *Meachum* v. *Fano*, 427 U. S. 215, 225 (1976). For this reason the Court has not required administrators to conduct a hearing before transferring a prisoner to a bed in a different prison, even if "life in one prison is much more disagreeable than in another." *Ibid.* The Court has considered the proposition that a prisoner in a more comfortable facility might begin to feel entitled to remain there throughout his term of incarceration. The Court has concluded, nevertheless, that this expectation "is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all." *Id.*, at 228. This logic has equal force in analyzing respodent's self-incrimination claim.

Respondent also complains that he will be demoted from Level III to Level I status as a result of his decision not to participate. This demotion means the loss of his personal television; less access to prison organizations and the gym area; a reduction in certain pay opportunities and canteen privileges; and restricted visitation rights. App. 27–28. An essential tool of prison administration, however, is the authority to offer inmates various incentives to behave. The Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit. Accordingly, *Hewitt* v. *Helms*, 459 U. S. 460, 467, n. 4 (1983), held that an inmate's transfer to another facility did not in itself implicate a liberty interest, even though that transfer resulted in the loss of "access to vocational, educational, recreational, and rehabilitative programs." Respondent concedes that no liberty interest is implicated in this case. Tr. of Oral Arg. 45. To be sure, cases like *Meachum* and

Hewitt involved the Due Process Clause rather than the privilege against compelled self-incrimination. Those cases nevertheless underscore the axiom that, by virtue of their convictions, inmates must expect significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted.

Respondent fails to cite a single case from this Court holding that the denial of discrete prison privileges for refusal to participate in a rehabilitation program amounts to unconstitutional compulsion. Instead, relying on the so-called penalty cases, respondent treats the fact of his incarceration as if it were irrelevant. See, *e. g.*, *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967). Those cases, however, involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood. See, *e. g.*, *id.*, at 516 ("[T]hreat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion"). Those principles are not easily extended to the prison context, where inmates surrender upon incarceration their rights to pursue a livelihood and to contract freely with the State, as well as many other basic freedoms. The persons who asserted rights in *Garrity* and *Spevack* had not been convicted of a crime. It would come as a surprise if *Spevack* stands for the proposition that when a lawyer has been disbarred by reason of a final criminal conviction, the court or agency considering reinstatement of the right to practice law could not consider that the disbarred attorney has admitted his guilt and expressed contrition. Indeed, this consideration is often given dispositive weight by this Court itself on routine motions for reinstatement. The current case is more complex, of course, in that respondent is also required to discuss other criminal acts for which he might still be liable for prosecution. On this point, however, there is still a critical distinction between the instant case and *Garrity* or *Spevack*. Unlike those cases,

respondent here is asked to discuss other past crimes as part of a legitimate rehabilitative program conducted within prison walls.

To reject out of hand these considerations would be to ignore the State's interests in offering rehabilitation programs and providing for the efficient administration of its prisons. There is no indication that the SATP is an elaborate attempt to avoid the protections offered by the privilege against compelled self-incrimination. Rather, the program serves an important social purpose. It would be bitter medicine to treat as irrelevant the State's legitimate interests and to invalidate the SATP on the ground that it incidentally burdens an inmate's right to remain silent.

Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not. The *Sandin* framework provides a reasonable means of assessing whether the response of prison administrators to correctional and rehabilitative necessities are so out of the ordinary that one could sensibly say they rise to the level of unconstitutional compulsion.

Prison context or not, respondent's choice is marked less by compulsion than by choices the Court has held give no rise to a self-incrimination claim. The "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California*, 402 U. S. 183, 213 (1971) (citation and internal quotation marks omitted). It is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free. See, *e. g.*, *Jenkins* v. *Anderson*, 447 U. S. 231, 238

(1980) (a criminal defendant's exercise of his Fifth Amendment privilege prior to arrest may be used to impeach his credibility at trial); *Williams* v. *Florida*, 399 U. S. 78, 84–85 (1970) (a criminal defendant may be compelled to disclose the substance of an alibi defense prior to trial or be barred from asserting it).

The cost to respondent of exercising his Fifth Amendment privilege—denial of certain perquisites that make his life in prison more tolerable—is much less than that borne by the defendant in *McGautha*. There, the Court upheld a procedure that allowed statements, which were made by a criminal defendant to mitigate his responsibility and avoid the death penalty, to be used against him as evidence of his guilt. 402 U. S., at 217. The Court likewise has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment. See, *e. g.*, *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978); *Brady*, 397 U. S., at 751.

Nor does reducing an inmate's prison wage and taking away personal television and gym access pose the same hard choice faced by the defendants in *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272 (1998), and *Minnesota* v. *Murphy*, 465 U. S. 420 (1984). In *Baxter*, a state prisoner objected to the fact that his silence at a prison disciplinary hearing would be held against him. The Court acknowledged that *Griffin* v. *California*, 380 U. S. 609 (1965), held that the Fifth Amendment prohibits courts from instructing a criminal jury that it may draw an inference of guilt from a defendant's failure to testify. The Court nevertheless refused to extend the *Griffin* rule to the context of state prison disciplinary hearings because those proceedings "involve the correctional process and important state interests other than conviction for crime." 425 U. S., at 319. Whereas the inmate in the present case faces the loss of certain privileges, the prisoner in

Baxter faced 30 days in punitive segregation as well as the subsequent downgrade of his prison classification status. *Id.*, at 313.

In *Murphy,* the defendant feared the possibility of additional jail time as a result of his decision to remain silent. The defendant's probation officer knew the defendant had committed a rape and murder unrelated to his probation. One of the terms of the defendant's probation required him to be truthful with the probation officer in all matters. Seizing upon this, the officer interviewed the defendant about the rape and murder, and the defendant admitted his guilt. The Court found no Fifth Amendment violation, despite the defendant's fear of being returned to prison for 16 months if he remained silent. 465 U. S., at 422, 438.

In *Woodard*, the plaintiff faced not loss of a personal television and gym access, but loss of life. In a unanimous opinion just four Terms ago, this Court held that a death row inmate could be made to choose between incriminating himself at his clemency interview and having adverse inferences drawn from his silence. The Court reasoned that it "is difficult to see how a voluntary interview could 'compel' respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment." 523 U. S., at 286. As here, the inmate in *Woodard* claimed to face a Hobson's choice: He would damage his case for clemency no matter whether he spoke and incriminated himself, or remained silent and the clemency board construed that silence against him. Unlike here, the Court nevertheless concluded that the pressure the inmate felt to speak to improve his chances of clemency did not constitute unconstitutional compulsion. *Id.*, at 287–288.

Woodard, *Murphy*, and *Baxter* illustrate that the consequences respondent faced here did not amount to unconstitutional compulsion. Respondent and the dissent attempt to distinguish *Baxter*, *Murphy*, and *Woodard* on the dual

grounds that (1) the penalty here followed automatically from respondent's decision to remain silent, and (2) respondent's participation in the SATP was involuntary. Neither distinction would justify departing from this Court's precedents, and the second is question begging in any event.

It is proper to consider the nexus between remaining silent and the consequences that follow. Plea bargains are not deemed to be compelled in part because a defendant who pleads not guilty still must be convicted. Cf. *Brady*, *supra*, at 751–752. States may award good-time credits and early parole for inmates who accept responsibility because silence in these circumstances does not automatically mean the parole board, which considers other factors as well, will deny them parole. See *Baxter*, *supra*, at 317–318. While the automatic nature of the consequence may be a necessary condition to finding unconstitutional compulsion, however, that is not a sufficient reason alone to ignore *Woodard*, *Murphy*, and *Baxter*. Even if a consequence follows directly from a person's silence, one cannot answer the question whether the person has been compelled to incriminate himself without first considering the severity of the consequences.

Nor can *Woodard* be distinguished on the alternative ground that respondent's choice to participate in the SATP was involuntary, whereas the death row inmate in *Woodard* chose to participate in clemency proceedings. This distinction assumes the answer to the compulsion inquiry. If respondent was not compelled to participate in the SATP, his participation was voluntary in the only sense necessary for our present inquiry. Kansas asks sex offenders to participate in SATP because, in light of the high rate of recidivism, it wants all, not just the few who volunteer, to receive treatment. Whether the inmates are being asked or ordered to participate depends entirely on the consequences of their decision not to do so. The parties in *Woodard*, *Murphy*, and *Baxter* all were faced with ramifications far worse than respondent faces here, and in each of those cases the Court

determined that their hard choice between silence and the consequences was not compelled. It is beyond doubt, of course, that respondent would prefer not to choose between losing prison privileges and accepting responsibility for his past crimes. It is a choice, nonetheless, that does not amount to compulsion, and therefore one Kansas may require respondent to make.

The Federal Government has filed an *amicus* brief describing its sex offender treatment program. Were respondent's position to prevail, the constitutionality of the federal program would be cast into serious doubt. The fact that the offender in the federal program can choose to participate without being given a new prisoner classification is not determinative. For, as the Government explains, its program is conducted at a single, 112-bed facility that is more desirable than other federal prisons. Tr. of Oral Arg. 22. Inmates choose at the outset whether to enter the federal program. Once accepted, however, inmates must continue to discuss and accept responsibility for their crimes if they wish to maintain the status quo and remain in their more comfortable accommodations. Otherwise they will be expelled from the program and sent to a less desirable facility. *Id.*, at 27. Thus the federal program is different from Kansas' SATP only in that it does not require inmates to sacrifice privileges besides housing as a consequence of nonparticipation. The federal program is comparable to the Kansas program because it does not offer participants use immunity and because it conditions a desirable housing assignment on inmates' willingness to accept responsibility for past behavior. Respondent's theory cannot be confined in any meaningful way, and state and federal courts applying that view would have no principled means to determine whether these similarities are sufficient to render the federal program unconstitutional.

Respondent is mistaken as well to concentrate on the so-called reward/penalty distinction and the illusory baseline

against which a change in prison conditions must be measured. The answer to the question whether the government is extending a benefit or taking away a privilege rests entirely in the eye of the beholder. For this reason, emphasis of any baseline, while superficially appealing, would be an inartful addition to an already confused area of jurisprudence. The prison warden in this case stated that it is largely a matter of chance where in a prison an inmate is assigned. App. 59–63. Even if Inmates A and B are serving the same sentence for the same crime, Inmate A could end up in a medium-security unit and Inmate B in a maximum-security unit based solely on administrative factors beyond their control. Under respondent's view, however, the Constitution allows the State to offer Inmate B the opportunity to live in the medium-security unit conditioned on his participation in the SATP, but does not allow the State to offer Inmate A the opportunity to live in that same medium-security unit subject to the same conditions. The consequences for Inmates A and B are identical: They may participate and live in medium security or refuse and live in maximum security. Respondent, however, would have us say the Constitution puts Inmate A in a superior position to Inmate B solely by the accident of the initial assignment to a medium-security unit.

This reasoning is unsatisfactory. The Court has noted before that "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts* v. *United States*, 445 U. S. 552, 557, n. 4 (1980). Respondent's reasoning would provide States with perverse incentives to assign all inmates convicted of sex offenses to maximum security prisons until near the time of release, when the rehabilitation program starts. The rule would work to the detriment of the entire class of sex offenders who might not otherwise be placed in maximum-security facilities. And prison adminis-

trators would be forced, before making routine prison housing decisions, to identify each inmate's so-called baseline and determine whether an adverse effect, however marginal, will result from the administrative decision. The easy alternatives that respondent predicts for prison administrators would turn out to be not so trouble free.

Respondent's analysis also would call into question the constitutionality of an accepted feature of federal criminal law: the downward adjustment for acceptance of criminal responsibility provided in §3E1.1 of the United States Sentencing Commission, Guidelines Manual (Nov. 2002). If the Constitution does not permit the government to condition the use of a personal television on the acceptance of responsibility for past crimes, it is unclear how it could permit the government to reduce the length of a prisoner's term of incarceration based upon the same factor. By rejecting respondent's theory, we do not, in this case, call these policies into question.

* * *

Acceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion. The Court of Appeals' ruling would defeat these objectives. If the State sought to comply with the ruling by allowing respondent to enter the program while still insisting on his innocence, there would be little incentive for other SATP participants to confess and accept counseling; indeed, there is support for Kansas' view that the dynamics of the group therapy would be impaired. If the State had to offer immunity, the practical effect would be that serial offenders who are incarcerated for but one violation would be given a windfall for past bad conduct, a result potentially destructive of any public or state support for the program and quite at odds with the dominant goal of acceptance of responsibility. If the State found it was forced to graduate prisoners from its rehabilitation program without knowing

what other offenses they may have committed, the integrity of its program would be very much in doubt. If the State found it had to comply by allowing respondent the same perquisites as those who accept counseling, the result would be a dramatic illustration that obduracy has the same rewards as acceptance, and so the program itself would become self-defeating, even hypocritical, in the eyes of those whom it seeks to help. The Fifth Amendment does not require the State to suffer these programmatic disruptions when it seeks to rehabilitate those who are incarcerated for valid, final convictions.

The Kansas SATP represents a sensible approach to reducing the serious danger that repeat sex offenders pose to many innocent persons, most often children. The State's interest in rehabilitation is undeniable. There is, furthermore, no indication that the SATP is merely an elaborate ruse to skirt the protections of the privilege against compelled self-incrimination. Rather, the program allows prison administrators to provide to those who need treatment the incentive to seek it.

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

It is so ordered.

Justice O'Connor, concurring in the judgment.

The Court today is divided on the question of what standard to apply when evaluating compulsion for the purposes of the Fifth Amendment privilege against self-incrimination in a prison setting. I write separately because, although I agree with Justice Stevens that the Fifth Amendment compulsion standard is broader than the "atypical and significant hardship" standard we have adopted for evaluating due process claims in prisons, see *post*, at 58–60 (dissenting opinion) (citing *Meachum* v. *Fano*, 427 U. S. 215 (1976)), I do not believe that the alterations in respondent's prison conditions as a result of his failure to participate in the Sexual

Abuse Treatment Program (SATP) were so great as to constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination. I therefore agree with the plurality that the decision below should be reversed.

The text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony. Not all pressure necessarily "compel[s]" incriminating statements.

For instance, in *Miranda* v. *Arizona*, 384 U. S. 436, 455 (1966), we found that an environment of police custodial interrogation was coercive enough to require prophylactic warnings only after observing that such an environment exerts a "heavy toll on individual liberty." But we have not required *Miranda* warnings during noncustodial police questioning. See, *e. g.*, *Beckwith* v. *United States*, 425 U. S. 341 (1976). In restricting *Miranda*'s applicability, we have not denied that noncustodial questioning imposes some sort of pressure on suspects to confess to their crimes. See *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam)* ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it . . ."); *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984) (describing the "*comparatively* nonthreatening character of [noncustodial] detentions" (emphasis added)). Rather, as suggested by the text of the Fifth Amendment, we have asked whether the pressure imposed in such situations rises to a level where it is likely to "compe[l]" a person "to be a witness against himself."

The same analysis applies to penalties imposed upon a person as a result of the failure to incriminate himself—some penalties are so great as to "compe[l]" such testimony, while others do not rise to that level. Our precedents establish that certain types of penalties are capable of coercing incriminating testimony: termination of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), the loss of a profes-

sional license, *Spevack* v. *Klein*, 385 U. S. 511 (1967), ineligibility to receive government contracts, *Lefkowitz* v. *Turley*, 414 U. S. 70 (1973), and the loss of the right to participate in political associations and to hold public office, *Lefkowitz* v. *Cunningham*, 431 U. S. 801 (1977). All of these penalties, however, are far more significant than those facing respondent here.

The first three of these so-called "penalty cases" involved the potential loss of one's livelihood, either through the loss of employment, loss of a professional license essential to employment, or loss of business through government contracts. In *Lefkowitz*, we held that the loss of government contracts was constitutionally equivalent to the loss of a profession because "[a government contractor] lives off his contracting fees just as surely as a state employee lives off his salary." 414 U. S., at 83; contra, *post*, at 68, n. 11. To support oneself in one's chosen profession is one of the most important abilities a person can have. A choice between incriminating oneself and being deprived of one's livelihood is the very sort of choice that is likely to compel someone to be a witness against himself. The choice presented in the last case, *Cunningham*, implicated not only political influence and prestige, but also the First Amendment right to run for office and to participate in political associations. 431 U. S., at 807–808. In holding that the penalties in that case constituted compulsion for Fifth Amendment purposes, we properly referred to those consequences as "grave." *Id.*, at 807.

I do not believe the consequences facing respondent in this case are serious enough to compel him to be a witness against himself. These consequences involve a reduction in incentive level, and a corresponding transfer from a medium-security to a maximum-security part of the prison. In practical terms, these changes involve restrictions on the personal property respondent can keep in his cell, a reduction in his visitation privileges, a reduction in the amount of money he can spend in the canteen, and a reduction in the

wage he can earn through prison employment. See *ante*, at 30–31. These changes in living conditions seem to me minor. Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated by the reduction in wages he would suffer as a result. While his visitation is reduced as a result of his failure to incriminate himself, he still retains the ability to see his attorney, his family, and members of the clergy. App. 27. The limitation on the possession of personal items, as well as the amount that respondent is allowed to spend at the canteen, may make his prison experience more unpleasant, but seems very unlikely to actually compel him to incriminate himself.

Justice Stevens also suggests that the move to the maximum-security area of the prison would itself be coercive. See *post*, at 63–64. Although the District Court found that moving respondent to a maximum-security section of the prison would put him "in a more dangerous environment occupied by more serious offenders," 24 F. Supp. 2d 1152, 1155 (Kan. 1998), there was no finding about how great a danger such a placement posed. Because it is respondent's burden to prove compulsion, we may assume that the prison is capable of controlling its inmates so that respondent's personal safety is not jeopardized by being placed in the maximum-security area of the prison, at least in the absence of proof to the contrary.

Justice Stevens argues that the fact that the penalties facing respondent for refusal to incriminate himself are the same as those imposed for prison disciplinary violations also indicates that they are coercive. See *post*, at 62–63. I do not agree. Insofar as Justice Stevens' claim is that these sanctions carry a stigma that might compel respondent to incriminate himself, it is incorrect. Because the same sanctions are also imposed on all prisoners who refuse to participate in any recommended program, App. 19–20, any stigma attached to the reduction would be minimal. Insofar as

Justice Stevens' claim is that these sanctions are designed to compel behavior because they are used as disciplinary tools, it is also flawed. There is a difference between the sorts of penalties that would give a prisoner a reason not to violate prison disciplinary rules and what would compel him to expose himself to criminal liability. Therefore, on this record, I cannot conclude that respondent has shown that his decision to incriminate himself would be compelled by the imposition of these penalties.

Although I do not think the penalties respondent faced were sufficiently serious to compel his testimony, I do not agree with the suggestion in the plurality opinion that these penalties could permissibly rise to the level of those in cases like *McGautha* v. *California*, 402 U. S. 183 (1971) (holding that statements made in the mitigation phase of a capital sentencing hearing may be used as evidence of guilt), *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978) (holding that plea bargaining does not violate the Fifth Amendment privilege against self-incrimination), and *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272 (1998) (holding that there is no right to silence at a clemency interview). See *ante*, at 41–43. The penalties potentially faced in these cases—longer incarceration and execution—are far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases. Indeed, the imposition of such outcomes as a penalty for refusing to incriminate oneself would surely implicate a "liberty interest."

Justice Stevens attempts to distinguish these cases because, in each, the negative outcome did not follow directly from the decision to remain silent, and because none of these cases involved a direct order to testify. See *post*, at 60. As the plurality's opinion makes clear, however, these two factors do not adequately explain the difference between these cases and the penalty cases, where we have found compulsion based on the imposition of penalties far less onerous. See *ante*, at 43–45.

I believe the proper theory should recognize that it is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process. See, *e. g.*, *McGautha* v. *California*, *supra*, at 213 ("The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose" (citation and internal quotation marks omitted)). Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate. But even this explanation of the privilege is incomplete, as it does not fully account for all of the Court's precedents in this area. Compare *Griffin* v. *California*, 380 U. S. 609 (1965) (holding that prosecutor may not comment on a defendant's failure to testify), with *Ohio Adult Parole Authority* v. *Woodard*, *supra* (holding that there is no right to silence at a clemency interview).

Complicating matters even further is the question of whether the denial of benefits and the imposition of burdens ought to be analyzed differently in this area. Compare *ante*, at 45–47, with *post*, at 64–65. This question is particularly important given the existence of United States Sentencing Commission, Guidelines Manual §3E1.1 (Nov. 2000), which can be read to offer convicted criminals the benefit of a lower sentence in exchange for accepting responsibility for their crimes. See *ante*, at 47.

I find the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination troubling. But because this case indisputably

involves burdens rather than benefits, and because I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case.

Although I do not agree that the standard for compulsion is the same as the due process standard we identified in *Sandin* v. *Conner*, 515 U. S. 472 (1995), I join in the judgment reached by the plurality's opinion.

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

No one could possibly disagree with the plurality's statement that "offering inmates minimal incentives to participate [in a rehabilitation program] does not amount to compelled self-incrimination prohibited by the Fifth Amendment." *Ante*, at 29. The question that this case presents, however, is whether the State may punish an inmate's assertion of his Fifth Amendment privilege with the same mandatory sanction that follows a disciplinary conviction for an offense such as theft, sodomy, riot, arson, or assault. Until today the Court has never characterized a threatened harm as "a minimal incentive." Nor have we ever held that a person who has made a valid assertion of the privilege may nevertheless be ordered to incriminate himself and sanctioned for disobeying such an order. This is truly a watershed case.

Based on an ad hoc appraisal of the benefits of obtaining confessions from sex offenders, balanced against the cost of honoring a bedrock constitutional right, the plurality holds that it is permissible to punish the assertion of the privilege with what it views as modest sanctions, provided that those sanctions are not given a "punitive" label. As I shall explain, the sanctions are in fact severe, but even if that were not so, the plurality's policy judgment does not justify the evisceration of a constitutional right. Despite the plurality's

meandering attempt to justify its unprecedented departure from a rule of law that has been settled since the days of John Marshall, I respectfully dissent.

I

The text of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." It is well settled that the prohibition "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U. S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973)). If a person is protected by the privilege, he may "refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.*, at 78 (citing *Kastigar* v. *United States*, 406 U. S. 441 (1972)). Prison inmates—including sex offenders—do not forfeit the privilege at the jailhouse gate. *Murphy*, 465 U. S., at 426.

It is undisputed that respondent's statements on the admission of responsibility and sexual history forms could incriminate him in a future prosecution for perjury or any other offense to which he is forced to confess.[1] It is also

[1] As a participant in the Sexual Abuse Treatment Program (SATP), respondent would be required to sign an "Admission of Responsibility" form setting forth the details of the offense for which he was convicted. Because he had testified at trial that his sexual intercourse with the victim before driving her back to her car was consensual, the District Court found that a written admission on this form would subject respondent to a possible charge of perjury. 24 F. Supp. 2d 1152, 1157 (Kan. 1998). In addition, the SATP requires participants to "generate a written sexual history which includes all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses." *Id.*, at

clear that he invoked his Fifth Amendment right by refusing to participate in the SATP on the ground that he would be required to incriminate himself. Once he asserted that right, the State could have offered respondent immunity from the use of his statements in a subsequent prosecution. Instead, the Kansas Department of Corrections (Department) ordered respondent either to incriminate himself or to lose his medium-security status. In my opinion that order, coupled with the threatened revocation of respondent's Level III privileges, unquestionably violated his Fifth Amendment rights.

Putting to one side the plurality's evaluation of the policy judgments made by Kansas, its central submission is that the threatened withdrawal of respondent's Level III and medium-security status is not sufficiently harmful to qualify as unconstitutional compulsion. In support of this position, neither the plurality nor JUSTICE O'CONNOR cites a single Fifth Amendment case in which a person invoked the privilege and was nevertheless required to answer a potentially incriminating question.[2]

The privilege against self-incrimination may have been born of the rack and the Star Chamber, see L. Levy, Origins of the Fifth Amendment 42 (I. Dee ed. 1999); *Andresen* v. *Maryland*, 427 U. S. 463, 470 (1976), but the Framers had a

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1155. The District Court found that the form "clearly seeks information that could incriminate the prisoner and subject him to further criminal charges." *Id.*, at 1157.

[2] Petitioners relied on two cases, *Fisher* v. *United States*, 425 U. S. 391 (1976), and *United States* v. *Washington*, 431 U. S. 181, 187–188 (1977). In *Fisher*, we held that the privilege does not permit the target of a criminal investigation to prevent his lawyer from answering a subpoena to produce incriminating documents. We reached that conclusion because the person asserting the privilege was not the one being compelled. In *Washington*, cited *ante*, at 36, a grand jury witness voluntarily answered questions after being advised of the privilege, though not of the fact that he was a potential defendant in danger of being indicted. In neither case did the witness assert the privilege against incriminating himself.

broader view of compulsion in mind when they drafted the Fifth Amendment.[3] We know, for example, that the privilege was thought to protect defendants from the moral compulsion associated with any statement made under oath.[4] In addition, the language of the Amendment, which focuses on a courtroom setting in which a defendant or a witness in a criminal trial invokes the privilege, encompasses the compulsion inherent in any judicial order overruling an assertion of the privilege. As Chief Justice Marshall observed in *United States* v. *Burr*, 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807): "If, in such a case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact."

Our holding in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), that the privilege applies to the States through the Fourteenth Amendment, determined that the right to remain silent is itself a liberty interest protected by that Amendment. We explained that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and to suffer no penalty* . . .

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[3] The origins and evolution of the privilege have received significant scholarly attention and debate in recent years. See, *e. g.*, Hazlett, Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination, 42 Am. J. Legal Hist. 235 (1998); Amar & Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995). The historical account is complicated by the fact that before *Boyd* v. *United States*, 116 U. S. 616 (1886), the privilege was treated as a common-law evidentiary doctrine separate from the Fifth Amendment. During that time, the privilege was also subsumed within general discussions of the voluntariness of confessions.

[4] Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination 181, 192–193 (R. Helmholz et al. eds. 1997) (discussing historical sources which indicate that the "privilege prohibited (1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency" (footnotes omitted)).

for such silence." *Id.*, at 8 (emphasis added). Since *Malloy*, we have construed the text to prohibit not only direct orders to testify, but also indirect compulsion effected by comments on a defendant's refusal to take the stand, *Griffin* v. *California*, 380 U. S. 609, 613–614 (1965), and we have recognized that compulsion can be presumed from the circumstances surrounding custodial interrogation, see *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000) ("[T]he 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' ") (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 439 (1966)). Without requiring the deprivation of any other liberty interest, we have found prohibited compulsion in the threatened loss of the right to participate in political associations, *Lefkowitz* v. *Cunningham*, 431 U. S. 801 (1977), forfeiture of government contracts, *Turley*, 414 U. S., at 82, loss of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), and disbarment, *Spevack* v. *Klein*, 385 U. S. 511, 516 (1967). None of our opinions contains any suggestion that compulsion should have a different meaning in the prison context. Nor is there any support in our Fifth Amendment jurisprudence for the proposition that nothing short of losing one's livelihood is sufficient to constitute compulsion. Accord, *Turley*, 414 U. S., at 83.

The plurality's suggestion that our decision in *Meachum* v. *Fano*, 427 U. S. 215 (1976), supports a novel interpretation of the Fifth Amendment, see *ante*, at 39, is inconsistent with the central rationale of that case. In *Meachum*, a group of prison inmates urged the Court to hold that the Due Process Clause entitled them to a hearing prior to their transfer to a substantially less favorable facility. Relying on the groundbreaking decisions in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Wolff* v. *McDonnell*, 418 U. S. 539 (1974),

which had rejected the once-prevailing view that a prison inmate had no more rights than a "slave of the State,"[5] the prisoners sought to extend those holdings to require judicial review of "any substantial deprivation imposed by prison authorities." The Court recognized that after *Wolff* and its progeny, convicted felons retain "a variety of important rights that the courts must be alert to protect." Although *Meachum* refused to expand the constitutional rights of inmates, we did not narrow the protection of any established right. Indeed, Justice White explicitly limited the holding to prison conditions that "do not otherwise violate the Constitution," 427 U. S., at 224.[6]

Not a word in our discussion of the privilege in *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272 (1998), *ante*, at 43, requires a heightened showing of compulsion in the prison context to establish a Fifth Amendment violation. That case is wholly unlike this one because Woodard was not ordered to incriminate himself and was not punished for refusing to do so. He challenged Ohio's clemency procedures, arguing, *inter alia*, that an interview with members of the clemency board offered to inmates one week before their clemency hearing presented him with a Hobson's choice that violated the privilege against self-incrimination. He could either take advantage of the interview and risk incriminating himself, or decline the interview, in which case the clemency board might draw adverse inferences from his decision not to testify. We concluded that the prisoner who was offered "a voluntary interview" is in the same position as

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[5] See *Meachum* v. *Fano*, 427 U. S. 215, 231 (1976) (STEVENS, J., dissenting).

[6] In his opinion for the Court in the companion case, *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976), Justice White reiterated this point: "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and [are] not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

any defendant faced with the option of either testifying or accepting the risk that adverse inferences may be drawn from his silence. 523 U. S., at 286.

Respondent was directly ordered by prison authorities to participate in a program that requires incriminating disclosures, whereas no one ordered Woodard to do anything. Like a direct judicial order to answer questions in the courtroom, an order from the State to participate in the SATP is inherently coercive. Cf. *Turley*, 414 U. S., at 82 ("The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver"). Moreover, the penalty for refusing to participate in the SATP is automatic. Instead of conjecture and speculation about the indirect consequences that may flow from a decision to remain silent, we can be sure that defiance of a direct order carries with it the stigma of being a lawbreaker or a problem inmate, as well as other specified penalties. The penalty involved in this case is a mandated official response to the assertion of the privilege.

In *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), *ante*, at 42–43, we held that a prison disciplinary proceeding did not violate the privilege, in part, because the State had not "insisted [nor] asked that Palmigiano waive his Fifth Amendment privilege," and it was "undisputed that an inmate's silence in and of itself [was] insufficient to support an adverse decision by the Disciplinary Board." 425 U. S., at 317–318. We distinguished the "penalty cases," *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Turley*, not because they involved civilians as opposed to prisoners, as the plurality assumes, *ante*, at 40, but because in those cases the "refusal to submit to interrogation and to waive the Fifth Amendment privilege, *standing alone and without regard to other evidence*, resulted in loss of employment or opportunity to contract with the State," whereas Palmigiano's silence "was given no more evidentiary value than was war-

ranted by the facts surrounding his case." 425 U. S., at 318 (emphasis added). And, in a subsequent "penalty" case, we distinguished *Baxter* on the ground that refusing to incriminate oneself "was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted," while in *Cunningham* "refusal to waive the Fifth Amendment privilege [led] automatically and without more to imposition of sanctions." 431 U. S., at 808, n. 5.

Similarly, in *Minnesota* v. *Murphy*, 465 U. S., at 438, 439, while "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege," because revocation was not automatic under the Minnesota statute, we concluded that "Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation."[7] These decisions recognized that there is an appreciable difference between an official sanction for disobeying a direct order and a mere risk of adverse consequences stemming from a voluntary choice. The distinction is not a novel one, nor is it simply offered to "justify departing from this Court's precedents," *ante*, at 44. Rather it is a distinction that we have drawn throughout our cases; therefore, it is the plurality's

[7] The plurality is quite wrong to rely on *Murphy* for the proposition that an individual is not compelled to incriminate himself when faced with the threat of return to prison. *Ante*, at 43. In *Murphy*, we did not have occasion to decide whether such a threat constituted compulsion because we held that "since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations." 465 U. S., at 440. As we explained, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. . . . But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Id.*, at 429. In contrast to Murphy, respondent has consistently asserted his Fifth Amendment privilege.

disregard for both factors that represents an unjustified departure. Unlike *Woodard*, *Murphy*, and *Baxter*, respondent cannot invoke his Fifth Amendment rights and then gamble on whether the Department will revoke his Level III status; the punishment is mandatory. The fact that this case involves a prison inmate, as did *Woodard* and *Baxter*, is not enough to render those decisions controlling authority. Since we have already said inmates do not forfeit their Fifth Amendment rights at the jailhouse gate, *Murphy*, 465 U. S., at 426, the plurality must point to something beyond respondent's status as a prisoner to justify its departure from our precedent.

II

The plurality and JUSTICE O'CONNOR hold that the consequences stemming from respondent's invocation of the privilege are not serious enough to constitute compulsion. The threat of transfer to Level I and a maximum-security unit is not sufficiently coercive in their view—either because the consequence is not really a penalty, just the loss of a benefit, or because it is a penalty, but an insignificant one. I strongly disagree.

It took respondent several years to acquire the status that he occupied in 1994 when he was ordered to participate in the SATP. Because of the nature of his convictions, in 1983 the Department initially placed him in a maximum-security classification. Not until 1989 did the Department change his "security classification to 'medium by exception' because of his good behavior." *Lile* v. *Simmons*, 23 Kan. App. 2d 1, 2, 929 P. 2d 171, 172 (1996). Thus, the sanction at issue threatens to deprive respondent of a status in the prison community that it took him six years to earn and which he had successfully maintained for five more years when he was ordered to incriminate himself. Moreover, abruptly "busting" his custody back to Level I, App. 94, would impose the same stigma on him as would a disciplinary conviction for any of the most serious offenses described in petitioners' formal

statement of Internal Management Policy and Procedure (IMPP). As the District Court found, the sanctions imposed on respondent "mirror the consequences imposed for serious disciplinary infractions." 24 F. Supp. 2d 1152, 1155 (Kan. 1998). This same loss of privileges is considered serious enough by prison authorities that it is used as punishment for theft, drug abuse, assault, and possession of dangerous contraband.[8]

The punitive consequences of the discipline include not only the dignitary and reputational harms flowing from the transfer, but a serious loss of tangible privileges as well. Because he refused to participate in the SATP, respondent's visitation rights will be restricted. He will be able to earn only $0.60 per day, as compared to Level III inmates, who can potentially earn minimum wage. His access to prison organizations and activities will be limited. He will no longer be able to send his family more than $30 per pay period. He will be prohibited from spending more than $20 per payroll period at the canteen, rather than the $140 he could spend at Level III, and he will be restricted in what property he can keep in his cell. App. 27–28. In addition, because he will be transferred to a maximum-security unit, respondent will be forced to share a cell with three other

[8] IMPP 11–101 provides that an inmate "shall be automatically reduced to Level I for any of the following: (1) Termination from a work or program assignment for cause; (2) Refusal to participate in recommended programs at the time of placement; (3) Offenses committed in which a felony charge is filed with the district or county prosecutor; (4) Disciplinary convictions for: (a) Theft; (b) Being in a condition of drunkenness, intoxication, or a state of altered consciousness; (c) Use of stimulants, sedatives, unauthorized drugs, or narcotics, or the misuse, or hoarding of authorized or prescribed medication; (d) Sodomy, aggravated sodomy, or aggravated sexual act; (e) Riot or incitement to riot; (f) Arson; (g) Assault; (h) Battery; (i) Inmate Activity (limitations); (j) Sexual Activity; (k) Interference with Restraints; (l) Relationships with Staff; (m) Work Performance; or (n) Dangerous Contraband." App. 19–20 (citations omitted).

inmates rather than one, and his movement outside the cell will be substantially curtailed. *Id.*, at 73, 83. The District Court found that the maximum-security unit is "a more dangerous environment occupied by more serious offenders." 24 F. Supp. 2d, at 1155.[9] Perhaps most importantly, respondent will no longer be able to earn his way back up to Level III status through good behavior during the remainder of his sentence. App. 17 ("To complete Level I, an inmate must . . . demonstrate a willingness to participate in recommended programs and/or work assignments for a full review cycle").

The plurality's glib attempt to characterize these consequences as a loss of potential benefits rather than a penalty is wholly unpersuasive. The threatened transfer to Level I and to a maximum-security unit represents a significant, adverse change from the status quo. Respondent achieved his medium-security status after six years of good behavior and maintained that status during five more years. During that time, an inmate unquestionably develops settled expectations regarding the conditions of his confinement. These conditions then form the baseline against which any change must be measured, and rescinding them now surely constitutes punishment.

Paying attention to the baseline is not just "superficially appealing," *ante*, at 46. We have recognized that the gov-

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[9] Respondent attested to the fact that in his experience maximum security "is a very hostile, intimidating environment because most of the inmates in maximum tend to have longer sentences and are convicted of more serious crimes, and, as a consequence, care less how they act or treat others." *Id.*, at 41–42. He explained that in the maximum-security unit "there is far more gang activity," "reported and unreported rapes and assaults of inmates are far more prevalent," and "sex offenders . . . are seen as targets for rape and physical and mental assault[s]," whereas in medium security, "because the inmates want to maintain their medium security status, they are less prone to breaking prison rules or acting violently." *Id.*, at 42–43.

ernment can extend a benefit in exchange for incriminating statements, see *Woodard*, 523 U. S., at 288 ("[T]his pressure to speak in the hope of improving [one's] chance of being granted clemency does not make the interview compelled"), but cannot threaten to take away privileges as the cost of invoking Fifth Amendment rights, see, *e. g.*, *Turley*, 414 U. S., at 82; *Spevack*, 385 U. S., at 516. Based on this distinction, nothing that I say in this dissent calls into question the constitutionality of *downward* adjustments for acceptance of responsibility under the United States Sentencing Guidelines, *ante*, at 47. Although such a reduction in sentence creates a powerful incentive for defendants to confess, it completely avoids the constitutional issue that would be presented if the Guidelines operated like the scheme here and authorized an *upward* adjustment whenever a defendant refused to accept responsibility. Similarly, taking into account an attorney's acceptance of responsibility or contrition in deciding whether to reinstate his membership to the bar of this Court, see *ante*, at 40, is obviously different from disbarring an attorney for invoking his privilege. By obscuring the distinction between penalties and incentives, it is the plurality that calls into question both the Guidelines and plea bargaining. See *Corbitt* v. *New Jersey*, 439 U. S. 212, 223–224 (1978) ("Nor does this record indicate that he was being punished for exercising a constitutional right. . . . [H]omicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed").[10]

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[10] The plurality quotes a footnote in *Roberts* v. *United States*, 445 U. S. 552 (1980), for the proposition that a principled distinction cannot be drawn between enhancing punishment and denying leniency, *ante*, at 46. This quote is misleading because, as in *Minnesota* v. *Murphy*, 465 U. S. 420 (1984), see n. 7, *supra*, Roberts failed to assert his privilege against

Even if the change in respondent's status could properly be characterized as a loss of benefits to which he had no entitlement, the question at hand is not whether the Department could have refused to extend those benefits in the first place, but rather whether revoking them at this point constitutes a penalty for asserting the Fifth Amendment privilege. See *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). The plurality contends that the transfer from medium to maximum security and the associated loss of Level III status is not intended to punish prisoners for asserting their Fifth Amendment rights, but rather is merely incidental to the prison's legitimate interest in making room for participants

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self-incrimination, and we reiterated that the privilege is not self-executing, 445 U. S., at 559. Furthermore, the passage quoted by the plurality, *id.*, at 557, n. 4, was in reference to Roberts' claim that the sentencing judge could not consider his refusal to incriminate *a co-conspirator* in deciding whether to impose his sentences consecutively. In that context, the privilege is not implicated and compulsion is not constitutionally significant. While it is true that in some cases the line between enhancing punishment and refusing leniency may be difficult to draw, that does not mean the distinction is irrelevant for Fifth Amendment purposes.

It is curious that the plurality asserts the impracticality of drawing such a distinction, given that in this case a majority of the Court agrees that it is perfectly clear the consequences facing respondent represent a burden, rather than the denial of a benefit. *Ante*, at 53–54 (O'CONNOR, J., concurring in judgment). Our cases reveal that it is not only possible, but necessary to draw the distinction. For even *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), conditioned its entire analysis of plea bargaining on the assumption that the defendant had been charged with the greater offense prior to plea bargaining and, therefore, faced the denial of leniency rather than an enhanced penalty. *Id.*, at 360–361 ("While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of plea negotiations. . . . This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted [the defendant] as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain").

in the program. *Ante,* at 38. Of course, the Department could still house participants together without moving those who refuse to participate to more restrictive conditions of confinement and taking away their privileges. Moreover, petitioners have not alleged that respondent is taking up a bed in a unit devoted to the SATP; therefore, all the Department would have to do is allow respondent to stay in his current medium-security cell. If need be, the Department could always transfer respondent to another medium-security unit. Given the absence of evidence in the record that the Department has a shortage of medium-security beds, or even that there is a separate unit devoted to participants in the SATP, the only plausible explanation for the transfer to maximum security and loss of Level III status is that it serves as punishment for refusing to participate in the program.

JUSTICE O'CONNOR recognizes that the transfer is a penalty, but finds insufficient coercion because the "changes in [respondent's] living conditions seem to [her] minor." *Ante,* at 51 (opinion concurring in judgment). The coerciveness of the penalty in this case must be measured not by comparing the quality of life in a prison environment with that in a free society, but rather by the contrast between the favored and disfavored classes of prisoners. It is obviously impossible to measure precisely the significance of the difference between being housed in a four-person, maximum-security cell in the most dangerous area of the prison, on the one hand, and having a key to one's own room, the right to take a shower, and the ability to move freely within adjacent areas during certain hours, on the other—or to fully appreciate the importance of visitation privileges, being able to send more than $30 per pay period to family, having access to the yard for exercise, and the opportunity to participate in group activities. What is perfectly clear, however, is that it is the aggregate effect of those penalties that creates compulsion. Nor is it coincidental that petitioners have selected this same

group of sanctions as the punishment to be imposed for the most serious violations of prison rules. Considering these consequences as a whole and comparing the Department's treatment of respondent to the rest of the prison population, it is perfectly clear that the penalty imposed is "constitutionally indistinguishable from the coercive provisions we struck down in *Gardner*, *Sanitation Men*, and *Turley*." *Cunningham*, 431 U. S., at 807.[11]

III

The SATP clearly serves legitimate therapeutic purposes. The goal of the program is to rehabilitate sex offenders, and the requirement that participants complete admission of responsibility and sexual history forms may well be an important component of that process. Mental health professionals seem to agree that accepting responsibility for past sexual misconduct is often essential to successful treatment, and that treatment programs can reduce the risk of recidivism by sex offenders. See Winn, Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders, 8 Sexual Abuse: J. Research and Treatment 25, 26–27 (1996).

The program's laudable goals, however, do not justify reduced constitutional protection for those ordered to participate. "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." *Cunningham*, 431 U. S., at 808.

[11] JUSTICE O'CONNOR would distinguish these cases because the penalty involved the loss of one's livelihood, whereas here respondent will be housed, clothed, and fed regardless of whether he is in maximum or medium security. We rejected a similar argument in *Turley*, when we refused to distinguish *Gardner* v. *Broderick*, 392 U. S. 273 (1968), and *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), based on the difference between losing one's job and losing the ability to obtain government contracts. 414 U. S., at 83. We concluded that there was no "difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Ibid.*

The benefits of obtaining confessions from sex offenders may be substantial, but "claims of overriding interests are not unusual in Fifth Amendment litigation," and until today at least "they have not fared well." *Turley*, 414 U. S., at 78. The State's interests in law enforcement and rehabilitation are present in every criminal case. If those interests were sufficient to justify impinging on prisoners' Fifth Amendment right, inmates would soon have no privilege left to invoke.

The plurality's willingness to sacrifice prisoners' Fifth Amendment rights is also unwarranted because available alternatives would allow the State to achieve the same objectives without impinging on inmates' privilege. *Turner* v. *Safley*, 482 U. S. 78, 93 (1987). The most obvious alternative is to grant participants use immunity. See *Murphy*, 465 U. S., at 436, n. 7 ("[A] State may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination"); *Baxter*, 425 U. S., at 318 ("Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution"). Petitioners have not provided any evidence that the program's therapeutic aims could not be served equally well by granting use immunity. Participants would still obtain all the therapeutic benefits of accepting responsibility and admitting past misconduct; they simply would not incriminate themselves in the process. At least one State already offers such protection, see Ky. Rev. Stat. Ann. § 197.440 (West 2001) ("Communications made in the application for or in the course of a sexual offender's diagnosis and treatment . . . shall be privileged from disclosure in any civil or criminal proceeding"), and there is no indication that its choice is incompatible with rehabilitation. In fact, the program's rehabilitative goals would likely be furthered by ensuring free and open discus-

sion without the threat of prosecution looming over participants' therapy sessions.

The plurality contends that requiring immunity will undermine the therapeutic goals of the program because once "inmates know society will not punish them for their past offenses, they may be left with the false impression that society does not consider those crimes to be serious ones." *Ante*, at 34. See also Brief for 18 States as *Amici Curiae* 11 ("By subjecting offenders to prosecution for newly revealed offenses, and by adhering to its chosen policy of mandatory reporting for cases of suspected child sexual abuse, Kansas reinforces the sensible notion that wrongdoing carries consequences"). The idea that an inmate who is confined to prison for almost 20 years for an offense could be left with the impression that his crimes are not serious or that wrongdoing does not carry consequences is absurd. Moreover, the argument starts from a false premise. Granting use immunity does not preclude prosecution; it merely prevents the State from using an inmate's own words, and the fruits thereof, against him in a subsequent prosecution. *New Jersey* v. *Portash*, 440 U. S. 450, 457–458 (1979). The plurality's concern might be justified if the State were required to grant *transactional* immunity, but we have made clear since *Kastigar* that use immunity is sufficient to alleviate a potential Fifth Amendment violation, 406 U. S., at 453. Nor is a State *required* to grant use immunity in order to have a sex offender treatment program that involves admission of responsibility.

Alternatively, the State could continue to pursue its rehabilitative goals without violating participants' Fifth Amendment rights by offering inmates a voluntary program. The United States points out that an inmate's participation in the sexual offender treatment program operated by the Federal Bureau of Prisons is entirely voluntary. "No loss of institutional privileges flows from an inmate's decision not to par-

ticipate in the program."[12] If an inmate chooses to participate in the federal program, he will be transferred from his "parent facility" to a "more desirable" prison, but if he refuses to participate in the first place, as respondent attempted to do, he suffers no negative consequences. Tr. of Oral Arg. 21–22. Although the inmates in the federal program are not granted use immunity, they are not compelled to participate. Indeed, there is reason to believe successful rehabilitation is more likely for voluntary participants than for those who are compelled to accept treatment. See Abel, Mittelman, Becker, Rathner, & Rouleau, Predicting Child Molesters' Response to Treatment, 528 Annals N. Y. Acad. of Sciences 223 (1988) (finding that greater perceived pressure to participate in treatment is strongly correlated with the dropout rate).

Through its treatment program, Kansas seeks to achieve the admirable goal of reducing recidivism among sex offenders. In the process, however, the State demands an impermissible and unwarranted sacrifice from the participants. No matter what the goal, inmates should not be compelled to forfeit the privilege against self-incrimination simply because the ends are legitimate or because they have been convicted of sex offenses. Particularly in a case like this one, in which respondent has protested his innocence all along and is being compelled to confess to a crime that he still insists he did not commit, we ought to ask ourselves—what if this is one of those rare cases in which the jury made a

[12] Brief for United States as *Amicus Curiae* 27. Because of this material difference between the Kansas and federal programs, recognizing the compulsion in this case would not cast any doubt on the validity of voluntary programs. The plurality asserts that "the federal program is different from Kansas' SATP only in that it does not require inmates to sacrifice privileges *besides housing* as a consequence of nonparticipation." *Ante*, at 45 (emphasis added). This statement is inaccurate because, as the quote in the text reveals, *no* loss of privileges follows from the decision not to participate in the federal program.

mistake and he is actually innocent? And in answering that question, we should consider that even members of the Star Chamber thought they were pursuing righteous ends.

I respectfully dissent.

Syllabus

CHEVRON U. S. A. INC. *v.* ECHAZABAL

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

No. 00–1406. Argued February 27, 2002—Decided June 10, 2002

Respondent Echazabal worked for independent contractors at one of petitioner Chevron U. S. A. Inc.'s oil refineries until Chevron refused to hire him because of a liver condition—which its doctors said would be exacerbated by continued exposure to toxins at the refinery—and the contractor employing him laid him off in response to Chevron's request that it reassign him to a job without exposure to toxins or remove him from the refinery. Echazabal filed suit, claiming, among other things, that Chevron's actions violated the Americans with Disabilities Act of 1990 (ADA). Chevron defended under an Equal Employment Opportunity Commission (EEOC) regulation permitting the defense that a worker's disability on the job would pose a direct threat to his health. The District Court granted Chevron summary judgment, but the Ninth Circuit reversed, finding that the regulation exceeded the scope of permissible rulemaking under the ADA.

Held: The ADA permits the EEOC's regulation. Pp. 78–87.

(a) The ADA's discrimination definition covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as "using qualification standards . . . that screen out or tend to screen out [such] an individual," 42 U. S. C. § 12112(b)(6). And along with § 12113(a), the definition creates an affirmative defense for action under a qualification standard "shown to be job-related and consistent with business necessity," which "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," § 12113(b). The EEOC's regulation carries the defense one step further, allowing an employer to screen out a potential worker with a disability for risks on the job to his own health or safety. Pp. 78–79.

(b) Echazabal relies on the canon *expressio unius exclusio alterius*—expressing one item of an associated group excludes another left unmentioned—for his argument that the ADA, by recognizing only threats to others, precludes the regulation as a matter of law. The first strike against the expression-exclusion rule here is in the statute, which includes the threat-to-others provision as an example of legitimate qualifications that are "job-related and consistent with business necessity." These spacious defensive categories seem to give an agency a good deal

of discretion in setting the limits of permissible qualification standards. And the expansive "may include" phrase points directly away from the sort of exclusive specifications that Echazabal claims. Strike two is the failure to identify any series of terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. Echazabal claims that Congress's adoption only of the threat-to-others exception in the ADA was a deliberate omission of the threat-to-self exception included in the EEOC's regulation implementing the precursor Rehabilitation Act of 1973, which has language identical to that in the ADA. But this is not an unequivocal implication of congressional intent. Because the EEOC was not the only agency interpreting the Rehabilitation Act, its regulation did not establish a clear, standard pairing of threats to self and others. And, it is likely that Congress used such language in the ADA knowing what the EEOC had made of that language under the earlier statute. The third strike is simply that there is no apparent stopping point to the argument that, by specifying a threat-to-others defense, Congress intended a negative implication about those whose safety could be considered. For example, Congress could not have meant that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the workplace. Pp. 79–84.

(c) Since Congress has not spoken exhaustively on threats to a worker's own health, the regulation can claim adherence under the rule in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, so long as it makes sense of the statutory defense for qualification standards that are "job-related and consistent with business necessity." Chevron's reasons for claiming that the regulation is reasonable include, *inter alia*, that it allows Chevron to avoid the risk of violating the Occupational Safety and Health Act of 1970 (OSHA). Whether an employer would be liable under OSHA for hiring an individual who consents to a job's particular dangers is an open question, but the employer would be courting trouble under OSHA. The EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked and subject to administrative leeway. Nor can the EEOC's resolution be called unreasonable as allowing the kind of workplace paternalism the ADA was meant to outlaw. The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. This sort of sham protection is just what the regulation disallows, by demanding a particularized enquiry into the harms an employee would probably face. Finally, that

the threat-to-self defense reasonably falls within the general "job related" and "business necessity" standard does not reduce the "direct threat" language to surplusage. The provision made a conclusion clear that might otherwise have been fought over in litigation or administrative rulemaking. Pp. 84–87.

226 F. 3d 1063, reversed and remanded.

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

Stephen M. Shapiro argued the cause for petitioner. With him on the briefs were *James D. Holzhauer*, *Robert P. Davis*, and *Evan M. Tager*.

Lisa Schiavo Blatt argued the cause for the United States et al. as *amici curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Deputy Solicitor General Clement*, *Assistant Attorney General McCallum*, *Marleigh D. Dover*, *Matthew Collette*, *Phillip B. Sklover*, *Carolyn L. Wheeler*, and *Robert J. Gregory*.

Samuel R. Bagenstos argued the cause for respondent. With him on the brief were *Larry Minsky* and *Chai R. Feldblum*.*

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*Briefs of *amici curiae* urging reversal were filed for the American College of Occupational and Environmental Medicine et al. by *Craig E. Stewart;* for the Chamber of Commerce of the United States et al. by *Roy T. Englert, Jr.*, *Kathryn S. Zecca*, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Employers Group by *Fred W. Alvarez* and *Christine A. Kendrick;* for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman*, *Jan S. Amundson*, and *Quentin Riegel;* for the Pacific Legal Foundation et al. by *Anne M. Hayes* and *M. Reed Hopper;* and for the Society for Human Resource Management by *Peter J. Petesch* and *John E. Duvall*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of People with Disabilities et al. by *John Townsend Rich*, *Arlene Mayerson*, *Daniel B. Kohrman*, *Ira A. Burnim*, and *Jennifer Mathis;* for the American Civil Liberties Union et al. by *Matthew A. Coles*, *James D. Esseks*, *Steven R. Shapiro*, and *Lenora M. Lapidus;* for the American Public Health Association et al. by *Catherine A. Hanssens* and *Jon W. Davidson;* for the National Council on Disability by *Peter Blanck*, *Diane Kutzko*, *Mark L. Zaiger*, *Douglas R. Oelschlaeger*, and *Sarah J. Gayer;* and for the National Employment Lawyers Association by *Gary Phelan*.

JUSTICE SOUTER delivered the opinion of the Court.

A regulation of the Equal Employment Opportunity Commission authorizes refusal to hire an individual because his performance on the job would endanger his own health, owing to a disability. The question in this case is whether the Americans with Disabilities Act of 1990, 104 Stat. 328, 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. V), permits the regulation.[1] We hold that it does.

I

Beginning in 1972, respondent Mario Echazabal worked for independent contractors at an oil refinery owned by petitioner Chevron U. S. A. Inc. Twice he applied for a job directly with Chevron, which offered to hire him if he could pass the company's physical examination. See 42 U. S. C. § 12112(d)(3) (1994 ed.). Each time, the exam showed liver abnormality or damage, the cause eventually being identified as Hepatitis C, which Chevron's doctors said would be aggravated by continued exposure to toxins at Chevron's refinery. In each instance, the company withdrew the offer, and the second time it asked the contractor employing Echazabal either to reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. The contractor laid him off in early 1996.

Echazabal filed suit, ultimately removed to federal court, claiming, among other things, that Chevron violated the Americans with Disabilities Act (ADA or Act) in refusing to

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[1] We do not consider the further issue passed upon by the Ninth Circuit, which held that the respondent is a "'qualified individual'" who "can perform the essential functions of the employment position," 42 U. S. C. § 12111(8) (1994 ed.). 226 F. 3d 1063, 1072 (2000). That issue will only resurface if the Circuit concludes that the decision of respondent's employer to exclude him was not based on the sort of individualized medical enquiry required by the regulation, an issue on which the District Court granted summary judgment for petitioner and which we leave to the Ninth Circuit for initial appellate consideration if warranted.

hire him, or even to let him continue working in the plant, because of a disability, his liver condition.[2] Chevron defended under a regulation of the Equal Employment Opportunity Commission (EEOC) permitting the defense that a worker's disability on the job would pose a "direct threat" to his health, see 29 CFR § 1630.15(b)(2) (2001). Although two medical witnesses disputed Chevron's judgment that Echazabal's liver function was impaired and subject to further damage under the job conditions in the refinery, the District Court granted summary judgment for Chevron. It held that Echazabal raised no genuine issue of material fact as to whether the company acted reasonably in relying on its own doctors' medical advice, regardless of its accuracy.

On appeal, the Ninth Circuit asked for briefs on a threshold question not raised before, whether the EEOC's regulation recognizing a threat-to-self defense, *ibid.*, exceeded the scope of permissible rulemaking under the ADA. 226 F. 3d 1063, 1066, n. 3 (2000). The Circuit held that it did and reversed the summary judgment. The court rested its position on the text of the ADA itself in explicitly recognizing an employer's right to adopt an employment qualification barring anyone whose disability would place others in the workplace at risk, while saying nothing about threats to the disabled employee himself. The majority opinion reasoned that "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the [direct threat] defense," *id.*, at 1066–1067, and it indicated that any such regulation would unreasonably conflict with congressional policy against paternalism in the workplace, *id.*, at 1067–1070. The court went on to reject Chevron's further argument that Echaza-

[2] Chevron did not dispute for purposes of its summary-judgment motion that Echazabal is "disabled" under the ADA, and Echazabal did not argue that Chevron could have made a "'reasonable accommodation.'" App. 184, n. 6.

bal was not "'otherwise qualified'" to perform the job, holding that the ability to perform a job without risk to one's health or safety is not an "'essential function'" of the job. *Id.*, at 1070.

The decision conflicted with one from the Eleventh Circuit, *Moses* v. *American Nonwovens, Inc.*, 97 F. 3d 446, 447 (1996), and raised tension with the Seventh Circuit case of *Koshinski* v. *Decatur Foundry, Inc.*, 177 F. 3d 599, 603 (1999). We granted certiorari, 534 U. S. 991 (2001), and now reverse.

II

Section 102 of the ADA, 104 Stat. 328, 42 U. S. C. § 12101 *et seq.*, prohibits "discriminat[ion] against a qualified individual with a disability because of the disability . . . in regard to" a number of actions by an employer, including "hiring." 42 U. S. C. § 12112(a). The statutory definition of "discriminat[ion]" covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as "using qualification standards . . . that screen out or tend to screen out an individual with a disability." § 12112(b)(6). By that same definition, *ibid.*, as well as by separate provision, § 12113(a), the Act creates an affirmative defense for action under a qualification standard "shown to be job-related for the position in question and . . . consistent with business necessity." Such a standard may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," § 12113(b), if the individual cannot perform the job safely with reasonable accommodation, § 12113(a). By regulation, the EEOC carries the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well: "The term 'qualification standard' may include a requirement that an individual shall not pose

a direct threat to the health or safety of the individual or others in the workplace." 29 CFR § 1630.15(b)(2) (2001).

Chevron relies on the regulation here, since it says a job in the refinery would pose a "direct threat" to Echazabal's health. In seeking deference to the agency, it argues that nothing in the statute unambiguously precludes such a defense, while the regulation was adopted under authority explicitly delegated by Congress, 42 U. S. C. § 12116, and after notice-and-comment rulemaking. See *United States* v. *Mead Corp.*, 533 U. S. 218, 227 (2001); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984). Echazabal, on the contrary, argues that as a matter of law the statute precludes the regulation, which he claims would be an unreasonable interpretation even if the agency had leeway to go beyond the literal text.

A

As for the textual bar to any agency action as a matter of law, Echazabal says that Chevron loses on the threshold question whether the statute leaves a gap for the EEOC to fill. See *id.*, at 843–844. Echazabal recognizes the generality of the language providing for a defense when a plaintiff is screened out by "qualification standards" that are "job-related and consistent with business necessity" (and reasonable accommodation would not cure the difficulty posed by employment). 42 U. S. C. § 12113(a). Without more, those provisions would allow an employer to turn away someone whose work would pose a serious risk to himself. That possibility is said to be eliminated, however, by the further specification that "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." § 12113(b); see also § 12111(3) (defining "direct threat" in terms of risk to others). Echazabal contrasts this provision with an EEOC regulation under the Rehabilitation Act of 1973, 87 Stat. 357, as amended, 29 U. S. C. § 701 *et seq.*, ante-

dating the ADA, which recognized an employer's right to consider threats both to other workers and to the threatening employee himself. Because the ADA defense provision recognizes threats only if they extend to another, Echazabal reads the statute to imply as a matter of law that threats to the worker himself cannot count.

The argument follows the reliance of the Ninth Circuit majority on the interpretive canon, *expressio unius est exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned." *United States* v. *Vonn*, 535 U. S. 55, 65 (2002). The rule is fine when it applies, but this case joins some others in showing when it does not. See, *e. g., ibid.; United Dominion Industries, Inc.* v. *United States*, 532 U. S. 822, 836 (2001); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 703 (1991).

The first strike against the expression-exclusion rule here is right in the text that Echazabal quotes. Congress included the harm-to-others provision as an example of legitimate qualifications that are "job-related and consistent with business necessity." These are spacious defensive categories, which seem to give an agency (or in the absence of agency action, a court) a good deal of discretion in setting the limits of permissible qualification standards. That discretion is confirmed, if not magnified, by the provision that "qualification standards" falling within the limits of job relation and business necessity "may include" a veto on those who would directly threaten others in the workplace. Far from supporting Echazabal's position, the expansive phrasing of "may include" points directly away from the sort of exclusive specification he claims. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 169 (1977); *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 100 (1941).[3]

[3] In saying that the expansive textual phrases point in the direction of agency leeway we do not mean that the defense provisions place no limit on agency rulemaking. Without deciding whether all safety-related qualification standards must satisfy the ADA's direct-threat standard, see *Al-*

Just as statutory language suggesting exclusiveness is missing, so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. E. Crawford, Construction of Statutes 337 (1940) (*expressio unius* "'properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference'" (quoting *State ex rel. Curtis* v. *De Corps*, 134 Ohio St. 295, 299, 16 N. E. 2d 459, 462 (1938))); *United States* v. *Vonn, supra.*

Strike two in this case is the failure to identify any such established series, including both threats to others and threats to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope. The closest Echazabal comes is the EEOC's rule interpreting the Rehabilitation Act of 1973, 87 Stat. 357, as amended, 29 U. S. C. § 701 *et seq.*, a precursor of the ADA. That statute excepts from the definition of a protected "qualified individual with a handicap" anyone who would pose a "direct threat to the health or safety of other individuals," but, like the later ADA, the Rehabilitation

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bertson's, Inc. v. *Kirkingburg*, 527 U. S. 555, 569–570, n. 15 (1999), we assume that some such regulations are implicitly precluded by the Act's specification of a direct-threat defense, such as those allowing "indirect" threats of "insignificant" harm. This is so because the definitional and defense provisions describing the defense in terms of "direct" threats of "significant" harm, 42 U. S. C. §§ 12113(b), 12111(3), are obviously intended to forbid qualifications that screen out by reference to general categories pretextually applied. See *infra*, at 85–86, and n. 5. Recognizing the "indirect" and "insignificant" would simply reopen the door to pretext by way of defense.

Act says nothing about threats to self that particular employment might pose. 42 U. S. C. § 12113(b). The EEOC nonetheless extended the exception to cover threat-to-self employment, 29 CFR § 1613.702(f) (1990), and Echazabal argues that Congress's adoption only of the threat-to-others exception in the ADA must have been a deliberate omission of the Rehabilitation Act regulation's tandem term of threat-to-self, with intent to exclude it.

But two reasons stand in the way of treating the omission as an unequivocal implication of congressional intent. The first is that the EEOC was not the only agency interpreting the Rehabilitation Act, with the consequence that its regulation did not establish a clear, standard pairing of threats to self and others. While the EEOC did amplify upon the text of the Rehabilitation Act exclusion by recognizing threats to self along with threats to others, three other agencies adopting regulations under the Rehabilitation Act did not. See 28 CFR § 42.540(*l*)(1) (1990) (Department of Justice), 29 CFR § 32.3 (1990) (Department of Labor), and 45 CFR § 84.3(k)(1) (1990) (Department of Health and Human Services).[4] It would be a stretch, then, to say that there was a standard usage, with its source in agency practice or elsewhere, that connected threats to others so closely to threats to self that leaving out one was like ignoring a twin.

Even if we put aside this variety of administrative experience, however, and look no further than the EEOC's Rehabil-

[4] In fact, we have said that the regulations issued by the Department of Health and Human Services, which had previously been the regulations of the Department of Health, Education, and Welfare, are of "particular significance" in interpreting the Rehabilitation Act because "HEW was the agency responsible for coordinating the implementation and enforcement of § 504 of the Rehabilitation Act, 29 U. S. C. § 794," prohibiting discrimination against individuals with disabilities by recipients of federal funds. *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U. S. 184, 195 (2002). Unfortunately for Echazabal's argument, the congruence of the ADA with the HEW regulations does not produce an unequivocal statement of congressional intent.

itation Act regulation pairing self and others, the congressional choice to speak only of threats to others would still be equivocal. Consider what the ADA reference to threats to others might have meant on somewhat different facts. If the Rehabilitation Act had spoken only of "threats to health" and the EEOC regulation had read that to mean threats to self or others, a congressional choice to be more specific in the ADA by listing threats to others but not threats to self would have carried a message. The most probable reading would have been that Congress understood what a failure to specify could lead to and had made a choice to limit the possibilities. The statutory basis for any agency rulemaking under the ADA would have been different from its basis under the Rehabilitation Act and would have indicated a difference in the agency's rulemaking discretion. But these are not the circumstances here. Instead of making the ADA different from the Rehabilitation Act on the point at issue, Congress used identical language, knowing full well what the EEOC had made of that language under the earlier statute. Did Congress mean to imply that the agency had been wrong in reading the earlier language to allow it to recognize threats to self, or did Congress just assume that the agency was free to do under the ADA what it had already done under the earlier Act's identical language? There is no way to tell. Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible.

There is even a third strike against applying the expression-exclusion rule here. It is simply that there is no apparent stopping point to the argument that by specifying a threat-to-others defense Congress intended a negative implication about those whose safety could be considered. When Congress specified threats to others in the workplace, for example, could it possibly have meant that an employer could not defend a refusal to hire when a worker's disability

would threaten others outside the workplace? If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away? See 42 U. S. C. § 12113(d). *Expressio unius* just fails to work here.

B

Since Congress has not spoken exhaustively on threats to a worker's own health, the agency regulation can claim adherence under the rule in *Chevron*, 467 U. S., at 843, so long as it makes sense of the statutory defense for qualification standards that are "job-related and consistent with business necessity." 42 U. S. C. § 12113(a). Chevron's reasons for calling the regulation reasonable are unsurprising: moral concerns aside, it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U. S. C. § 651 *et seq.* Although Echazabal claims that none of these reasons is legitimate, focusing on the concern with OSHA will be enough to show that the regulation is entitled to survive.

Echazabal points out that there is no known instance of OSHA enforcement, or even threatened enforcement, against an employer who relied on the ADA to hire a worker willing to accept a risk to himself from his disability on the job. In Echazabal's mind, this shows that invoking OSHA policy and possible OSHA liability is just a red herring to excuse covert discrimination. But there is another side to this. The text of OSHA itself says its point is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," § 651(b), and Congress specifically obligated an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," § 654(a)(1). Although there may be an open question

whether an employer would actually be liable under OSHA for hiring an individual who knowingly consented to the particular dangers the job would pose to him, see Brief for United States et al. as *Amici Curiae* 19, n. 7, there is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of "each" and "every" worker. Courts would, of course, resolve the tension if there were no agency action, but the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U. S. C. § 12113(a).

Nor can the EEOC's resolution be fairly called unreasonable as allowing the kind of workplace paternalism the ADA was meant to outlaw. It is true that Congress had paternalism in its sights when it passed the ADA, see § 12101(a)(5) (recognizing "overprotective rules and policies" as a form of discrimination). But the EEOC has taken this to mean that Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes.[5] Its regu-

[5] Echazabal's contention that the Act's legislative history is to the contrary is unpersuasive. Although some of the comments within the legislative history decry paternalism in general terms, see, *e. g.*, H. R. Rep. No. 101–485, pt. 2, p. 72 (1990) ("It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant"); ADA Conf. Rep., 136 Cong. Rec. 17377 (1990) (statement of Sen. Kennedy) ("[A]n employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed"), those comments that elaborate actually express the more pointed concern that such justifications are usually pretextual,

lation disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face. The direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR § 1630.2(r) (2001). The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job.[6]

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rooted in generalities and misperceptions about disabilities. See, *e. g.*, H. R. Rep. No. 101–485, at 74 ("Generalized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability"); S. Rep. No. 101–116, p. 28 (1989) ("It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant . . . . By definition, such fears are based on averages and group-based predictions. This legislation requires individualized assessments").

Similarly, Echazabal points to several of our decisions expressing concern under Title VII, which like the ADA allows employers to defend otherwise discriminatory practices that are "consistent with business necessity," 42 U. S. C. § 2000e–2(k), with employers adopting rules that exclude women from jobs that are seen as too risky. See, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 335 (1977); *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187, 202 (1991). Those cases, however, are beside the point, as they, like Title VII generally, were concerned with paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments.

[6] Respect for this distinction does not entail the requirement, as Echazabal claims, that qualification standards be "neutral," stating what the job requires, as distinct from a worker's disqualifying characteristics. Brief for Respondent 26. It is just as much business necessity for skyscraper

Finally, our conclusions that some regulation is permissible and this one is reasonable are not open to Echazabal's objection that they reduce the direct threat provision to "surplusage," see *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 698 (1995). The mere fact that a threat-to-self defense reasonably falls within the general "job related" and "business necessity" standard does not mean that Congress accomplished nothing with its explicit provision for a defense based on threats to others. The provision made a conclusion clear that might otherwise have been fought over in litigation or administrative rulemaking. It did not lack a job to do merely because the EEOC might have adopted the same rule later in applying the general defense provisions, nor was its job any less responsible simply because the agency was left with the option to go a step further. A provision can be useful even without congressional attention being indispensable.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

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contractors to have steelworkers without vertigo as to have well-balanced ones. See 226 F. 3d, at 1074 (Trott, J., dissenting). Reasonableness does not turn on formalism. We have no occasion, however, to try to describe how acutely an employee must exhibit a disqualifying condition before an employer may exclude him from the class of the generally qualified. See Brief for Respondent 31. This is a job for the trial courts in the first instance.

Syllabus

JPMORGAN CHASE BANK *v.* TRAFFIC STREAM (BVI) INFRASTRUCTURE LTD.

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

No. 01–651. Argued April 17, 2002—Decided June 10, 2002

Respondent Traffic Stream (BVI) Infrastructure Ltd. is a corporation organized under the laws of the British Virgin Islands (BVI), an Overseas Territory of the United Kingdom. In 1998, petitioner, then known as Chase Manhattan Bank, agreed to finance some Traffic Stream ventures, with the contract to be governed by New York law and with Traffic Stream agreeing to submit to the jurisdiction of federal courts in Manhattan. Chase subsequently sued Traffic Stream for defaulting on its obligations. The District Court for the Southern District of New York found subject-matter jurisdiction under the alienage diversity statute, 28 U. S. C. § 1332(a)(2)—which gives district courts jurisdiction over civil actions where the controversy, *inter alia*, is "between citizens of a State and citizens or subjects of a foreign state"—and granted Chase summary judgment. In reversing, the Second Circuit found that, because Traffic Stream was a citizen of an Overseas Territory and not an independent foreign state, jurisdiction was lacking.

Held: A corporation organized under the laws of the BVI is a "citize[n] or subjec[t] of a foreign state" for the purposes of alienage diversity jurisdiction. Pp. 91–100.

(a) A corporation of a foreign state is deemed that state's subject for jurisdiction purposes. *Steamship Co.* v. *Tugman*, 106 U. S. 118, 121. Although Traffic Stream was organized under BVI law and the BVI is unrecognized by the United States Executive Branch as an independent foreign state, this Court has never held that the requisite status as citizen or subject must be held directly from a formally recognized state, as distinct from that state's legal dependency; and any such distinction would be entirely beside the point of the alienage jurisdiction statute. Pp. 91–92.

(b) The BVI Constitution was established by the Crown of the United Kingdom. The United Kingdom exercises pervasive authority over the BVI, *e. g.*, the Queen may annul any BVI statute and make laws for the BVI. The Crown's representatives have imposed laws and international obligations on the BVI. In a practical sense, then, the statutes permitting incorporation in the BVI are enacted in the exercise of the United Kingdom's political authority, and it seems fair to regard a BVI

company as a citizen or subject of this ultimate political authority. Pp. 92–94.

(c) Whether, as the Second Circuit posits, the relationship between the United Kingdom and its territories is too attenuated for that state to be viewed as a governing authority for § 1332(a)(2) purposes depends upon the statute's objective. The state courts' penchant before and after the Revolution to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution. The First Congress granted federal courts such jurisdiction, and the statute was amended in 1875 to track Article III's language. The similarity of § 1332(a)(2) to Article III thus bespeaks a shared purpose. The relationship between the BVI's powers over corporations and the sources of those powers in Crown and Parliament places the United Kingdom well within the range of concern that Article III and § 1332(a)(2) address. It exercises ultimate authority over the BVI's statutory law and responsibility for the BVI's external relations. Pp. 94–97.

(d) Two flaws defeat Traffic Stream's alternative argument that, because the United Kingdom does not recognize BVI residents as citizens or subjects, and because corporations are legally nothing more than a collection of shareholders residing in the corporation's jurisdiction, Traffic Stream is not a citizen or subject under the alienage diversity statute. First, its outdated notion that corporate citizenship derives from natural persons has long since been replaced by the conception of corporations as independent legal entities. Second, it fails to recognize that jurisdictional analysis under United States law is not governed by United Kingdom law. Traffic Stream's status under United Kingdom law does not disqualify it from being a citizen or subject under the domestic statute at issue. Section 1332(a)(2) has no room for the suggestion that members of a polity, under a sovereign's authority, do not qualify as "subjects" merely because they enjoy fewer rights than other members do. Because Traffic Stream concedes that BVI citizens are "nationals" of the United Kingdom, it is immaterial that United Kingdom law may provide different rights of abode for individuals in the territories. Pp. 97–99.

251 F. 3d 334, reversed.

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

Sarah L. Reid argued the cause for petitioner. With her on the briefs were *Joseph N. Froehlich* and *Edward H. Tillinghast III.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Michael Jay Singer*, *Wendy M. Keats*, *William Howard Taft IV*, *James G. Hergen*, and *John P. Schnitker*.

Craig J. Albert argued the cause for respondent. With him on the brief was *Lauren K. Kluger*.*

JUSTICE SOUTER delivered the opinion of the Court.

The question here is whether a corporation organized under the laws of the British Virgin Islands is a "citize[n] or subjec[t] of a foreign state" for the purposes of alienage diversity jurisdiction, 28 U. S. C. § 1332(a)(2). We hold that it is.

I

Respondent Traffic Stream (BVI) Infrastructure Ltd. is a corporation organized under the laws of the British Virgin Islands (BVI), an Overseas Territory of the United Kingdom.[1] In 1998, petitioner Chase Manhattan Bank, now JPMorgan Chase Bank, agreed to finance some ventures Traffic Stream had organized to construct and operate toll roads in China, with the parties' contract to "be governed by and construed in accordance with the laws of the State of New York," App. 85a. Traffic Stream agreed to "submi[t] to the jurisdiction" of federal courts in Manhattan, and to "waiv[e] any immunity from [their] jurisdiction." *Ibid.*

**Mark N. Bravin* and *Peter Buscemi* filed a brief for the Government of the United Kingdom of Great Britain and Northern Ireland as *amicus curiae* urging reversal.

[1] In 1998, the Government of the United Kingdom announced that its "'Dependent Territories'" would, from that point on, be known as "'Overseas Territories.'" Apparently the change of name implied nothing more. Lodging, Amended Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in No. 99–10385 (CA5), p. 7, n. 2 (available in Clerk of Court's case file).

Chase subsequently charged Traffic Stream with defaulting on its obligations. It sued in the United States District Court for the Southern District of New York, which found subject-matter jurisdiction under the alienage diversity statute, 28 U. S. C. § 1332(a)(2), and granted summary judgment to Chase. When Traffic Stream appealed, the United States Court of Appeals for the Second Circuit *sua sponte* raised the question whether Traffic Stream was a citizen or subject of a foreign state for the purposes of alienage diversity jurisdiction. The court relied on its precedent in *Matimak Trading Co.* v. *Khalily*, 118 F. 3d 76 (1997), in answering that because Traffic Stream was a citizen of an Overseas Territory and not an independent foreign state, jurisdiction was lacking. 251 F. 3d 334, 337 (2001). The judgment of the District Court was reversed, and the case ordered to be remanded with instructions to dismiss the complaint. *Ibid.* Chase was denied rehearing en banc.

Because the Second Circuit's decision conflicts with those of other Circuits, see *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F. 3d 410, 413 (CA3 1999); *Koehler* v. *Dodwell*, 152 F. 3d 304, 308 (CA4 1998); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F. 2d 1239, 1242–1243 (CA7 1990), and implicates serious issues of foreign relations, we granted certiorari, 534 U. S. 1074 (2001). We now reverse.

II

Title 28 U. S. C. § 1332(a)(2) provides district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of a State and citizens or subjects of a foreign state." A "corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." *Steamship Co.* v. *Tugman*, 106 U. S. 118, 121 (1882). Cf. Restatement (Third) of Foreign Relations Law of the United States § 213 (1986) ("For purposes of international

law, a corporation has the nationality of the state under the laws of which the corporation is organized"). In spite of this general rule of corporate citizenship, this case presents two issues about the application of the statute to Traffic Stream: whether Traffic Stream has been incorporated under the laws of a "foreign state" given the BVI's status as an Overseas Territory, and whether the BVI's corporate citizens are "citizens or subjects" within the meaning of § 1332(a)(2).

A

The argument that the status of the BVI renders the statute inapplicable begins by assuming that Traffic Stream, organized under BVI law, must be a citizen or subject of the BVI alone. Since the BVI is a British Overseas Territory, unrecognized by the United States Executive Branch as an independent foreign state, it is supposed to follow that for purposes of alienage jurisdiction Traffic Stream is not a citizen or subject of a "foreign state" within the meaning of § 1332(a)(2).

Even on the assumption, however, that a foreign state must be diplomatically recognized by our own Government to qualify as such under the jurisdictional statute (an issue we need not decide here), we have never held that the requisite status as citizen or subject must be held directly from a formally recognized state, as distinct from such a state's legal dependency. On the contrary, a consideration of the relationships of the BVI and the recognized state of the United Kingdom convinces us that any such distinction would be entirely beside the point of the statute providing alienage jurisdiction.

1

The current BVI Constitution was established when the Crown of the United Kingdom, in the exercise of power granted by the West Indies Act, 1962, c. 19, § 5(1), issued the Virgin Islands (Constitution) Order 1976, SI 1976/2145. Under that order, the United Kingdom exercises pervasive

authority over the territory. The Constitution provides, for example, that the BVI Government shall include a Governor and Deputy Governor appointed by the Queen to "hold office during Her Majesty's pleasure," *id.*, pt. II, § 3(1), an Executive Council mainly appointed by the Governor on the basis of the popular election for the Legislative Council, §§ 14–15, and a Legislature comprising the Queen and a Legislative Council of mainly popularly elected representatives, §§ 25–26.

Bills take effect as laws only when approved by the royally appointed Governor or by the Queen acting through a Secretary of State, § 42. The Governor is instructed to withhold assent from any bill that may conflict with the laws of the United Kingdom or is "likely to prejudice the Royal prerogative." § 42(2)(b). The Queen, acting through a Secretary of State, has authority to annul any BVI statute, § 43(1), and "[t]here is reserved to Her Majesty full power to make laws for the peace, order and good government of the Virgin Islands," § 71. "[I]f the Legislative Council fails to pass . . . a Bill or motion . . . the Governor may, at any time that he thinks fit, . . . declare that such Bill or motion shall have effect as if it had been passed . . . ." § 44.

The Crown's representatives have not slept on their powers, which have recently been exercised to impose laws and international obligations upon the territory, as in the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, and the Merchant Shipping (Salvage Convention) (Overseas Territories) Order 1997, the latter of which brought the BVI into compliance with the International Convention on Salvage, 1989. In a very practical sense, then, the statutes that permit incorporation in the BVI, see BVI Companies Act (CAP. 285); BVI International Business Companies Act (CAP. 291), are laws enacted in the exercise of the political authority of the United Kingdom, and it seems fair to regard a BVI company as a citizen or subject of this ultimate political authority. This view of the relationship

seems especially reasonable when such a corporation is engaged in an international transaction, since the United Kingdom acts on the BVI's behalf in the international arena. See 6 Halsbury, Laws of England ¶ 983, p. 471 (4th ed. 1991) ("Her Majesty's government in the United Kingdom is internationally responsible for the external affairs of United Kingdom dependent territories"); see also United Nations Act, 1946, c. 45 (empowering the Crown to bring "His Majesty's dominions" into compliance with directives of the United Nations Security Council).

2

The Second Circuit nonetheless takes the position that the relationship between the United Kingdom and its territories is "too attenuated" for the United Kingdom to be viewed as a governing authority for purposes of the relationship assumed by § 1332(a)(2). *Matimak Trading Co.*, 118 F. 3d, at 86. This, of course, depends upon the statute's objective.

Both during and after the Revolution, state courts were notoriously frosty to British creditors trying to collect debts from American citizens, and state legislatures went so far as to hobble British debt collection by statute, despite the specific provision of the 1783 Treaty of Paris that creditors in the courts of either country would "meet with no lawful impediment" to debt collection. Definitive Treaty of Peace, United States-Great Britain, Art. IV, 8 Stat. 82. See Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L. J. 1421, 1438–1449. Ultimately, the States' refusal to honor the treaty became serious enough to prompt protests by the British Secretary of State, particularly when irked by American demands for treaty compliance on the British side. See 31 Journals of the Continental Congress, 1774–1789, pp. 781–784 (J. Fitzpatrick ed. 1934).

This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Con-

stitution. See U. S. Const., Art. III, § 2 (federal jurisdiction "extend[s] to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"). "[T]he proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary." Holt, *supra*, at 1473. This is how James Wilson put it during the debates at the Pennsylvania ratification convention:

> "Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince . . . of the injustice that has been done him. . . . Bound by inclination, as well as duty, to redress the wrong his subject sustains . . . [h]e must therefore apply to the United States; the United States must be accountable. 'My subject has received a flagrant injury: do me justice, or I will do myself justice.' If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it? They ought; and this is what is done here. For now, if complaint is made in consequence of such injustice, Congress can answer, 'Why did not your subject apply to the General Court . . . ?'" 2 Debates on the Federal Constitution 493 (J. Elliot ed. 1876) (hereinafter Elliot's Debates).

Wilson emphasized that in order to "extend our manufactures and our commerce" there would need to be a "proper security . . . provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government." *Id.*, at 492. His concerns were echoed by James Madison: "We well know, sir, that foreigners cannot get justice done

them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 *id.*, at 583. Madison also remarked that alienage jurisdiction was necessary to "avoid controversies with foreign powers" so that a single State's courts would not "drag the whole community into war." *Id.*, at 534; see also The Federalist No. 80, p. 536 (J. Cooke ed. 1961) (A. Hamilton) ("[A]n unjust sentence against a foreigner [may] be an aggression upon his sovereign" rendering alienage jurisdiction "essential to . . . the security of the public tranquility").

Thus, the First Congress granted federal courts the alienage jurisdiction authorized in the Constitution, even while general federal-question jurisdiction was withheld. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (providing for jurisdiction where "an alien is a party" and more than $500 in controversy). The language of the statute was amended in 1875 to track Article III by replacing the word "aliens" with "citizens, or subjects," Act of Mar. 3, 1875, 18 Stat. 470, the phrase that remains today. Although there is no need here to decide whether the current drafting provides jurisdiction up to the constitutional hilt, cf. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454 (1894) (despite similar language, federal-question jurisdiction under 28 U. S. C. § 1331 does not extend as far as Article III), there is no doubt that the similarity of § 1332(a)(2) to Article III bespeaks a shared purpose.

The relationship between the BVI's powers over corporations and the sources of those powers in Crown and Parliament places the United Kingdom well within the range of concern addressed by Article III and § 1332(a)(2). The United Kingdom exercises ultimate authority over the BVI's statutory law, including its corporate law and the law of corporate charter, and it exercises responsibility for the BVI's external relations. These exercises of power and responsibility point to just the kind of relationship that the Framers believed would bind sovereigns "by inclination, as well as duty, to redress the wrong[s]" against their nationals, 2 El-

liot's Debates 493 (J. Wilson). See J. Jones, British Nationality Law and Practice 288 (1947) ("It is the practice of His Majesty's Government in the United Kingdom to protect, as against foreign Powers, . . . [c]orporations owing their existence to the law in force in the United Kingdom and colonies"). Any doubters may consult the United Kingdom's own filings in this matter and others comparable, which express apprehension that expulsion of corporations like Traffic Stream from federal courts would cloud investment opportunity and raise the sort of threat to "the security of the public tranquility" that the Framers hoped to avoid. See, *e. g.*, Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae;* Diplomatic Note No. 13/2000 from British Embassy in Washington, D. C., to U. S. State Dept., Feb. 2, 2000, Lodging 29, p. 1 (available in Clerk of Court's case file); Diplomatic Note No. 90/2001 from the British Embassy in Washington, D. C., to the U. S. State Dept., Oct. 5, 2002, App. to Motion to File Brief as *Amicus Curiae* for Government of United Kingdom of Great Britain and Northern Ireland 1a.

B

Traffic Stream's alternative argument is that BVI corporations are not "citizens or subjects" of the United Kingdom. Traffic Stream begins with the old fiction that a corporation is just an association of shareholders, presumed to reside in the place of incorporation, see, *e. g.*, *Tugman*, 106 U. S., at 120–121, with the result that, for jurisdictional purposes, a suit against the corporation should be understood as a suit against the shareholders, see *id.*, at 121. Traffic Stream proceeds to read the British Nationality Act, 1981, as a declaration by the United Kingdom that BVI residents are not its citizens or subjects, but mere "nationals," without the rights and privileges of citizens or subjects, such as the right to travel freely within the United Kingdom. See I. Macdonald & N. Blake, Macdonald's Immigration Law and Practice in the United Kingdom 130–131 (4th ed. 1995) (describing

categories of United Kingdom citizenship).[2] Traffic Stream insists that because it is legally nothing more than a collection of noncitizen individuals, the corporation itself cannot be treated as deserving of access to the courts of the United States under a statute that opens them to foreign citizens and subjects.

The less important flaw in the argument is its reliance on the outdated legal construct of corporations as collections of shareholders linked by contract, see M. Horwitz, The Transformation of American Law 1870–1960, pp. 69–93 (1992), a view long since replaced by the conception of corporations as independent legal entities, see *id.*, at 93–107.[3] Thus, Traffic Stream's whole notion of corporate citizenship derived from natural persons is irrelevant to jurisdictional enquiry in the United States today.

But the argument's more significant weakness is its failure to recognize that jurisdictional analysis under the law of the United States is not ultimately governed by the law of the United Kingdom, whatever that may be. While it is perfectly true that "every independent nation [has the inherent right] to determine for itself . . . what classes of persons shall be entitled to its citizenship," *United States* v. *Wong Kim Ark*, 169 U. S. 649, 668 (1898), our jurisdictional concern here is with the meaning of "citizen" and "subject" as those

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[2] Ironically, in passing the British Nationality Act, 1981, c. 61, § 36, the United Kingdom identified one goal as "reducing statelessness."

[3] Indeed, Congress itself rejected the earlier rule in 1958 when it provided that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U. S. C. § 1332(c)(1). There has been raised some question as to whether § 1332(c) applies to foreign, as well as domestic, corporations, although those Circuits that have reached the issue are in agreement that § 1332(c) extends to alien corporations. See *Danjaq, S. A.* v. *Pathe Communications Corp.*, 979 F. 2d 772, 773–774 (CA9 1992); *Vareka Investment, N. V.* v. *American Investment Properties, Inc.*, 724 F. 2d 907, 909 (CA11 1984); *Jerguson* v. *Blue Dot Investment, Inc.*, 659 F. 2d 31, 35 (CA5 1981). There is no need for us to weigh in on this point.

terms are used in § 1332(a)(2). In fact, we have no need even to decide whether Traffic Stream's reading of the British Nationality Act is wrong, as the United Kingdom says it is,[4] but only whether the status Traffic Stream claims under the Nationality Act would so operate on the law of the United States as to disqualify it from being a citizen or subject under the domestic statute before us here. We think there is nothing disqualifying.

Although the word "citizen" may imply (and in 1789 and 1875 may have implied) the enjoyment of certain basic rights and privileges, see Black's Law Dictionary 237 (7th ed. 1999) (defining "citizen" as "entitled to enjoy all its civil rights and protections" of a community), a "subject" is merely "[o]ne who owes allegiance to a sovereign and is governed by that sovereign's laws," *id.*, at 1438. Thus, contrary to Traffic Stream's view, the text of § 1332(a)(2) has no room for the suggestion that members of a polity, under the authority of a sovereign, fail to qualify as "subjects" merely because they enjoy fewer rights than other members do. For good or ill, many societies afford greater rights to some of its members than others without any suggestion that the less favored ones have ceased to be "citizens or subjects." And although some persons, like resident aliens, may live within a foreign state without being treated under American law as members of that particular polity, cf. *Wong Kim Ark*, *supra*, at 660 ("'children . . . born in a place . . . then occupied . . . by conquest, are still aliens'"), Traffic Stream concedes that BVI citizens are at least "nationals" of the United Kingdom. See Brief for Respondent 25. Given the object of the alienage statute, as explained earlier, there is no serious question that "nationals" were meant to be amenable to the jurisdiction of the federal courts, leaving it immaterial for our purposes that the law of the United Kingdom may provide different rights of abode for individuals in the territories.

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[4] See Brief for Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 12–13.

III

Because our opinion accords with the positions taken by the Governments of the United Kingdom, the BVI, and the United States, the case presents no issue of deference that may be due to the various interested governments. It is enough to hold that the United Kingdom's retention and exercise of authority over the BVI renders BVI citizens, both natural and juridic, "citizens or subjects" of the United Kingdom under 28 U. S. C. § 1332(a). We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

Syllabus

NATIONAL RAILROAD PASSENGER CORPORATION *v.* MORGAN

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

No. 00–1614. Argued January 9, 2002—Decided June 10, 2002

Under Title VII of the Civil Rights Act of 1964, a plaintiff "shall" file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days after an "alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5(e)(1). Respondent Morgan, a black male, filed a charge of discrimination and retaliation with the EEOC against petitioner National Railroad Passenger Corporation (Amtrak), and cross-filed with the California Department of Fair Employment and Housing. He alleged that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. The EEOC issued a "Notice of Right to Sue," and Morgan filed this lawsuit. While some of the allegedly discriminatory acts occurred within 300 days of the time that Morgan filed his EEOC charge, many took place prior to that time period. The District Court granted Amtrak summary judgment in part, holding that the company could not be liable for conduct occurring outside of the 300-day filing period. The Ninth Circuit reversed, holding that a plaintiff may sue on claims that would ordinarily be time barred so long as they either are "sufficiently related" to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the period.

Held: A Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period; in neither instance is a court precluded from applying equitable doctrines that may toll or limit the time period. Pp. 108–122.

(a) Strict adherence to Title VII's timely filing requirements is the best guarantee of evenhanded administration of the law. *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826. In a State having an entity authorized to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice;

in all other States, the charge must be filed within 180 days. § 2000e–5(e)(1). The operative statutory terms of § 2000e–5(e)(1), the charge filing provision, are "shall," "after . . . occurred," and "unlawful employment practice." "[S]hall" makes the act of filing a charge within the specified time period mandatory. "[O]ccurred" means that the practice took place or happened in the past. The requirement, therefore, that the charge be filed "after" the practice "occurred" means that a litigant has up to 180 or 300 days *after* the unlawful practice happened to file with the EEOC. The critical questions for both discrete discriminatory acts and hostile work environment claims are: What constitutes an "unlawful employment practice" and when has that practice "occurred"? The answer varies with the practice. Pp. 108–110.

(b) A party must file a charge within either 180 or 300 days of the date that a discrete retaliatory or discriminatory act "occurred" or lose the ability to recover for it. Morgan asserts that the term "practice" provides a statutory basis for the Ninth Circuit's continuing violation doctrine because it connotes an ongoing violation that can endure or recur over a period of time. This argument is unavailing, however, given that § 2000e–2 explains in great detail the sorts of actions that qualify as "[u]nlawful employment practices," including among them numerous discrete acts, without indicating in any way that the term "practice" converts related discrete acts into a single unlawful practice for timely filing purposes. And the Court has repeatedly interpreted the term "practice" to apply to a discrete act of single "occurence," even where it has a connection to other acts. Several principles may be derived from *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 234–235; *United Air Lines, Inc.* v. *Evans,* 431 U. S. 553, 558; and *Delaware State College* v. *Ricks,* 449 U. S. 250, 257. First, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Because each discrete act starts a new clock for filing charges alleging that act, the charge must be filed within the 180- or 300-day period after the act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence to support a timely claim. In addition, the time period for filing a charge remains subject to application of equitable doctrines such as waiver, estoppel, and tolling. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date he was hired through the date he was fired, only those acts that occurred within the applicable 300-day filing period are actionable.

All prior discrete discriminatory acts are untimely filed and no longer actionable. Pp. 110–115.

(c) Hostile work environment claims are different in kind from discrete acts. Because their very nature involves repeated conduct, the "unlawful employment practice," § 2000e–5(e)(1), cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21. Determining whether an actionable hostile environment claim exists requires an examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.*, at 23. The question whether a court may, for purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, turns on the statutory requirement that a charge be filed within a certain number of days "after the alleged unlawful employment practice occurred." Because such a claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice," it does not matter that some of the component acts fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for the purposes of determining liability. That act need not be the last act. Subsequent events may still be part of the one claim, and a charge may be filed at a later date and still encompass the whole. Therefore, a court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period. To support his hostile environment claim, Morgan presented evidence that managers made racial jokes, performed racially derogatory acts, and used various racial epithets. Although many of these acts occurred outside the 300-day filing period, it cannot be said that they are not part of the same actionable hostile environment claim. Pp. 115–121.

(d) The Court's holding does not leave employers defenseless when a plaintiff unreasonably delays filing a charge. The filing period is subject to waiver, estoppel, and equitable tolling when equity so requires, *Zipes*, *supra*, at 398, and an employer may raise a laches defense if the plaintiff unreasonably delays in filing and as a result harms the defendant, see, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424–425. Pp. 121–122.

232 F. 3d 1008, affirmed in part, reversed in part, and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined as to Part II–A. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, in which SCALIA and KENNEDY, JJ., joined as to all but Part I, and in which BREYER, J., joined as to Part I, *post*, p. 123.

Roy T. Englert, Jr., argued the cause for petitioner. With him on the briefs was *Melissa B. Rogers.*

Pamela Y. Price argued the cause for respondent. With her on the brief were *Howard J. Moore, Jr.*, and *William McNeill III.*

Austin C. Schlick argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Clement, Marleigh D. Dover*, and *John C. Hoyle.**

JUSTICE THOMAS delivered the opinion of the Court.

Respondent Abner Morgan, Jr., sued petitioner National Railroad Passenger Corporation (Amtrak) under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. Section 2000e–5(e)(1) requires that a Title

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**Katherine Y. K. Cheung, Ann Elizabeth Reesman, Stephen A. Bokat*, and *Robin S. Conrad* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Impact Fund et al. by *Ellen Lake, Brad Seligman*, and *Jocelyn D. Larkin;* for the NAACP Legal Defense and Educational Fund, Inc., by *Robert H. Stroup, Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin, James L. Cott*, and *Eric Schnapper;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Thomas J. Henderson, John A. Payton, Gary T. Johnson, Norman Redlich, Barbara R. Arnwine, Dennis Courtland Hayes, Marcia D. Greenberger, Judith L. Lichtman, Marc Stern*, and *Paula A. Brantner.*

VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days "after the alleged unlawful employment practice occurred." We consider whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside this statutory time period.

The United States Court of Appeals for the Ninth Circuit held that a plaintiff may sue on claims that would ordinarily be time barred so long as they either are "sufficiently related" to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the limitations period. We reverse in part and affirm in part. We hold that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period. We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period. The application of equitable doctrines, however, may either limit or toll the time period within which an employee must file a charge.

I

On February 27, 1995, Abner J. Morgan, Jr., a black male, filed a charge of discrimination and retaliation against Amtrak with the EEOC and cross-filed with the California Department of Fair Employment and Housing. Morgan alleged that during the time period that he worked for Amtrak he was "consistently harassed and disciplined more harshly than other employees on account of his race."[1] App. to Pet.

[1] Such discrimination, he alleges, began when the company hired him in August 1990 as an electrician helper, rather than as an electrician. Subsequent alleged racially motivated discriminatory acts included a termination for refusing to follow orders, Amtrak's refusal to allow him to

for Cert. 25a. The EEOC issued a "Notice of Right to Sue" on July 3, 1996, and Morgan filed this lawsuit on October 2, 1996. While some of the allegedly discriminatory acts about which Morgan complained occurred within 300 days of the time that he filed his charge with the EEOC, many took place prior to that time period. Amtrak filed a motion, arguing, among other things, that it was entitled to summary judgment on all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge. The District Court granted summary judgment in part to Amtrak, holding that the company could not be liable for conduct occurring before May 3, 1994, because that conduct fell outside of the 300-day filing period. The court employed a test established by the United States Court of Appeals for the Seventh Circuit in *Galloway* v. *General Motors Service Parts Operations*, 78 F. 3d 1164 (1996): A "plaintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Id.*, at 1167. The District Court held that "[b]ecause Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts before the limitations period on these claims ran." App. to Pet. for Cert. 40a.[2]

Morgan appealed. The United States Court of Appeals for the Ninth Circuit reversed, relying on its previous articu-

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participate in an apprenticeship program, numerous "written counselings" for absenteeism, as well as the use of racial epithets against him by his managers.

[2] The District Court denied summary judgment to Amtrak with respect to those claims it held were timely filed. The remaining claims then proceeded to trial, where the jury returned a verdict in favor of Amtrak.

lation of the continuing violation doctrine, which "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" 232 F. 3d 1008, 1014 (2000) (quoting *Anderson* v. *Reno*, 190 F. 3d 930, 936 (CA9 1999)). Contrary to both the Seventh Circuit's test, used by the District Court, and a similar test employed by the Fifth Circuit,[3] the Ninth Circuit held that its precedent "precludes such a notice limitation on the continuing violation doctrine." 232 F. 3d, at 1015.

In the Ninth Circuit's view, a plaintiff can establish a continuing violation that allows recovery for claims filed outside of the statutory period in one of two ways. First, a plaintiff may show "a series of related acts one or more of which are within the limitations period." *Ibid.* Such a "serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period." *Ibid.* The alleged incidents, however, "cannot be isolated, sporadic, or discrete." *Ibid.* Second, a plaintiff may establish a continuing violation if he shows "a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation." *Id.*, at 1015–1016.

To survive summary judgment under this test, Morgan had to "raise a genuine issue of disputed fact as to (1) the existence of a continuing violation—be it serial or systemic," and (2) the continuation of the violation into the limitations period. *Id.*, at 1016. Because Morgan alleged three types

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[3] The Fifth Circuit employs a multifactor test, which, among other things, takes into account: (1) whether the alleged acts involve the same type of discrimination; (2) whether the incidents are recurring or independent and isolated events; and (3) whether the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation. See *Berry* v. *Board of Supervisors*, 715 F. 2d 971, 981 (1983).

of Title VII claims, namely, discrimination, hostile environment, and retaliation, the Court of Appeals considered the allegations with respect to each category of claim separately and found that the prelimitations conduct was sufficiently related to the postlimitations conduct to invoke the continuing violation doctrine for all three. Therefore, "[i]n light of the relatedness of the incidents, [the Court of Appeals found] that Morgan ha[d] sufficiently presented a genuine issue of disputed fact as to whether a continuing violation existed." *Id.*, at 1017. Because the District Court should have allowed events occurring in the prelimitations period to be "presented to the jury not merely as background information, but also for purposes of liability," *id.*, at 1017–1018, the Court of Appeals reversed and remanded for a new trial.

We granted certiorari, 533 U. S. 927 (2001), and now reverse in part and affirm in part.

II

The Courts of Appeals have taken various approaches to the question whether acts that fall outside of the statutory time period for filing charges set forth in 42 U. S. C. § 2000e–5(e) are actionable under Title VII. See n. 3, *supra.* While the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute. In the context of a request to alter the timely filing requirements of Title VII, this Court has stated that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980). In *Mohasco*, the Court rejected arguments that strict adherence to a similar statutory time restriction[4] for filing a

[4] The Court there considered both the 300-day time limit of 42 U. S. C. § 2000e–5(e) and the requirement of § 2000e–5(c) that, in the case of an unlawful employment practice that occurs in a State that prohibits such practices, no charge may be filed with the EEOC before the expiration of 60 days after proceedings have been commenced in the appropriate state agency unless such proceedings have been earlier terminated.

charge was "unfair" or that "a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies." *Id.*, at 824–825. Instead, the Court noted that "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Id.*, at 825. Similarly here, our most salient source for guidance is the statutory text.

Title 42 U. S. C. § 2000e–5(e)(1) is a charge filing provision that "specifies with precision" the prerequisites that a plaintiff must satisfy before filing suit. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974). An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days. A claim is time barred if it is not filed within these time limits.

For our purposes, the critical sentence of the charge filing provision is: "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*" § 2000e–5(e)(1) (emphasis added). The operative terms are "shall," "after . . . occurred," and "unlawful employment practice." "[S]hall" makes the act of filing a charge within the specified time period mandatory. See, *e. g.*, *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"). "[O]ccurred" means that the practice took place or happened in the past.[5] The require-

[5] "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 207

ment, therefore, that the charge be filed "after" the practice "occurred" tells us that a litigant has up to 180 or 300 days *after* the unlawful practice happened to file a charge with the EEOC.

The critical questions, then, are: What constitutes an "unlawful employment practice" and when has that practice "occurred"? Our task is to answer these questions for both discrete discriminatory acts and hostile work environment claims. The answer varies with the practice.

A

We take the easier question first. A discrete retaliatory or discriminatory act "occurred" on the day that it "happened." A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it.

Morgan argues that the statute does not require the filing of a charge within 180 or 300 days of each discrete act, but that the language requires the filing of a charge within the specified number of days after an "unlawful employment *practice.*" "Practice," Morgan contends, connotes an ongoing violation that can endure or recur over a period of time. See Brief for Respondent 25–26. In Morgan's view, the term "practice" therefore provides a statutory basis for the Ninth Circuit's continuing violation doctrine.[6] This argu-

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(1997) (quoting *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership,* 507 U. S. 380, 388 (1993) (internal quotation marks and citation omitted)). Webster's Third New International Dictionary 1561 (1993) defines "occur" as "to present itself: come to pass: take place: HAPPEN." See also Black's Law Dictionary 1080 (6th ed. 1990) (defining "[o]ccur" as "[t]o happen; . . . to take place; to arise").

[6] Morgan also argues that the EEOC's discussion of continuing violations in its Compliance Manual, which provides that certain serial violations and systemic violations constitute continuing violations that allow relief for untimely events, as well as the positions the EEOC has taken in prior briefs, warrant deference under *Chevron U. S. A. Inc.* v. *Natural*

ment is unavailing, however, given that 42 U. S. C. § 2000e–2 explains in great detail the sorts of actions that qualify as "[u]nlawful employment practices" and includes among such practices numerous discrete acts. See, *e. g.*, § 2000e–2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."). There is simply no indication that the term "practice" converts related discrete acts into a single unlawful practice for the purposes of timely filing. Cf. § 2000e–6(a) (providing that the Attorney General may bring a civil action in "pattern or practice" cases).

We have repeatedly interpreted the term "practice" to apply to a discrete act or single "occurrence," even when it has a connection to other acts. For example, in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 234 (1976), an employee asserted that his complaint was timely filed because the date "the alleged unlawful employment practice occurred" was the date after the conclusion of a grievance arbitration procedure, rather than the earlier date of his discharge. The discharge, he contended, was "tentative" and "nonfinal" until the grievance and arbitration procedure ended. Not so, the Court concluded, because the discriminatory act *occurred* on the date of discharge—the date that the parties understood the termination to be final. *Id.*, at 234–235. Similarly, in *Bazemore* v. *Friday*, 478 U. S. 385

Resources Defense Council, Inc., 467 U. S. 837 (1984). Brief for Respondent 26–32. But we have held that the EEOC's interpretive guidelines do not receive *Chevron* deference. See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257 (1991). Such interpretations are "'entitled to respect' under our decision in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000).

(1986) *(per curiam)*, a pattern-or-practice case, when considering a discriminatory salary structure, the Court noted that although the salary discrimination began prior to the date that the act was actionable under Title VII, "[e]ach week's paycheck that deliver[ed] less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ." *Id.*, at 395.

This Court has also held that discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period. In *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977), United forced Evans to resign after she married because of its policy against married female flight attendants. Although Evans failed to file a timely charge following her initial separation, she nonetheless claimed that United was guilty of a present, continuing violation of Title VII because its seniority system failed to give her credit for her prior service once she was rehired. The Court disagreed, concluding that "United was entitled to treat [Evans' resignation] as lawful after [she] failed to file a charge of discrimination within the" charge filing period then allowed by the statute. *Id.*, at 558. At the same time, however, the Court noted that "[i]t may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Ibid.* The emphasis, however, "should not be placed on mere continuity" but on "whether any present *violation* exist[ed]." *Ibid.* (emphasis in original).

In *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), the Court evaluated the timeliness of an EEOC complaint filed by a professor who argued that he had been denied academic tenure because of his national origin. Following the decision to deny tenure, the employer offered him a "'terminal'" contract to teach an additional year. *Id.*, at 253. Claiming, in effect, a "'continuing violation,'" the professor argued that the time period did not begin to run until his actual termination. *Id.*, at 257. The Court rejected this argument: "Mere continuity of employment, without more,

is insufficient to prolong the life of a cause of action for employment discrimination." *Ibid.* In order for the time period to commence with the discharge, "he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment." *Ibid.* He could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory.

We derive several principles from these cases. First, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 152 (1984) *(per curiam)* ("Procedural requirements established by Congress for gaining access to

the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants").

The Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability. See 232 F. 3d, at 1015. With respect to this holding, therefore, we reverse.

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period.[7] While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, only incidents that took place within the timely filing period are actionable. Because Morgan first filed his charge with an appropriate state agency, only those acts that occurred 300 days before February 27, 1995, the day that Morgan filed his charge, are actionable. During that time period, Morgan contends that he was wrongfully suspended and charged with a violation of Amtrak's "Rule L" for insubordination while failing to complete work assigned to him, denied training, and falsely accused of threatening a man-

[7] Because the Court of Appeals held that the "discrete acts" were actionable as part of a continuing violation, there was no need for it to further contemplate when the time period began to run for each act. The District Court noted that "Morgan believed that he was being discriminated against at the time that all of these acts occurred. . . ." App. to Pet. for Cert. 40a. There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.

ager.[8] *Id.*, at 1013. All prior discrete discriminatory acts are untimely filed and no longer actionable.[9]

B

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 348–349 (3d ed. 1996) (hereinafter Lindemann) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence"). The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) ("As we pointed out in *Meritor* [*Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67 (1986),] 'mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee,' *ibid.* (internal quotation marks omitted), does not sufficiently affect the conditions of employment to implicate Title VII"). Such claims are based on the cumulative effect of individual acts.

"We have repeatedly made clear that although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to "eco-

[8] The final alleged discriminatory act, he contends, led to his termination on March 3, 1995. Morgan alleges that after the manager reported that Morgan had threatened him, he was ordered into a supervisor's office. Then, after he asked for union representation or the presence of a co-worker as a witness, the supervisor denied both, ordered everyone out of the office, and yelled at Morgan to get his "black ass" into the office. Morgan refused and went home. He was subsequently suspended and charged with violations of two company rules and, following an investigatory hearing, terminated.

[9] We have no occasion here to consider the timely filing question with respect to "pattern-or-practice" claims brought by private litigants as none are at issue here.

nomic" or "tangible" discrimination,' *Harris*, [510 U. S., at 21] (quoting *Meritor Savings Bank, FSB* v. *Vinson*, [477 U. S.,] at 64), and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *Faragher* v. *Boca Raton*, 524 U. S. 775, 786 (1998) (quoting *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 78 (1998)). As the Court stated in *Harris*, "[t]he phrase 'terms, conditions, or privileges of employment' [of 42 U. S. C. § 2000e–2(a)(1)] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." 510 U. S., at 21 (some internal quotation marks omitted) (quoting *Meritor*, 477 U. S., at 64, in turn quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978)).[10] "Workplace conduct is not measured in isolation . . . ." *Clark County School Dist.* v. *Breeden*, 532 U. S. 268, 270 (2001) *(per curiam)*. Thus, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris*, 510 U. S., at 21 (citations omitted).

In determining whether an actionable hostile work environment claim exists, we look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*, at 23. To assess whether a court may, for the purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, we again look to the

[10] Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment. See *Faragher* v. *Boca Raton*, 524 U. S. 775, 786–787, and n. 1 (1998); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 66–67 (1986).

statute. It provides that a charge must be filed within 180 or 300 days "after the alleged unlawful employment practice occurred." A hostile work environment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U. S. C. § 2000e–5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.[11]

That act need not, however, be the last act. As long as the employer has engaged in enough activity to make out an actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole.

It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran

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[11] Amtrak argues that recovery for conduct taking place outside the time period for filing a timely charge should be available only in hostile environment cases where the plaintiff reasonably did not know such conduct was discriminatory or where the discriminatory nature of such conduct is recognized as discriminatory only in light of later events. See Brief for Petitioner 38. The Court of Appeals for the Seventh Circuit adopted this approach in *Galloway* v. *General Motors Service Parts Operations*, 78 F. 3d 1164 (1996). See *supra*, at 106. Although we reject the test proposed by petitioner, other avenues of relief are available to employers. See *infra*, at 121–122.

on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days "after" the single unlawful practice "occurred." Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

The following scenarios illustrate our point: (1) Acts on days 1–400 create a hostile work environment. The employee files the charge on day 401. Can the employee recover for that part of the hostile work environment that occurred in the first 100 days? (2) Acts contribute to a hostile environment on days 1–100 and on day 401, but there are no acts between days 101–400. Can the act occurring on day 401 pull the other acts in for the purposes of liability? In truth, all other things being equal, there is little difference between the two scenarios as a hostile environment constitutes one "unlawful employment practice" and it does not matter whether nothing occurred within the intervening 301 days so long as each act is part of the whole. Nor, if sufficient activity occurred by day 100 to make out a claim, does it matter that the employee knows on that day that an actionable claim happened; on day 401 all incidents are still part of the same claim. On the other hand, if an act on day 401 had no relation to the acts between days 1–100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act.

Our conclusion with respect to the incidents that may be considered for the purposes of liability is reinforced by the

fact that the statute in no way bars a plaintiff from recovering damages for that portion of the hostile environment that falls outside the period for filing a timely charge. Morgan correctly notes that the timeliness requirement does not dictate the amount of recoverable damages. It is but one in a series of provisions requiring that the parties take action within specified time periods, see, *e. g.*, §§ 2000e–5(b), (c), (d), none of which function as specific limitations on damages.

Explicit limitations on damages are found elsewhere in the statute. Section 1981a(b)(3), for example, details specific limitations on compensatory and punitive damages. Likewise, § 2000e–5(g)(1) allows for recovery of backpay liability for up to two years prior to the filing of the charge. If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay. And the fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period indicates that the timely filing provision was not meant to serve as a specific limitation either on damages or the conduct that may be considered for the purposes of one actionable hostile work environment claim.

It also makes little sense to limit the assessment of liability in a hostile work environment claim to the conduct that falls within the 180- or 300-day period given that this time period varies based on whether the violation occurs in a State or political subdivision that has an agency with authority to grant or seek relief. It is important to remember that the statute requires that a Title VII plaintiff must wait 60 days after proceedings have commenced under state or local law to file a charge with the EEOC, unless such proceedings have earlier terminated. § 2000e–5(c). In such circumstances, however, the charge must still be filed within 300 days of the occurrence. See *Mohasco*, 447 U. S., at 825–826. The extended time period for parties who first file such

charges in a State or locality ensures that employees are neither time barred from later filing their charges with the EEOC nor dissuaded from first filing with a state agency. See *id.*, at 821 ("The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated"). Surely, therefore, we cannot import such a limiting principle into the provision where its effect would be to make the reviewable time period for liability dependent upon whether an employee lives in a State that has its own remedial scheme.[12]

Simply put, § 2000e–5(e)(1) is a provision specifying when a charge is timely filed and only has the consequence of limiting liability because filing a timely charge is a prerequisite to having an actionable claim. A court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period.

With respect to Morgan's hostile environment claim, the Court of Appeals concluded that "the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." 232 F. 3d, at 1017. To support his claims of a hostile environment, Morgan presented evidence from a number of other employees that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors, and used various racial epithets. *Id.*, at 1013. Although many of the acts upon which his claim depends occurred outside the 300 day filing period,

[12] The same concern is not implicated with discrete acts given that, unlike hostile work environment claims, liability there does not depend upon proof of repeated conduct extending over a period of time.

we cannot say that they are not part of the same actionable hostile environment claim.[13] On this point, we affirm.

C

Our holding does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time. Employers have recourse when a plaintiff unreasonably delays filing a charge. As noted in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), the filing period is not a jurisdictional prerequisite to filing a Title VII suit. Rather, it is a requirement subject to waiver, estoppel, and equitable tolling "when equity so requires." *Id.*, at 398. These equitable doctrines allow us to honor Title VII's remedial purpose "without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Ibid.*

This Court previously noted that despite the procedural protections of the statute "a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts." *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 373 (1977). The same is true when the delay is caused by the employee, rather than by the EEOC. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975) ("[A] party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party"). In such cases, the federal courts have the discretionary power to "to locate 'a just result' in light of the circumstances peculiar to the case." *Id.*, at 424–425.

In addition to other equitable defenses, therefore, an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. This defense "'re-

[13] We make no judgment, however, on the merits of Morgan's claim.

quires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas* v. *Colorado*, 514 U. S. 673, 687 (1995) (quoting *Costello* v. *United States*, 365 U. S. 265, 282, (1961)). We do not address questions here such as "how—and how much—prejudice must be shown" or "what consequences follow if laches is established." 2 Lindemann 1496–1500.[14] We observe only that employers may raise various defenses in the face of unreasonable and prejudicial delay.

III

We conclude that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time period—180 or 300 days—set forth in 42 U. S. C. § 2000e–5(e)(1). A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. Neither holding, however, precludes a court from applying equitable doctrines that may toll or limit the time period.

For the foregoing reasons, the Court of Appeals' judgment is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[14] Nor do we have occasion to consider whether the laches defense may be asserted against the EEOC, even though traditionally the doctrine may not be applied against the sovereign. We note, however, that in *Occidental* there seemed to be general agreement that courts can provide relief to defendants against inordinate delay by the EEOC. See *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 373 (1977). Cf. *id.*, at 383 (REHNQUIST, J., dissenting in part) ("Since here the suit is to recover backpay for an individual that could have brought her own suit, it is impossible to think that the EEOC was suing in the sovereign capacity of the United States").

Justice O'Connor, with whom The Chief Justice joins, with whom Justice Scalia and Justice Kennedy join as to all but Part I, and with whom Justice Breyer joins as to Part I, concurring in part and dissenting in part.

I join Part II–A of the Court's opinion because I agree that Title VII suits based on discrete discriminatory acts are time barred when the plaintiff fails to file a charge with the Equal Employment Opportunity Commission (EEOC) within the 180- or 300-day time period designated in the statute. 42 U. S. C. § 2000e–5(e)(1). I dissent from the remainder of the Court's opinion, however, because I believe a similar restriction applies to all types of Title VII suits, including those based on a claim that a plaintiff has been subjected to a hostile work environment.

I

The Court today holds that, for discrete discriminatory acts, § 2000e–5(e)(1) serves as a form of statute of limitations, barring recovery for actions that take place outside the charge-filing period. The Court acknowledges, however, that this limitations period may be adjusted by equitable doctrines. See *ante,* at 114, n. 7; see also *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Like the Court, I see no need to resolve fully the application of the discovery rule to claims based on discrete discriminatory acts. See *ante,* at 114, n. 7. I believe, however, that some version of the discovery rule applies to discrete-act claims. See 2 B. Lindemann & P. Grossman, Employment Discrimination Law 1349 (3d ed. 1996) ("Although [Supreme Court precedents] seem to establish a relatively simple 'notice' rule as to when discrimination 'occurs' (so as to start the running of the charge-filing period), courts continue to disagree on what

the notice must be *of*" (emphasis in original)). In my view, therefore, the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act.

II

Unlike the Court, I would hold that § 2000e–5(e)(1) serves as a limitations period for all actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment. Section 2000e–5(e)(1) provides that a plaintiff must file a charge with the EEOC within 180 or 300 days "after the alleged unlawful employment practice occurred."* It draws no distinction between claims based on discrete acts and claims based on hostile work environments. If a plaintiff fails to file a charge within that time period, liability may not be assessed, and damages must not be awarded, for that part of the hostile environment that occurred outside the charge-filing period.

The Court's conclusion to the contrary is based on a characterization of hostile environment discrimination as composing a single claim based on conduct potentially spanning several years. See *ante*, at 117. I agree with this characterization. I disagree, however, with the Court's conclusion that, because of the cumulative nature of the violation, if any conduct forming part of the violation occurs within the charge-filing period, liability can be proved and damages can be collected for the entire hostile environment. Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate "occurrence," and claims based on some of those occurrences

*This case provides no occasion to determine whether the discovery rule operates in the context of hostile work environment claims.

forfeited. In other words, a hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not.

The Court's treatment of hostile environment claims as constituting a single occurrence leads to results that contradict the policies behind 42 U. S. C. § 2000e–5(e)(1). Consider an employee who has been subjected to a hostile work environment for 10 years. Under the Court's approach, such an employee may, subject only to the uncertain restrictions of equity, see *ante*, at 122, sleep on his or her rights for a decade, bringing suit only in year 11 based in part on actions for which a charge could, and should, have been filed many years previously in accordance with the statutory mandate. § 2000e–5(e)(1) ("A charge under this section shall be filed [within 180 or 300 days] after the alleged unlawful employment practice occurred"). Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address:

> "Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944).

Although the statute's 2-year limitation on backpay partially addresses these concerns, § 2000e–5(g)(1), under the Court's view, liability may still be assessed and other sorts of damages (such as damages for pain and suffering) awarded based on long-past occurrences. An employer asked to defend such stale actions, when a suit challenging them could have

been brought in a much more timely manner, may rightly complain of precisely this sort of unjust treatment.

The Court is correct that nothing in § 2000e–5(e)(1) can be read as imposing a cap on damages. But reading § 2000e–5(e)(1) to require that a plaintiff bring an EEOC charge within 180 or 300 days of the time individual incidents constituting a hostile work environment occur or lose the ability to bring suit based on those incidents is not equivalent to transforming it into a damages cap. The limitation is one on *liability*. The restriction on damages for occurrences too far in the past follows only as an obvious consequence.

Nor, as the Court claims, would reading § 2000e–5(e)(1) as limiting hostile environment claims conflict with Title VII's allowance of backpay liability for a period of up to two years prior to a charge's filing. § 2000e–5(g)(1). Because of the potential adjustments to the charge-filing period based on equitable doctrines, two years of backpay will sometimes be available even under my view. For example, two years of backpay may be available where an employee failed to file a timely charge with the EEOC because his employer deceived him in order to conceal the existence of a discrimination claim.

The Court also argues that it makes "little sense" to base relief on the charge-filing period, since that period varies depending on whether the State or political subdivision where the violation occurs has designated an agency to deal with such claims. See *ante*, at 119. The Court concludes that "[s]urely . . . we cannot import such a limiting principle . . . where its effect would be to make the reviewable time period for liability dependent upon whether an employee lives in a State that has its own remedial scheme." *Ante*, at 120. But this is precisely the principle the Court has adopted for discrete discriminatory acts—depending on where a plaintiff lives, the time period changes as to which discrete discriminatory actions may be reviewed. The justification for the variation is the same for discrete discrimina-

tory acts as it is for claims based on hostile work environments. The longer time period is intended to give States and other political subdivisions time to review claims themselves, if they have a mechanism for doing so. The same rationale applies to review of the daily occurrences that make up a part of a hostile environment claim.

My approach is also consistent with that taken by the Court in other contexts. When describing an ongoing antitrust violation, for instance, we have stated:

> "[E]ach overt act that is part of the violation and that injures the plaintiff . . . starts the statutory [limitations] period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. . . . But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 189 (1997) (citations omitted).

Similarly, in actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, concerning a pattern of racketeering activity, we rejected a rule that would have allowed plaintiffs to recover for all of the acts that made up the pattern so long as at least one occurred within the limitations period. In doing so, we endorsed the rule of several Circuits that, although "commission of a separable, new predicate act within [the] limitations period permits a plaintiff to recover for the additional damages caused by that act . . . the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." 521 U. S., at 190; but cf. *Rotella* v. *Wood*, 528 U. S. 549, 554, n. 2, 557 (2000) (reserving the question of whether the injury discovery rule applies in civil RICO and, by extension, Clayton Act cases). The Court today allows precisely this sort of bootstrapping in the Title

VII context; plaintiffs may recover for exposure to a hostile environment whose time has long passed simply because the hostile environment has continued into the charge-filing period.

I would, therefore, reverse the judgment of the Court of Appeals in its entirety.

Syllabus

FRANCONIA ASSOCIATES ET AL. *v.* UNITED STATES

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

No. 01–455. Argued April 15, 2002—Decided June 10, 2002*

Under §§ 515 and 521 of the Housing Act of 1949, the Farmers Home Administration (FmHA) makes direct loans to private, nonprofit entities to develop and/or construct rural housing for the elderly and low- or middle-income individuals and families. Petitioners are property owners who entered into such loans before December 21, 1979. The promissory notes petitioners executed authorized "[p]repaymen[t] of scheduled installments, or any portion thereof, . . . at any time at the option of Borrower." On February 5, 1988, concerned about the dwindling supply of low- and middle-income rural housing in the face of increasing prepayments of mortgages by § 515 borrowers, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), which amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of § 515 mortgages entered into before December 21, 1979. On May 30, 1997, the *Franconia* petitioners filed suit under the Tucker Act, 28 U. S. C. § 1491, charging that ELIHPA abridged the absolute prepayment right set forth in their promissory notes and thereby effected, *inter alia*, a repudiation of their contracts. In dismissing petitioners' contract claims as untimely under § 2501—which provides that a claim "shall be barred unless the petition thereon is filed within six years after such claim first accrues"—the Court of Federal Claims concluded that the claims first accrued on the ELIHPA regulations' effective date. In affirming on statute of limitations grounds, the Federal Circuit ruled that, if the Government's continuing duty to allow petitioners to prepay their loans was breached, the breach occurred immediately upon ELIHPA's enactment date, over nine years before petitioners filed their suit. The court rejected petitioners' argument that ELIHPA's passage qualified as a repudiation, so that their suit would be timely if filed within six years of either the date performance fell due (the date they tendered prepayment) or the date on which they elected to treat the repudiation as a present breach. On September 16, 1998, the *Grass Valley* petitioners filed an action that was virtually identical to the *Franconia* suit. The Court of Federal Claims dismissed for the

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*Together with *Grass Valley Terrace et al.* v. *United States* (see this Court's Rule 12.4), also on certiorari to the same court.

Syllabus

reasons it had dismissed the *Franconia* claims, and the Federal Circuit affirmed without opinion.

Held: Because ELIHPA's enactment qualified as a repudiation of the parties' bargain, not a present breach of the loan agreements, breach would occur, and the six-year limitations period would commence to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender and release its control over use of the property securing the loan. Pp. 141–149.

(a) Resolution of two threshold matters narrows the scope of the controversy. First, the requirement that the Government unequivocally waive its sovereign immunity is satisfied here because, once the United States waives immunity and does business with its citizens, it does so much as a party never cloaked with immunity. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369. Second, the Court, like the Government, accepts for purposes of this decision that the loan contracts guaranteed the absolute prepayment right petitioners allege. P. 141.

(b) Under applicable general contract law principles, whether petitioners' claims were filed "within six years after [they] first accrue[d]," § 2501, depends upon when the Government breached the prepayment undertaking stated in the promissory notes. In declaring ELIHPA a present breach of petitioners' loan contracts, the Federal Circuit reasoned that the Government had but one obligation under those agreements: to continue to allow borrowers the unfettered right to prepay their loans at any time. If that continuing duty was breached, the court maintained, the breach occurred *immediately*, totally, and definitively, when ELIHPA took away the borrowers' unfettered right to prepay. In so ruling, the court incorrectly characterized the performance allegedly due from the Government under the promissory notes. The Government's pledged performance is properly comprehended as an obligation to accept prepayment. Once the Government's obligation is thus correctly characterized, the decisions below lose force. A promisor's failure to perform at the time indicated for performance in the contract establishes an immediate breach. But the promisor's renunciation of a contractual duty *before* the time fixed in the contract for performance is a repudiation, which ripens into a breach prior to the time for performance only if the promisee elects to treat it as such, see *Roehm* v. *Horst*, 178 U. S. 1, 13. Viewed in this light, ELIHPA effected a repudiation of the FmHA loan contracts, not an immediate breach. ELIHPA conveyed the Government's announcement that it would not perform as represented in the promissory notes if and when, at some point in the future, petitioners attempted to prepay their mortgages. Unless petitioners treated ELIHPA as a present breach by filing suit prior to the

date indicated for performance, breach would occur when a borrower attempted to prepay, for only then would the Government's responsive performance become due. Pp. 141–144.

(c) The first of the Government's arguments to the contrary is unpersuasive. The Government contends that § 2501's "first accrues" qualification is meant to ensure that suits against the United States are filed on the earliest possible date, thereby providing the Government with reasonably prompt notice of the fiscal implications of past enactments. However, § 2501's text is unexceptional: A number of contemporaneous state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim "first accrues." Equally telling, in its many years of applying and interpreting § 2501, the Court of Federal Claims has never attributed to the words "first accrues" the meaning the Government now proposes. Instead, in other settings, that court has adopted the repudiation doctrine in its traditional form when evaluating the timeliness of suits governed by § 2501. Two practical considerations reinforce the Court's conclusion. First, reading § 2501 as the Government proposes would seriously distort the repudiation doctrine in Tucker Act suits because a party aggrieved by the Government's renunciation of a contractual obligation anticipating future performance would be compelled by the looming limitations bar to forgo the usual option of awaiting the time performance is due before filing suit for breach. Second, putting prospective plaintiffs to the choice of either bringing suit soon after the Government's repudiation or forever relinquishing their claims would surely proliferate litigation, forcing the Government to defend against highly speculative damages claims in a profusion of suits, most of which would never have been brought under a less novel interpretation of § 2501. Pp. 144–147.

(d) The Court also rejects the premise, and therefore the conclusion, of the Government's second argument against application of the repudiation doctrine. The Government contends that a congressional enactment like ELIHPA that precludes the Government from honoring a contractual obligation anticipating future performance always constitutes a present breach because the agency or official responsible for administering the contract is not free to change its mind and render the requisite performance without violating binding federal law. However, just as Congress may announce the Government's intent to dishonor an obligation to perform in the future through a duly enacted law, so may it retract that renouncement prior to the time for performance, thereby enabling the agency or contracting official to perform as promised. Indeed, Congress changed its mind in just this manner before it enacted ELIHPA. In 1979 amendments to the National Housing Act, Congress

repudiated the promissory notes at issue here by conditioning prepayment of all § 515 loans on the borrower's agreement to maintain the low-income use of its property for a specified period. One year later, Congress removed those conditions on pre-1979 loans, thereby retracting the repudiation. Hence, the fact that the Government's repudiation here rested upon the enactment of a new statute makes no significant difference. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U. S. 604, 619, 620. Pp. 147–148.

240 F. 3d 1358; 7 Fed. Appx. 928, reversed and remanded.

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

Jeff H. Eckland argued the cause for petitioners. With him on the briefs were *William L. Roberts* and *Mark J. Blando.*

Matthew D. Roberts argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General McCallum, James A. Feldman, David M. Cohen,* and *Mark L. Josephs.*†

JUSTICE GINSBURG delivered the opinion of the Court.

The two cases consolidated for our review concern the timeliness of claims filed against the United States under the Tucker Act, 28 U. S. C. § 1491. Petitioners are property owners who participated in a federal program to promote development of affordable rental housing in areas not traditionally served by conventional lenders. In exchange for low-interest mortgage loans issued by the Farmers Home Administration (FmHA), petitioners agreed to devote their

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†Briefs of *amici curiae* urging reversal were filed for Bank of America, FSB, et al. by *Steven S. Rosenthal, Alan K. Palmer, Leo G. Rydzewski, John C. Millian, Melvin C. Garbow, Howard N. Cayne, David B. Bergman, Michael A. Johnson, Daniel J. Goldberg, William T. Reilly,* and *Stephen M. Forte;* for the Council for Affordable and Rural Housing by *Carl A. S. Coan III;* and for the National Association of Home Builders by *Thomas Jon Ward.*

John C. Millian, Mark A. Perry, and *Paul Blankenstein* filed a brief for John K. Castle et al. as *amici curiae.*

properties to low- and middle-income housing and to abide by related restrictions during the life of the loans.

Petitioners allege that the promissory notes governing their loans guaranteed the borrower the right to prepay at any time and thereby gain release from the federal program and the restrictions it places on the use of a participating owner's property. In the suits that yielded the judgments before us, petitioners charged that Congress abridged that release right in the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA or Act), 101 Stat. 1877, as amended, 42 U. S. C. § 1472(c) (1994 ed. and Supp. V). That Act placed permanent restraints upon prepayment of FmHA loans. Petitioners asserted in their complaints that ELIHPA effected both a repudiation of their contracts and a taking of their property in violation of the Fifth Amendment.

The Federal Circuit held petitioners' claims time barred under 28 U. S. C. § 2501, which prescribes that all Tucker Act claims must be filed within six years of the date they "first accrue[d]." In the Federal Circuit's view, passage of ELIHPA constituted an immediate breach of the FmHA loan agreements and therefore triggered the running of the limitations period. Petitioners filed suit not "within six years of," but over nine years after, ELIHPA's enactment. On that account, the Federal Circuit held their claims untimely, and their suits properly dismissed.

Accepting for purposes of this decision that the loan contracts guaranteed the absolute prepayment right petitioners allege, we reverse the Federal Circuit's judgment. ELIHPA's enactment, we conclude, qualified as a repudiation of the parties' bargain, not a present breach of the loan agreements. Accordingly, breach would occur, and the six-year limitations period would commence to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender and release its control over use of the property that secured the loan.

I

A

Under §§ 515 and 521 of the Housing Act of 1949, 76 Stat. 671, 82 Stat. 551, as amended, 42 U. S. C. §§ 1485, 1490a, the FmHA makes direct loans to private, nonprofit entities to develop or construct rural housing designed to serve the elderly and low- or middle-income individuals and families.[1] Section 515 loans require the borrower, *inter alia,* to execute various loan documents, including a loan agreement, a promissory note, and a real estate mortgage.

Before December 21, 1979, each petitioner entered into a loan agreement with the FmHA under §§ 515 and 521 "to provide rental housing and related facilities for eligible occupants . . . in rural areas." App. to Pet. for Cert. A165. In the loan agreements, each petitioner certified that it was unable to obtain a comparable loan in the commercial market. See *id.,* at A177. The loan agreements contained various provisions designed to ensure that the projects were affordable for people with low incomes. Those provisions included restrictions as to eligible tenants, the rents petitioners could charge, and the rate of return petitioners could realize, as well as requirements regarding the maintenance and financial operations of each project. See *id.,* at A170–A174. Each loan agreement also specified the length of the loan, ordinarily 40 or 50 years.

The promissory notes executed by petitioners required payment of the principal on each mortgage in scheduled installments, plus interest. See *id.,* at A176–A177. The

[1] Since 1994, the program has been entrusted to the Rural Housing Service, known between 1994 and 1996 as Rural Housing and Community Development Services. That agency was created by the Secretary of Agriculture under authority provided by the Department of Agriculture Reorganization Act of 1994, 108 Stat. 3219, as amended, 110 Stat. 1128, 1131. See also 7 CFR § 2003.18 (2002) (functional organization of Rural Housing Service). Our references to the FmHA should be understood to include these successor agencies.

notes also contained the prepayment provision curtailed by the legislation involved in the litigation now before us. That provision read: "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." *Id.*, at A176. No other provision of the loan documents addressed prepayment.

In 1979, Congress found that many § 515 participants had prepaid their mortgages, thus threatening the continued availability of affordable rural housing. Concerned that "these projects [remain] available to low and moderate income families for the entire original term of the loan," H. R. Rep. No. 96–154, p. 43 (1979), Congress amended the National Housing Act to stem the loss of low-cost rural housing due to prepayments, see Housing and Community Development Amendments of 1979, 93 Stat. 1101. In these 1979 amendments, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner agreed to maintain the low-income use of the rental housing for a 15-year or 20-year period from the date of the loan. 93 Stat. 1134–1135. That requirement could be avoided if the FmHA determined that there was no longer a need for the low-cost housing. *Id.*, at 1135.

The 1979 amendments applied to all program loans, past, present, and future. In 1980, however, Congress further amended the National Housing Act to eliminate retroactive application of the § 515 prepayment limitations imposed by the 1979 legislation. The Housing and Community Development Act of 1980, 94 Stat. 1614, provided that the prepayment restrictions would apply only to loans entered into after December 21, 1979, the date that amendment was enacted. § 514, 94 Stat. 1671–1672. The 1980 Act also required the Secretary of Agriculture to inform Congress of the repeal's adverse effects, if any, on the availability of low-income housing. *Id.*, at 1672.

By 1987, Congress had again become concerned about the dwindling supply of low- and moderate-income rural housing in the face of increasing prepayments of mortgages under § 515.[2] A House of Representatives Committee found that owners were "prepay[ing] or . . . refinanc[ing] their FmHA loans, without regard to the low income and elderly tenants in these projects." H. R. Rep. No. 100–122, p. 53.

Responsive to that concern, Congress passed ELIHPA, which amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of § 515 mortgages entered into before December 21, 1979. This legislation, enacted on February 5, 1988, provides that before FmHA can accept an offer to prepay such a mortgage,

> "the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed." 42 U. S. C. § 1472(c)(4)(A) (1994 ed.).

The legislation further provides that the FmHA may include incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an additional loan to the borrower. § 1472(c)(4)(B) (1994 ed. and Supp. V).

Under ELIHPA, if the FmHA determines after a "reasonable period" that an agreement cannot be reached, the owner who sought to prepay must offer to sell the housing to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." § 1472(c)(5)(A)(i) (1994 ed.). If an offer to buy is not

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[2] In 1986, Congress had passed a temporary moratorium that precluded § 515 prepayments in most cases. The moratorium originally was to expire in 1987, but it was extended into 1988 by another temporary measure. See note following 42 U. S. C. § 1472, p. 163 (1994 ed.).

made by a nonprofit organization or agency within 180 days, the FmHA may accept the owner's offer to prepay. § 1472(c)(5)(A)(ii). The offer-for-sale requirement may be avoided if the FmHA determines that prepayment will not "materially affec[t]" housing opportunities for minorities and one of two other conditions is met: Prepayment will not displace the tenants of the affected housing, or there is "an adequate supply of safe, decent, and affordable rental housing within the market area" and "sufficient actions have been taken to ensure" that such housing "will be made available" to displaced tenants. § 1472(c)(5)(G)(ii).

ELIHPA's implementing regulations establish a process by which the FmHA addresses prepayment requests. Under those procedures, the FmHA first "develo[ps] an incentive offer," making a "reasonable effort . . . to enter into an agreement with the borrower to maintain the housing for low-income use that takes into consideration the economic loss the borrower may suffer by foregoing *[sic]* prepayment." 7 CFR § 1965.210 (2002). Only if the borrower rejects that offer will the FmHA attempt to make the determinations—regarding the effect on minority housing opportunities, the displacement of tenants, and the supply of affordable housing in the market—required by 42 U. S. C. § 1472(c)(5)(G) before prepayment can be accepted. 7 CFR § 1965.215(a) (2002).[3]

B

Petitioners in *Franconia* filed this action in the United States Court of Federal Claims on May 30, 1997. Plaintiffs included petitioners—all of whom had entered into loan agreements before December 21, 1979, and were therefore

[3] In 1992, Congress passed the Housing and Community Development Act of 1992, 106 Stat. 3672, codified in relevant part at 42 U. S. C. § 1472(c) (1992 legislation). That provision, which had no effect on petitioners' loans, extended ELIHPA's restrictions to loans made after those of petitioners, *i. e.*, loans made from December 21, 1979, through 1989. See 106 Stat. 3841.

subject to ELIHPA—and others, who had entered into loan agreements after December 21, 1979, and were therefore unaffected by the Act. See App. to Pet. for Cert. A3, n. 2.[4] Petitioners alleged that ELIHPA repudiated their loan contracts, which, they asserted, gave them the right "to terminate their participation in the Government's housing program by exercising their option to prepay at any time." *Id.*, at A112. Their complaint sought relief on two theories: breach of contract and a violation of the Fifth Amendment's proscription against taking property without just compensation. See *id.*, at A132–A133.

The Court of Federal Claims granted the Government's motion to dismiss petitioners' contract claims as barred by the six-year statute of limitations in 28 U. S. C. § 2501. 43 Fed. Cl. 702 (1999). That provision states: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The court concluded that petitioners' contract claims first accrued on May 23, 1988, the effective date of regulations implementing ELIHPA. *Id.*, at 709. That was so, the court said, because those regulations breached the only performance required of the Government under the promissory notes: "to keep its promise to allow borrowers an unfettered prepayment right." *Id.*, at 710. The court also dismissed petitioners' takings claims *sua sponte;* because "the [Government] conduct . . . alleged to have constituted a taking" was "Congress's change of the prepayment option," the court reasoned, any claim based on that conduct "accrued at the time of the 1988 legislation." *Id.*, at 711.

The Federal Circuit affirmed the dismissal of petitioners' claims on timeliness grounds. 240 F. 3d 1358 (2001). The

[4] The claims of the latter group of *Franconia* plaintiffs remain pending before the Court of Federal Claims. See App. to Pet. for Cert. A3, n. 2.

Court of Appeals agreed with the Court of Federal Claims on the respective benefits and burdens generated by the promissory notes: Petitioners enjoyed "an unfettered right to prepay their loans at any time," *id.*, at 1363, while the Government had an obligation "to continue to allow borrowers" that option, *ibid.* If the Government's "continuing duty was breached," the court concluded, "the breach occurred immediately upon enactment of ELIHPA because, by its terms, ELIHPA took away the borrowers' unfettered right of prepayment." *Ibid.* Thus, the court ruled, the statute of limitations began to run on February 5, 1988, the date of ELIHPA's passage, see *id.*, at 1364;[5] given that limitations-triggering date, the court held, petitioners' claims, filed over nine years post-ELIHPA, were time barred.

In holding petitioners' claims untimely, the Federal Circuit rejected the argument pressed by petitioners that the passage of ELIHPA qualified as a repudiation. Were ELIHPA so regarded, petitioners' suit would be timely if filed within six years of either the date performance fell due (the date petitioners tendered prepayment) or the date on which petitioners elected to treat the repudiation as a present breach. "An anticipatory repudiation occurs," the Court of Appeals recognized, "when an obligor communicates to an obligee that he will commit a breach in the future." *Id.*, at 1363 (internal quotation marks omitted). "The doctrine of anticipatory repudiation does not apply in this case," the court reasoned, because after ELIHPA revoked the promise to allow unrestricted prepayment, the Government owed no future performance under the contracts. *Id.*, at 1364.

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[5] The Federal Circuit thus disagreed with the Court of Federal Claims in one respect: The former concluded that petitioners' claims had accrued on the date of ELIHPA's enactment, while the latter held that those claims had accrued on the effective date of regulations implementing the Act. 240 F. 3d, at 1365, n. 3. This disagreement is irrelevant to, and rendered academic by, our resolution of the petitions.

Petitioners' takings claims were time barred for essentially the same reason, the Federal Circuit held. The "property" allegedly taken without just compensation was petitioners' contractual "right to prepay their FmHA loans at any time," *id.*, at 1365; the takings claim thus arose when, upon passage of ELIHPA, the Government "took away and conclusively abolished" the unrestricted prepayment option, *id.*, at 1366.[6]

On September 16, 1998, the *Grass Valley* petitioners, all of whom had entered into § 515 loan agreements before December 21, 1979, joined by other plaintiffs with post-1979 loans, filed an action in the Court of Federal Claims virtually identical to the *Franconia* action. On April 12, 2000, that court granted the Government's motion to dismiss the *Grass Valley* petitioners' contract claims for the reasons it had dismissed the claims of the *Franconia* petitioners. 46 Fed. Cl. 629, 633–635 (2000). The Federal Circuit affirmed without opinion. Judgt. order reported at 7 Fed. Appx. 928 (2001).[7]

We granted certiorari, 534 U. S. 1073 (2002), and now reverse the two judgments of the Federal Circuit before us for review.

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[6] Like the Court of Federal Claims, see 43 Fed. Cl. 702, 708–709 (1999), the Federal Circuit rejected petitioners' "alternative argument" that even if the limitations period commenced to run upon enactment of legislation installing prepayment restrictions, the 1992 legislation, rather than ELIHPA, served as the operative provision. 240 F. 3d, at 1365, and n. 4. Petitioners contended that ELIHPA represented an emergency measure that curtailed prepayment rights only temporarily; the definitive legislative action, they maintained, occurred later, when the 1992 legislation made curtailment of their prepayment rights permanent. *Id.*, at 1365. The Federal Circuit concluded that although Congress had designated certain provisions in ELIHPA "interim measures," *ibid.* (internal quotation marks omitted), "no similar language . . . indicate[s] that [ELIHPA's] restrictions on FmHA loan prepayments were anything but permanent as to" borrowers in petitioners' situation, *ibid.*

[7] The Court of Federal Claims dismissed the *Grass Valley* petitioners' takings claims as untimely in a separate decision. 51 Fed. Cl. 436, 439 (2002).

II

A

A waiver of the sovereign immunity of the United States "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U. S. 1, 4 (1969). That requirement is satisfied here. Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369 (1943) ("The United States does business on business terms." (internal quotation marks omitted)).

Another threshold matter confines this controversy. For purposes of our disposition, the United States agrees, it may be assumed that petitioners obtained precisely the promise they allege—a promise that permits them an unfettered right to prepay their mortgages any time over the life of the loans, thereby gaining release from federal restrictions on the use of their property. See Brief for United States 18–19; Tr. of Oral Arg. 29–30. The sole issue before us is thus cleanly presented: were petitioners' complaints initiated within the six-year limitations period prescribed in 28 U. S. C. § 2501?

"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." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U. S. 604, 607 (2000) (internal quotation marks omitted). Under applicable "principles of general contract law," *Priebe & Sons, Inc.* v. *United States*, 332 U. S. 407, 411 (1947), whether petitioners' claims were filed "within six years after [they] first accrue[d]," 28 U. S. C. § 2501, depends upon when the Government breached the prepayment undertaking stated in the promissory notes. See 1 C. Corman, Limitations of Actions § 7.2.1, p. 482 (1991) ("The cause of action for breach of contract accrues, and the statute of limitations begins to run, at the time of the breach." (footnote

omitted)); see also 18 W. Jaeger, Williston on Contracts § 2021A, p. 697 (3d ed. 1978) (same).

In declaring ELIHPA a present breach of petitioners' loan contracts, the Federal Circuit reasoned that the Government had but one obligation under those agreements: "to continue to allow borrowers the unfettered right to prepay their loans at any time." 240 F. 3d, at 1363; see also 43 Fed. Cl., at 710 (Government's contractual duty was "to keep its promise to allow borrowers an unfettered prepayment right"). If that continuing duty was breached, the court maintained, the breach occurred *immediately*, totally, and definitively when ELIHPA took away the borrowers' unfettered right to prepay. See 240 F. 3d, at 1363. The Court of Appeals so ruled despite petitioners' insistence that "the government's performance obligation under the contracts was to *accept* prepayment" whenever tendered during the long life of the loans, even decades into the future. *Id.*, at 1362 (emphasis added); see also 43 Fed. Cl., at 710.

The Federal Circuit, we are persuaded, incorrectly characterized the performance allegedly due from the Government under the promissory notes. If petitioners enjoyed a "right to prepay their loans at any time," 240 F. 3d, at 1363, then necessarily the Government had a corresponding obligation to accept prepayment and execute the appropriate releases. See Brief for Petitioners 5–6. Absent an obligation on the lender to accept prepayment, the obligation "to allow" borrowers to prepay would be meaningless. A loan contract of such incomplete design would be illusory. See J. Murray, Contracts § 2, p. 5 (2d rev. ed. 1974) (promise required to create a binding contract must be an "undertaking or commitment to do or refrain from doing [some]thing in the future").

Once the Government's pledged performance is properly comprehended as an obligation to accept prepayment, the error in the Federal Circuit's reasoning becomes apparent. Failure by the promisor to perform at the time indicated for performance in the contract establishes an immediate

breach. See Restatement (Second) of Contracts § 235(2) (1979) (hereinafter Restatement) ("When performance of a duty under a contract is due[,] any non-performance is a breach."); Murray, *supra*, § 206, at 417. But the promisor's renunciation of a "contractual duty *before* the time fixed in the contract for . . . performance" is a repudiation. 4 A. Corbin, Contracts § 959, p. 855 (1951) (emphasis added); Restatement § 250 (repudiation entails a statement or "voluntary affirmative act" indicating that the promisor "will commit a breach" when performance becomes due). Such a repudiation ripens into a breach prior to the time for performance only if the promisee "elects to treat it as such." See *Roehm* v. *Horst*, 178 U. S. 1, 13 (1900) (repudiation "give[s] the promisee the right of electing either to . . . wait till the time for [the promisor's] performance has arrived, or to act upon [the renunciation] and treat it as a final assertion by the promisor that he is no longer bound by the contract").

Viewed in this light, ELIHPA effected a repudiation of the FmHA loan contracts, not an immediate breach. The Act conveyed an announcement by the Government that it would not perform as represented in the promissory notes if and when, at some point in the future, petitioners attempted to prepay their mortgages. See Restatement § 250, Comment *b* ("[A] statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation." (internal quotation marks omitted)); Murray, *supra*, § 208, at 421. Unless petitioners treated ELIHPA as a present breach by filing suit prior to the date indicated for performance, breach would occur when a borrower attempted to prepay, for only at that time would the Government's responsive performance become due.[8]

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[8] The record indicates that at least one petitioner has attempted to prepay, see App. to Pet. for Cert. A157–A158, but contains no information about how many others have done so or when any such attempts took place, see 43 Fed. Cl., at 707. Application of our holding to each petitioner in light of such determinations is a task for the lower courts on remand.

In sum, once it is understood that ELIHPA is most sensibly characterized as a repudiation, the decisions below lose force. To recapitulate, "[t]he time of accrual . . . depends on whether the injured party chooses to treat the . . . repudiation as a present breach." 1 C. Corman, Limitation of Actions § 7.2.1, p. 488 (1991). If that party "[e]lects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from [the] time of performance to the date of such election." *Id.*, at 488–489. But if the injured party instead opts to await performance, "the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation." *Id.*, at 488.

The Government draws no distinction "between a duty to allow petitioners to prepay and a duty to accept tendered prepayments"; "any such distinction," the Government acknowledges, "would be without significance." Brief for United States 33. Indeed, the Government recognizes, if petitioners had an "unfettered right to prepay," then, "of course," that right would be complemented by an "obligation to accept any prepayment tendered." *Ibid.* In defense of the judgment below, the Government relies on two other grounds.

First, the Government draws upon the text of § 2501, which bars any claims not "filed within six years after [the] claim first accrues." The words "first accrues," the Government contends, are key. See *id.*, at 11. Those words, according to the Government, convey Congress' intent to guard the sovereign against claims that might be deemed timely under statutes of limitations applicable to private parties. *Id.*, at 28. As the Government reads § 2501, the "first accrues" qualification ensures that suits against the United States are filed on "the earliest possible date," *id.*, at 17, thereby providing the Government with "reasonably prompt notice of the fiscal implications of past enactments," *id.*,

at 16. See *ibid.* ("[S]trict construction of [§ 2501] . . . serves the salutary purpose of ensuring that a Congress close to the one that enacted the statute [alleged to have caused a breach of contract]—rather than a Congress serving perhaps many decades later—may and must address the consequences."); see Tr. of Oral Arg. 45–46.

We do not agree that § 2501 creates a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional: A number of contemporaneous state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim "first accrues." See J. Angell, Limitations of Actions 536–588 (6th ed. 1876) (quoting state statutes of limitations). Equally telling, in its many years of applying and interpreting § 2501, the Court of Federal Claims has never attributed to the words "first accrues" the meaning the Government now proposes. Instead, in other settings, that court has adopted the repudiation doctrine in its traditional form when evaluating the timeliness of suits governed by § 2501. See *Plaintiffs in Winstar-Related Cases* v. *United States*, 37 Fed. Cl. 174, 183–184 (1997), aff'd *sub nom. Ariadne Financial Services Pty. Ltd.* v. *United States*, 133 F. 3d 874 (CA Fed. 1998). In line with our recognition that limitations principles should generally apply to the Government "in the same way that" they apply to private parties, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990), we reject the Government's proposed construction of § 2501. That position, we conclude, presents an "unduly restrictiv[e]" reading of the congressional waiver of sovereign immunity, *Bowen* v. *City of New York*, 476 U. S. 467, 479 (1986), rather than "a realistic assessment of legislative intent," *Irwin*, 498 U. S., at 95.[9]

[9] As petitioners observe, see Reply Brief 6, n. 6, the "first accrues" qualification might serve a meaningful purpose in the context of tolling of disabilities for successive claimants. In that context, the qualification would ensure that suit could be delayed only during the disability of the claim-

Two practical considerations reinforce this conclusion. Cf. *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, 517 (1967) (the words "first accrues" must be interpreted "with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought" (internal quotation marks omitted)). Reading § 2501 as the Government proposes would seriously distort the repudiation doctrine in suits brought under the Tucker Act. Assuming a claim could "first accrue" for limitations purposes on the date of repudiation, but see *supra*, at 144, a party aggrieved by the Government's renunciation of a contractual obligation anticipating future performance would be compelled by the looming limitations bar to forgo the usual option of awaiting the time performance is due before filing an action for breach. The Government's construction of § 2501 would thus convert the repudiation doctrine from a shield for the promisee into a sword by which the Government could invoke its own wrongdoing to defeat otherwise timely suits. As Professor Corbin explained, "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." Corbin, Contracts § 989, at 967; see *Roehm* v. *Horst*, 178 U. S., at 10 ("[I]t seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, . . . which may be advantageous to the innocent party.").

There is also reason to doubt that the Government's reading of § 2501 would inure to the benefit of the United States. Putting prospective plaintiffs to the choice of either bringing suit soon after the Government's repudiation or forever relinquishing their claims would surely proliferate litigation.

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ant to whom a right of action first accrued; successive claimants laboring under a disability would be unprotected by any tolling proviso. See J. Angell, Limitations of Actions 488, and n. 2 (6th ed. 1876).

Every borrower of FmHA loans, for example, would be forced to sue the Government within six years of ELIHPA's enactment in order to preserve a claim stemming from that Act. Faced with the prospect of forever forgoing such a claim, even a borrower that had not previously wished to prepay might well conclude that early exit from the FmHA program is the only safe course. The Government would thus find itself defending against highly speculative damages claims in a profusion of lawsuits, most of which would never have been brought under a less novel interpretation of § 2501. See Tr. of Oral Arg. 33–34.[10]

The Government also seeks to avoid the repudiation doctrine by attacking as "futile" petitioners' "search for an exact parallel in contracts solely between private parties." Brief for United States 13. The law of repudiation does not govern here, the Government ultimately contends, because the "statement of intent not to perform" on which petitioners base their claim is an Act of Congress. *Id.*, at 24. According to the Government, a congressional enactment like ELIHPA that precludes the Government from honoring a contractual obligation anticipating future performance always constitutes a present breach. This is so, the Government maintains, because "the promisor"—the agency or official responsible for administering the contract—does not

[10] The Government's reliance on *McMahon* v. *United States*, 342 U. S. 25 (1951), is misplaced. Brief for United States 29–30. The Court there rejected an interpretation of the Suits in Admiralty Act that would have given tort plaintiffs "an option as to when they will choose to start the period of limitation of an action against the United States." 342 U. S., at 27. The reasoning in that case does not apply to petitioners' claims, which arise out of contracts in which the Government allegedly granted borrowers an option to demand performance, and thereby precipitate breach, at any time. See *supra*, at 141. And unlike the position rejected in *McMahon*, our ruling today ensures that suit must be brought within a fixed period after the date of injury—in this case, no later than six years after the Government's refusal to accept prepayment in accord with the terms of the promissory notes.

"remai[n] free to change its mind and render the requisite performance" without violating binding federal law. *Id.*, at 27. Accordingly, the Government concludes, the essential purpose of the repudiation doctrine—to avoid an unnecessary lawsuit by allowing the promisor an opportunity to adhere to its undertaking—is inapplicable.

We reject the Government's premise, and therefore its conclusion. Just as Congress may announce the Government's intent to dishonor an obligation to perform in the future through a duly enacted law, so may it retract that renouncement prior to the time for performance, thereby enabling the agency or contracting official to perform as promised. Indeed, Congress "change[d] its mind" in just this manner before it enacted ELIHPA. *Ibid.* In the 1979 amendments to the National Housing Act, Congress repudiated the promissory notes at issue here by conditioning prepayment of all § 515 loans on the borrower's agreement to maintain the low-income use of its property for a specified period. See Housing and Community Development Amendments of 1979, 93 Stat. 1134–1135. One year later, Congress removed those conditions on pre-1979 loans, thereby retracting the repudiation. See Housing and Community Development Act of 1980, 94 Stat. 1671–1672; *supra*, at 135.

We comprehend no reason why an Act of Congress may not constitute a repudiation of a contract to which the United States is a party. Congress may renounce the Government's contractual duties without triggering an immediate breach because Congress may withdraw that repudiation if given the opportunity to do so. "Hence, . . . the fact that [the Government's] repudiation rested upon the enactment of a new statute makes no significant difference." *Mobil Oil*, 530 U. S., at 620; see *id.*, at 619 ("[I]f legislation passed by Congress and signed by the President is not a 'statement by the obligor' " capable of triggering a repudiation, "it is difficult to imagine what would constitute such a statement." (quoting Restatement § 250)).

B

To answer the question presented—when does the statute of limitations on petitioners' claims begin to run, see Pet. for Cert. i—we need not separately address petitioners' alternative theory of recovery based on the Takings Clause of the Fifth Amendment. The Federal Circuit's holding that takings relief was time barred hinged entirely on its conclusion that petitioners' contract claims accrued upon passage of ELIHPA. See 240 F. 3d, at 1365–1366. Because that conclusion was incorrect, we hold, the Federal Circuit erred in dismissing petitioners' takings theory on grounds of untimeliness.

* * *

Concluding that each petitioner's claim is timely if filed within six years of a wrongly rejected tender of prepayment, we reverse the judgments of the Federal Circuit and remand the *Franconia* and *Grass Valley* cases reviewed herein for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., ET AL. *v.* VILLAGE OF STRATTON ET AL.

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

No. 00–1737. Argued February 26, 2002—Decided June 17, 2002

Respondent Village of Stratton (Village) promulgated an ordinance that, *inter alia,* prohibits "canvassers" from "going in and upon" private residential property to promote any "cause" without first obtaining a permit from the mayor's office by completing and signing a registration form. Petitioners, a society and a congregation of Jehovah's Witnesses that publish and distribute religious materials, brought this action for injunctive relief, alleging that the ordinance violates their First Amendment rights to the free exercise of religion, free speech, and freedom of the press. The District Court upheld most provisions of the ordinance as valid, content-neutral regulations, although it did require the Village to accept narrowing constructions of several provisions. The Sixth Circuit affirmed. Among its rulings, that court held that the ordinance was content neutral and of general applicability and therefore subject to intermediate scrutiny; rejected petitioners' argument that the ordinance is overbroad because it impairs the right to distribute pamphlets anonymously that was recognized in *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334; concluded that the Village's interests in protecting its residents from fraud and undue annoyance and its desire to prevent criminals from posing as canvassers in order to defraud its residents were sufficient bases on which to justify the regulation; and distinguished this Court's earlier cases protecting the Jehovah's Witnesses ministry.

Held: The ordinance's provisions making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violate the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. Pp. 160–169.

(a) For over 50 years, this Court has invalidated on First Amendment grounds restrictions on door-to-door canvassing and pamphleteering by Jehovah's Witnesses. See, *e. g., Murdock* v. *Pennsylvania,* 319 U. S. 105. Although those cases do not directly control the question at issue, they yield several themes that guide the Court. Among other things,

those cases emphasize that the hand distribution of religious tracts is ages old and has the same claim as more orthodox practices to the guarantees of freedom of religion, speech, and press, *e. g., id.,* at 109; discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas, *e. g., Schneider* v. *State (Town of Irvington),* 308 U. S. 147, 164, but recognize the legitimate interests a town may have in some form of regulation, particularly when the solicitation of money is involved, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296, 306, or the prevention of burglary is a legitimate concern, *Martin* v. *City of Struthers,* 319 U. S. 141, 144; make clear that there must be a balance between such interests and the effect of the regulations on First Amendment rights, *e. g., ibid.;* and demonstrate that the Jehovah's Witnesses have not struggled for their rights alone, but for those many who are poorly financed and rely extensively upon this method of communication, see, *e. g., id.,* at 144–146, including nonreligious groups and individuals, see, *e. g., Thomas* v. *Collins,* 323 U. S. 516, 539–540. Pp. 160–164.

(b) The Court need not resolve the parties' dispute as to what standard of review to use here because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Sixth Circuit erred in upholding it. There is no doubt that the interests the ordinance assertedly serves—the prevention of fraud and crime and the protection of residents' privacy—are important and that the Village may seek to safeguard them through some form of regulation of solicitation activity. However, the amount of speech covered by the ordinance raises serious concerns. Had its provisions been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting its residents' privacy and preventing fraud. Yet, the Village's administration of its ordinance unquestionably demonstrates that it applies to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." The pernicious effect of the permit requirement is illustrated by, *e. g.,* the requirement that a canvasser be identified in a permit application filed in the mayor's office and made available for public inspection, which necessarily results in a surrender of the anonymity this Court has protected. Also central to the Court's conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village's

argument that the ordinance is nonetheless valid because it serves the two additional interests of protecting residents' privacy and the prevention of crime is unpersuasive. As to the former, an unchallenged ordinance section authorizing residents to post "No Solicitation" signs, coupled with their unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for unwilling listeners. As to the latter, it seems unlikely that the lack of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance, and, in any event, there is no evidence in the record of a special crime problem related to door-to-door solicitation. Pp. 164–169.

240 F. 3d 553, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 169. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 171. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 172.

Paul D. Polidoro argued the cause for petitioners. With him on the briefs were *Philip Brumley, Richard D. Moake*, and *Donald T. Ridley.*

Abraham Cantor argued the cause and filed a brief for respondents.

David M. Gormley, State Solicitor of Ohio, argued the cause for the State of Ohio et al. as *amici curiae* in support of respondents. With him on the brief were *Betty D. Montgomery*, Attorney General of Ohio, *Elise W. Porter* and *Kirk A. Lindsey*, Assistant Solicitors, and the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas Reilly* of Massachusetts, *Frankie Sue Del Papa* of Nevada, *W. A. Drew Edmondson* of Oklahoma, and *Hoke MacMillan* of Wyoming.*

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*Briefs of *amici curiae* urging reversal were filed for Commonwealth of the Northern Mariana Islands by *Herbert D. Soll*, Attorney General,

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners contend that a village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violates the First Amendment. Through this facial challenge, we consider the door-to-door canvassing regulation not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills.

I

Petitioner Watchtower Bible and Tract Society of New York, Inc., coordinates the preaching activities of Jehovah's Witnesses throughout the United States and publishes Bibles and religious periodicals that are widely distributed. Petitioner Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., supervises the activities of approximately 59 members in a part of Ohio that includes the Village of Stratton (Village). Petitioners offer religious literature without cost to anyone interested in reading it. They allege that they do not solicit contributions or orders for the sale of merchandise or services, but they do accept donations.

Petitioners brought this action against the Village and its mayor in the United States District Court for the Southern

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David Collins, and *Karen M. Klaver;* for the Center for Individual Freedom by *Eric S. Jaffe;* for the Church of Jesus Christ of Latter-day Saints by *Von G. Keetch;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg*, *Steven R. Shapiro*, and *Raymond Vasvari;* and for RealCampaignReform.org, Inc., et al. by *William J. Olson*, *John S. Miles*, and *Herbert W. Titus*.

Briefs of *amici curiae* urging affirmance were filed for the Ohio Municipal League by *Barry M. Byron* and *John E. Gotherman;* and for the International Municipal Lawyers Association et al. by *Richard Ruda* and *James I. Crowley*.

Briefs of *amici curiae* were filed for the Brennan Center for Justice by *Burt Neuborne*, *Deborah Goldberg*, and *Richard L. Hasen;* and for Independent Baptist Churches of America by *Thomas W. King III*.

District of Ohio, seeking an injunction against the enforcement of several sections of Ordinance No. 1998–5 regulating uninvited peddling and solicitation on private property in the Village. Petitioners' complaint alleged that the ordinance violated several constitutional rights, including the free exercise of religion, free speech, and the freedom of the press. App. 10a–44a. The District Court conducted a bench trial at which evidence of the administration of the ordinance and its effect on petitioners was introduced.

Section 116.01 prohibits "canvassers" and others from "going in and upon" private residential property for the purpose of promoting any "cause" without first having obtained a permit pursuant to § 116.03.[1] That section provides that any canvasser who intends to go on private property to promote a cause must obtain a "Solicitation Permit" from the office of the mayor; there is no charge for the permit, and apparently one is issued routinely after an applicant

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[1] Section 116.01 provides: "The practice of going in and upon private property and/or the private residences of Village residents in the Village by canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise or services, not having been invited to do so by the owners or occupants of such private property or residences, and not having first obtained a permit pursuant to Section 116.03 of this Chapter, for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services, is hereby declared to be a nuisance and is prohibited." App. to Brief for Respondents 2a. The Village has interpreted the term "canvassers" to include Jehovah's Witnesses and the term "cause" to include their ministry. The ordinance does not appear to require a permit for a surveyor since such an individual would not be entering private property "for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services." Thus, contrary to the assumption of the dissent in its heavy reliance on the example from Dartmouth, *post*, at 172–173, 177, 179 (opinion of REHNQUIST, C. J.), the Village's ordinance would have done nothing to prevent that tragic crime.

fills out a fairly detailed "Solicitor's Registration Form."[2] The canvasser is then authorized to go upon premises that he listed on the registration form, but he must carry the permit upon his person and exhibit it whenever requested to do so by a police officer or by a resident.[3] The ordinance

[2] Section 116.03 provides:

"(a) No canvasser, solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise or services who is described in Section 116.01 of this Chapter and who intends to go in or upon private property or a private residence in the Village for any of the purposes described in Section 116.01, shall go in or upon such private property or residence without first registering in the office of the Mayor and obtaining a Solicitation Permit.

"(b) The registration required by subsection (a) hereof shall be made by filing a Solicitor's Registration Form, at the office of the Mayor, on a form furnished for such purpose. The Form shall be completed by the Registrant and it shall then contain the following information:

"(1) The name and home address of the Registrant and Registrant's residence for five years next preceding the date of registration;

"(2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause, and/or the goods or services offered;

"(3) The name and address of the employer or affiliated organization, with credentials from the employer or organization showing the exact relationship and authority of the Applicant;

"(4) The length of time for which the privilege to canvass or solicit is desired;

"(5) The specific address of each private residence at which the Registrant intends to engage in the conduct described in Section 116.01 of this Chapter, and,

"(6) Such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." Brief for Respondents 3a–4a.

[3] Section 116.04 provides: "Each Registrant who complies with Section 116.03(b) shall be furnished a Solicitation Permit. The permit shall indicate that the applicant has registered as required by Section 116.03 of this Chapter. No permittee shall go in or upon any premises not listed on the Registrant's Solicitor's Registration Form.

"Each person shall at all times, while exercising the privilege in the Village incident to such permit, carry upon his person his permit and the

sets forth grounds for the denial or revocation of a permit,[4] but the record before us does not show that any application has been denied or that any permit has been revoked. Petitioners did not apply for a permit.

A section of the ordinance that petitioners do not challenge establishes a procedure by which a resident may prohibit solicitation even by holders of permits. If the resident files a "No Solicitation Registration Form" with the mayor, and also posts a "No Solicitation" sign on his property, no uninvited canvassers may enter his property, unless they are specifically authorized to do so in the "No Solicitation Registration Form" itself.[5] Only 32 of the Village's 278 residents

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same shall be exhibited by such person whenever he is requested to do so by any police officer or by any person who is solicited." *Id.*, at 4a.

[4] Section 116.06 provides: "Permits described in Section 116.04 of this Chapter may be denied or revoked by the Mayor for any one or more of the following reasons:

"(a) Incomplete information provided by the Registrant in the Solicitor's Registration Form.

"(b) Fraud or misrepresentation contained in the Solicitor's Registration Form.

"(c) Fraud, misrepresentation or false statements made in the course of conducting the activity.

"(d) Violation of any of the provisions of this chapter or of other Codified Ordinances or of any State or Federal Law.

"(e) Conducting canvassing, soliciting or business in such a manner as to constitute a trespass upon private property.

"(f) The permittee ceases to possess the qualifications required in this chapter for the original registration." *Id.*, at 5a.

[5] Section 116.07 provides, in part: "(a) Notwithstanding the provisions of any other Section of this Chapter 116, any person, firm or corporation who is the owner or lawful occupant of private property within the territorial limits of the Village of Stratton, Ohio, may prohibit the practice of going in or upon the private property and/or the private residence of such owner or occupant, by uninvited canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors, by registering its property in accordance with Subdivision (b) of this Section and by posting upon each such registered property a sign which reads 'No Solicitation' in a location

filed such forms. Each of the forms in the record contains a list of 19 suggested exceptions;[6] on one form, a resident checked 17 exceptions, thereby excluding only "Jehovah's Witnesses" and "Political Candidates" from the list of invited canvassers. Although Jehovah's Witnesses do not consider themselves to be "solicitors" because they make no charge for their literature or their teaching, leaders of the church testified at trial that they would honor "no solicitation" signs in the Village. They also explained at trial that they did not apply for a permit because they derive their authority to

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which is reasonably visible to persons who intend to enter upon such property.

"(b) The registration authorized by Subsection (a) hereof shall be made by filing a 'No Solicitation Registration Form', at the office of the Mayor, on a form furnished for such purpose. The form shall be completed by the property owner or occupant and it shall then contain the following information: . . . ." *Id.*, at 6a.

[6] The suggested exceptions listed on the form are:

1. Scouting Organizations
2. Camp Fire Girls
3. Children's Sports Organizations
4. Children's Solicitation for Supporting School Activities
5. Volunteer Fire Dept.
6. Jehovah's Witnesses
7. Political Candidates
8. Beauty Products Sales People
9. Watkins Sales
10. Christmas Carolers
11. Parcel Delivery
12. Little League
13. Trick or Treaters during Halloween Season
14. Police
15. Campaigners
16. Newspaper Carriers
17. Persons Affiliated with Stratton Church
18. Food Salesmen
19. Salespersons. App. 229a.

Apparently the ordinance would prohibit each of these 19 categories from canvassing unless expressly exempted.

preach from Scripture.[7] "For us to seek a permit from a municipality to preach we feel would almost be an insult to God." App. 321a.

Petitioners introduced some evidence that the ordinance was the product of the mayor's hostility to their ministry, but the District Court credited the mayor's testimony that it had been designed to protect the privacy rights of the Village residents, specifically to protect them "from 'flim flam' con artists who prey on small town populations." 61 F. Supp. 2d 734, 736 (SD Ohio 1999). Nevertheless, the court concluded that the terms of the ordinance applied to the activities of petitioners as well as to "business or political canvassers," *id.*, at 737, 738.

The District Court upheld most provisions of the ordinance as valid, content-neutral regulations that did not infringe on petitioners' First Amendment rights. The court did, however, require the Village to accept narrowing constructions of three provisions. First, the court viewed the requirement in § 116.03(b)(5) that the applicant must list the specific address of each residence to be visited as potentially invalid, but cured by the Village's agreement to attach to the form a list of willing residents. *Id.*, at 737. Second, it held that petitioners could comply with § 116.03(b)(6) by merely stating their purpose as "the Jehovah's Witness ministry." *Id.*, at 738. And third, it held that § 116.05, which limited canvassing to the hours before 5 p.m., was invalid on its face and should be replaced with a provision referring to "reasonable hours of the day." *Id.*, at 739. As so modified, the court held the ordinance constitutionally valid as applied to petitioners and dismissed the case.

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[7] Specifically, from the Book of "Matthew chapter 28, verses 19 and 20, which we take as our commission to preach. . . . So Jesus, by example, instituted a house-to-house search for people so as to preach the good news to them. And that's the activity that Jehovah's Witnesses engage in, even as Christ's apostles did after his resurrection to heaven." *Id.*, at 313a–314a.

The Court of Appeals for the Sixth Circuit affirmed. 240 F. 3d 553 (2001). It held that the ordinance was "content neutral and of general applicability and therefore subject to intermediate scrutiny." *Id.*, at 560. It rejected petitioners' reliance on the discussion of laws affecting both the free exercise of religion and free speech in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990),[8] because that "language was dicta and therefore not binding." 240 F. 3d, at 561. It also rejected petitioners' argument that the ordinance is overbroad because it impairs the right to distribute pamphlets anonymously that we recognized in *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), reasoning that "the very act of going door-to-door requires the canvassers to reveal a portion of their identities." 240 F. 3d, at 563. The Court of Appeals concluded that the interests promoted by the Village—"protecting its residents from fraud and undue annoyance"—as well as the harm that it seeks to prevent—"criminals posing as canvassers in order to defraud its residents"—though "by no means overwhelming," were sufficient to justify the regulation. *Id.*, at 565–566. The court distinguished earlier cases protecting the Jehovah's Witnesses ministry because those cases either in-

[8] "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell* v. *Connecticut*, 310 U. S., at 304–307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett* v. *McCormick*, 321 U. S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), to direct the education of their children, see *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)." 494 U. S., at 881 (footnote omitted).

volved a flat prohibition on the dissemination of ideas, *e. g.*, *Martin* v. *City of Struthers*, 319 U. S. 141 (1943), or an ordinance that left the issuance of a permit to the discretion of a municipal officer, see, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296, 302 (1940).

In dissent, Judge Gilman expressed the opinion that by subjecting noncommercial solicitation to the permit requirements, the ordinance significantly restricted a substantial quantity of speech unrelated to the Village's interest in eliminating fraud and unwanted annoyance. In his view, the Village "failed to demonstrate either the reality of the harm or the efficacy of the restriction." 240 F. 3d, at 572.

We granted certiorari to decide the following question: "Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse?" 534 U. S. 971 (2001); Pet. for Cert. i.[9]

II

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering.[10] It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. As we noted in *Murdock* v. *Pennsylvania*,

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[9] In their briefs and at oral argument, the parties debated a factual issue embedded in the question presented, namely, whether the permit contains the speaker's name. We need not resolve this factual dispute in order to answer whether the ordinance's registration requirement abridges so much protected speech that it is invalid on its face.

[10] *Hynes* v. *Mayor and Council of Oradell*, 425 U. S. 610 (1976); *Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938).

319 U. S. 105, 108 (1943), the Jehovah's Witnesses "claim to follow the example of Paul, teaching 'publickly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God." Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.

Although our past cases involving Jehovah's Witnesses, most of which were decided shortly before and during World War II, do not directly control the question we confront today, they provide both a historical and analytical backdrop for consideration of petitioners' First Amendment claim that the breadth of the Village's ordinance offends the First Amendment.[11] Those cases involved petty offenses that raised constitutional questions of the most serious magnitude—questions that implicated the free exercise of religion, the freedom of speech, and the freedom of the press. From these decisions, several themes emerge that guide our consideration of the ordinance at issue here.

First, the cases emphasize the value of the speech involved. For example, in *Murdock* v. *Pennsylvania*, the Court noted that "hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion.

[11] The question presented is similar to one raised, but not decided, in *Hynes*. The ordinance that we held invalid in that case on vagueness grounds required advance notice to the police before "casually soliciting the votes of neighbors." 425 U. S., at 620, n. 4.

It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press." *Id.*, at 108–109.

In addition, the cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas. In *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939), the petitioner was a Jehovah's Witness who had been convicted of canvassing without a permit based on evidence that she had gone from house to house offering to leave books or booklets. Writing for the Court, Justice Roberts stated that "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. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the *free and unhampered* distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.*, at 164 (emphasis added).

Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds

for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Id.*, at 306. Similarly, in *Martin* v. *City of Struthers*, the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." 319 U. S., at 144. Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.'" *Ibid.* (quoting *Schneider*, 308 U. S., at 161).

Finally, the cases demonstrate that efforts of the Jehovah's Witnesses to resist speech regulation have not been a struggle for their rights alone. In *Martin*, after cataloging the many groups that rely extensively upon this method of communication, the Court summarized that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." 319 U. S., at 144–146.

That the Jehovah's Witnesses are not the only "little people" who face the risk of silencing by regulations like the Village's is exemplified by our cases involving nonreligious speech. See, *e. g.*, *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); *Hynes* v. *Mayor and Council of Oradell*, 425 U. S. 610 (1976); *Thomas* v. *Collins*, 323 U. S. 516 (1945). In *Thomas*, the issue was whether a labor leader could be required to obtain a permit before delivering a speech to prospective union members. After reviewing the Jehovah's Witnesses cases discussed above, the Court observed:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. . . .
>
> . . . . .
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> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.*, at 539–540.

Although these World War II-era cases provide guidance for our consideration of the question presented, they do not answer one preliminary issue that the parties adamantly dispute. That is, what standard of review ought we use in assessing the constitutionality of this ordinance. We find it unnecessary, however, to resolve that dispute because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.

III

The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime,

and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity. We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.

The text of the Village's ordinance prohibits "canvassers" from going on private property for the purpose of explaining or promoting any "cause," unless they receive a permit and the residents visited have not opted for a "no solicitation" sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud. Yet, even though the Village has explained that the ordinance was adopted to serve those interests, it has never contended that it should be so narrowly interpreted. To the contrary, the Village's administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." Indeed, on the "No Solicitation Forms" provided to the residents, the canvassers include "Camp Fire Girls," "Jehovah's Witnesses," "Political Candidates," "Trick or Treaters during Halloween Season," and "Persons Affiliated with Stratton Church." The ordinance unquestionably applies, not only to religious causes, but to political activity as well. It would seem to extend to "residents casually soliciting the votes of neighbors,"[12] or ringing doorbells to enlist support for employing a more efficient garbage collector.

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive—not only to

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[12] *Hynes*, 425 U. S., at 620, n. 4.

the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition. Three obvious examples illustrate the pernicious effect of such a permit requirement.

First, as our cases involving distribution of unsigned handbills demonstrate,[13] there are a significant number of persons who support causes anonymously.[14] "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S., at 341–342. The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity. Although it is true, as the Court of Appeals suggested, see 240 F. 3d, at 563, that persons who are known to the resident reveal their allegiance to a group or cause when they present themselves at the front door to advocate an issue or to deliver a handbill, the Court of Appeals erred in concluding that the ordinance does not implicate anonymity interests. The Sixth Circuit's reasoning is undermined by

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[13] *Talley* v. *California*, 362 U. S. 60 (1960); *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995).

[14] Although the Jehovah's Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

our decision in *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182 (1999). The badge requirement that we invalidated in *Buckley* applied to petition circulators seeking signatures in face-to-face interactions. The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity. In the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes. Such preclusion may well be justified in some situations—for example, by the special state interest in protecting the integrity of a ballot-initiative process, see *ibid.*, or by the interest in preventing fraudulent commercial transactions. The Village ordinance, however, sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process.

Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.

In this respect, the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936). In *Grosjean*, while discussing the history of the Free Press Clause of the First Amendment, the Court stated that "'[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.'" *Id.*, at 249–250 (quoting 2 T. Cooley, Constitutional Limitations 886 (8th ed. 1927)); see also *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938).

The breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village, however, argues that the ordinance is nonetheless valid because it serves the two additional interests of protecting the privacy of the resident and the prevention of crime.

With respect to the former, it seems clear that § 107 of the ordinance, which provides for the posting of "No Solicitation" signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. *Schaumburg*, 444 U. S., at 639 ("[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the availability of less intrusive and more effective measures to protect privacy"). The annoyance caused by an

uninvited knock on the front door is the same whether or not the visitor is armed with a permit.

With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyers or census takers. See n. 1, *supra*. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials. Moreover, the Village did not assert an interest in crime prevention below, and there is an absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us.

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

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

It is so ordered.

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

While joining the Court's opinion, I write separately to note that the dissent's "crime prevention" justification for this ordinance is not a strong one. Cf. *post*, at 176–180 (opinion of REHNQUIST, C. J.). For one thing, there is no indication that the legislative body that passed the ordinance considered this justification. Stratton did not rely on the rationale in the courts below, see 61 F. Supp. 2d 734, 736 (SD Ohio 1999) (opinion of the District Court describing the

ordinance as "constructed to protect the Village residents from 'flim flam' con artists"); 240 F. 3d 553, 565 (CA6 2001) (opinion of the Court of Appeals describing interests as "protecting [the Village's] residents from fraud and undue annoyance"), and its general references to "deter[ing] crime" in its brief to this Court cannot fairly be construed to include anything other than the fraud it discusses specifically. Brief for Respondents 14–18.

In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given. Cf. *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" (emphasis added)). That does not mean, as THE CHIEF JUSTICE suggests, that only a government with a "battery of constitutional lawyers," *post,* at 172, could satisfy this burden. It does mean that we expect a government to give its real reasons for passing an ordinance. Legislators, in even the smallest town, are perfectly able to do so—sometimes better on their own than with too many lawyers, *e. g.,* a "battery," trying to offer their advice. I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.

But it is not just that. It is also intuitively implausible to think that Stratton's ordinance serves any governmental interest in preventing such crimes. As the Court notes, several categories of potential criminals will remain entirely untouched by the ordinance. *Ante,* at 168–169, 154, n. 1. And as to those who might be affected by it, "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 392 (2000). Even less readily should we accept such implausible conjecture offered not by the party itself but only by an *amicus,* see Brief for Ohio et al. as *Amici Curiae* 5–6.

Because Stratton did not rely on the crime prevention justification, because Stratton has not now "present[ed] more than anecdote and supposition," *Playboy Entertainment Group*, *supra*, at 822, and because the relationship between the interest and the ordinance is doubtful, I am unwilling to assume that these conjectured benefits outweigh the cost of abridging the speech covered by the ordinance.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I concur in the judgment, for many but not all of the reasons set forth in the opinion for the Court. I do not agree, for example, that one of the causes of the invalidity of Stratton's ordinance is that some people have a religious objection to applying for a permit, and others (posited by the Court) "have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official." *Ante*, at 167.

If a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free-exercise claim, see *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), into a valid free-speech claim—and a more destructive one at that. Whereas the free-exercise claim, if acknowledged, would merely exempt Jehovah's Witnesses from the licensing requirement, the free-speech claim exempts *everybody*, thanks to Jehovah's Witnesses.

As for the Court's fairytale category of "patriotic citizens," *ante*, at 167, who would rather be silenced than licensed in a manner that the Constitution (but for their "patriotic" objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.

CHIEF JUSTICE REHNQUIST, dissenting.

Stratton is a village of 278 people located along the Ohio River where the borders of Ohio, West Virginia, and Pennsylvania converge. It is strung out along a multilane highway connecting it with the cities of East Liverpool to the north and Steubenville and Weirton, West Virginia, to the south. One may doubt how much legal help a village of this size has available in drafting an ordinance such as the present one, but even if it had availed itself of a battery of constitutional lawyers, they would have been of little use in the town's effort. For the Court today ignores the cases on which those lawyers would have relied, and comes up with newly fashioned doctrine. This doctrine contravenes well-established precedent, renders local governments largely impotent to address the very real safety threat that canvassers pose, and may actually result in less of the door-to-door communication that it seeks to protect.

More than half a century ago we recognized that canvassers, "whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home," and that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." *Martin* v. *City of Struthers,* 319 U. S. 141, 144 (1943). These problems continue to be associated with door-to-door canvassing, as are even graver ones.

A recent double murder in Hanover, New Hampshire, a town of approximately 7,500 that would appear tranquil to most Americans but would probably seem like a bustling town of Dartmouth College students to Stratton residents, illustrates these dangers. Two teenagers murdered a married couple of Dartmouth College professors, Half and Susanne Zantop, in the Zantops' home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing

access numbers to bank debit cards and then killing their owners. See Dartmouth Professors Called Random Targets, Washington Post, Feb. 20, 2002, p. A2. Their *modus operandi* was to tell residents that they were conducting an environmental survey for school. They canvassed a few homes where no one answered. At another, the resident did not allow them in to conduct the "survey." They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death. See *ibid.*

In order to reduce these very grave risks associated with canvassing, the 278 "'little people,'" *ante*, at 163, of Stratton, who, unlike petitioners, do not have a team of attorneys at their ready disposal, see Jehovah's Witnesses May Make High Court History Again, Legal Times, Feb. 25, 2002, p. 1 (noting that petitioners have a team of 12 lawyers in their New York headquarters), enacted the ordinance at issue here. The residents did not prohibit door-to-door communication; they simply required that canvassers obtain a permit before going door-to-door. And the village does not have the discretion to reject an applicant who completes the application.

The town had little reason to suspect that the negligible burden of having to obtain a permit runs afoul of the First Amendment. For over 60 years, we have categorically stated that a permit requirement for door-to-door canvassers, which gives no discretion to the issuing authority, is constitutional. The District Court and Court of Appeals, relying on our cases, upheld the ordinance. The Court today, however, abruptly changes course and invalidates the ordinance.

The Court speaks of the "historical and analytical backdrop for consideration of petitioners' First Amendment claim," *ante*, at 161. But this "backdrop" is one of longstanding and unwavering approval of a permit requirement like Stratton's. Our early decisions in this area expressly

sanction a law that merely requires a canvasser to register. In *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940), we stated that "[w]ithout doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116 (1943), we contrasted the license tax struck down in that case with "merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community." And *Martin*, *supra*, at 148, states that a "city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers."

It is telling that Justices Douglas and Black, perhaps the two Justices in this Court's history most identified with an expansive view of the First Amendment, authored, respectively, *Murdock* and *Martin*. Their belief in the constitutionality of the permit requirement that the Court strikes down today demonstrates just how far the Court's present jurisprudence has strayed from the core concerns of the First Amendment.

We reaffirmed our view that a discretionless permit requirement is constitutional in *Hynes* v. *Mayor and Council of Oradell*, 425 U. S. 610 (1976). *Hynes*, though striking down a registration ordinance on vagueness grounds, noted that "the Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." *Id.*, at 616–617.

The Stratton ordinance suffers from none of the defects deemed fatal in these earlier decisions. The ordinance does not prohibit door-to-door canvassing; it merely requires that canvassers fill out a form and receive a permit. Cf. *Martin*, *supra*. The mayor does not exercise any discretion in deciding who receives a permit; approval of the permit is automatic upon proper completion of the form. Cf. *Cantwell*, *supra*. And petitioners do not contend in this Court that the ordinance is vague. Cf. *Hynes*, *supra*.

Just as troubling as the Court's ignoring over 60 years of precedent is the difficulty of discerning from the Court's opinion what exactly it is about the Stratton ordinance that renders it unconstitutional. It is not clear what test the Court is applying, or under which part of that indeterminate test the ordinance fails. See *ante*, at 164 (finding it "unnecessary . . . to resolve" what standard of review applies to the ordinance). We are instead told that the "breadth of speech affected" and "the nature of the regulation" render the permit requirement unconstitutional. *Ibid.* Under a straightforward application of the applicable First Amendment framework, however, the ordinance easily passes muster.

There is no support in our case law for applying anything more stringent than intermediate scrutiny to the ordinance. The ordinance is content neutral and does not bar anyone from going door-to-door in Stratton. It merely regulates the manner in which one must canvass: A canvasser must first obtain a permit. It is, or perhaps I should say was, settled that 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.' " *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)). Earlier

this Term, the Court reaffirmed that this test applies to content-neutral time, place, or manner restrictions on speech in public forums. See *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316 (2002).

The Court suggests that Stratton's regulation of speech warrants greater scrutiny. *Ante*, at 164. But it would be puzzling if regulations of speech taking place on *another citizen's* private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite. In *Hynes*, the Court explained: "'Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.'" 425 U. S., at 619 (quoting Z. Chafee, Free Speech in the United States 406 (1954)). In *Ward*, the Court held that intermediate scrutiny was appropriate "*even* in a public forum," 491 U. S., at 791 (emphasis added), appropriately recognizing that speech enjoys greater protection in a public forum that has been opened to all citizens, see *ibid.* Indeed, we have held that the mere proximity of private residential property to a public forum permits more extensive regulation of speech taking place at the public forum than would otherwise be allowed. See *Frisby* v. *Schultz*, 487 U. S. 474, 483–484 (1988). Surely then, intermediate scrutiny applies to a content-neutral regulation of speech that occurs not just near, but at, another citizen's private residence.

The Stratton regulation is aimed at three significant governmental interests: the prevention of fraud, the prevention of crime, and the protection of privacy.[1] The Court con-

[1] Of course, fraud itself may be a crime. I assume, as does the majority, that the interest in preventing "crime" refers to a separate interest in preventing burglaries and violent crimes.

cedes that "in light of our precedent, . . . these are important interests that [Stratton] may seek to safeguard through some form of regulation of solicitation activity." *Ante,* at 165. Although initially recognizing the important interest in preventing crime, the Court later indicates that the "absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us" lessens this interest. *Ante,* at 169. But the village is entitled to rely on our assertion in *Martin* that door-to-door canvassing poses a risk of crime, see *Erie* v. *Pap's A. M.*, 529 U. S. 277, 297 (2000) (citing *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986)), and the experience of other jurisdictions with crime stemming from door-to-door canvassing, see 529 U. S., at 297; *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 393, n. 6 (2000).

The double murder in Hanover described above is but one tragic example of the crime threat posed by door-to-door canvassing. Other recent examples include a man soliciting gardening jobs door-to-door who tied up and robbed elderly residents, see Van Derbken, 98-Year-Old Latest Victim in Series of Home Invasions, San Francisco Chronicle, Sept. 13, 2000, p. A18, a door-to-door vacuum cleaner salesman who raped a woman, see Employers Liable for Rape by Salesman, Texas Lawyer, Jan. 11, 1999, p. 2, and a man going door-to-door purportedly on behalf of a church group who committed multiple sexual assaults, see Ingersoll, Sex Crime Suspect Traveled with Church Group, Wis. State Journal, Feb. 19, 2000, p. 1B. The Constitution does not require that Stratton first endure its own crime wave before it takes measures to prevent crime.

What is more, the Court soon forgets both the privacy and crime interests. It finds the ordinance too broad because it applies to a "significant number of noncommercial 'canvassers.'" *Ante,* at 165. But noncommercial canvassers, for example, those purporting to conduct environmental surveys for school, see *supra,* at 172–173, can violate no trespassing

signs and engage in burglaries and violent crimes just as easily as commercial canvassers can. See *Martin*, 319 U. S., at 144 (canvassers, "whether selling pots *or distributing leaflets*, may lessen the peaceful enjoyment of a home" and "sp[y] out" homes for burglaries (emphasis added)). Stratton's ordinance is thus narrowly tailored. It applies to everyone who poses the risks associated with door-to-door canvassing, *i. e.*, it applies to everyone who canvasses door-to-door. The Court takes what should be a virtue of the ordinance—that it is content neutral, cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501 (1996) ("[O]ur commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression")—and turns it into a vice.

The next question is whether the ordinance serves the important interests of protecting privacy and preventing fraud and crime. With respect to the interest in protecting privacy, the Court concludes that "[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit." *Ante*, at 168–169. True, but that misses the key point: The permit requirement results in fewer uninvited knocks. Those who have complied with the permit requirement are less likely to visit residences with no trespassing signs, as it is much easier for the authorities to track them down.

The Court also fails to grasp how the permit requirement serves Stratton's interest in preventing crime.[2] We have approved of permit requirements for those engaging in protected First Amendment activity because of a commonsense recognition that their existence both deters and helps detect wrongdoing. See, *e. g.*, *Thomas* v. *Chicago Park Dist.*, 534

[2] It is sufficient that the ordinance serves the important interest of protecting residents' privacy. A law need only serve *a* governmental interest. Because the Court's treatment of Stratton's interest in preventing crime gives short shrift to Stratton's attempt to deal with a very serious problem, I address that issue as well.

U. S. 316 (2002) (upholding a permit requirement aimed, in part, at preventing unlawful uses of a park and assuring financial accountability for damage caused by the event). And while some people, intent on committing burglaries or violent crimes, are not likely to be deterred by the prospect of a misdemeanor for violating the permit ordinance, the ordinance's effectiveness does not depend on criminals registering.

The ordinance prevents and detects serious crime by making it a crime not to register. Take the Hanover double murder discussed earlier. The murderers did not achieve their objective until they visited their fifth home over a period of seven months. If Hanover had a permit requirement, the teens may have been stopped before they achieved their objective. One of the residents they visited may have informed the police that there were two canvassers who lacked a permit. Such neighborly vigilance, though perhaps foreign to those residing in modern day cities, is not uncommon in small towns. Or the police on their own may have discovered that two canvassers were violating the ordinance. Apprehension for violating the permit requirement may well have frustrated the teenagers' objectives; it certainly would have assisted in solving the murders had the teenagers gone ahead with their plan.[3]

Of course, the Stratton ordinance does not guarantee that no canvasser will ever commit a burglary or violent crime. The Court seems to think this dooms the ordinance, erecting an insurmountable hurdle that a law must provide a foolproof method of preventing crime. In order to survive intermediate scrutiny, however, a law need not solve the crime

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[3] Indeed, an increased focus on apprehending criminals for "petty" offenses, such as not paying subway fares, is credited with the dramatic reduction in violent crimes in New York City during the last decade. See, *e. g.,* M. Gladwell, The Tipping Point: How Little Things Can Make a Big Difference (2000). If this works in New York City, surely it can work in a small village like Stratton.

problem, it need only further the interest in preventing crime. Some deterrence of serious criminal activity is more than enough to survive intermediate scrutiny.

The final requirement of intermediate scrutiny is that a regulation leave open ample alternatives for expression. Undoubtedly, ample alternatives exist here. Most obviously, canvassers are free to go door-to-door after filling out the permit application. And those without permits may communicate on public sidewalks, on street corners, through the mail, or through the telephone.

Intermediate scrutiny analysis thus confirms what our cases have long said: A discretionless permit requirement for canvassers does not violate the First Amendment. Today, the Court elevates its concern with what is, at most, a negligible burden on door-to-door communication above this established proposition. Ironically, however, today's decision may result in less of the door-to-door communication that the Court extols. As the Court recognizes, any homeowner may place a "No Solicitation" sign on his or her property, and it is a crime to violate that sign. *Ante*, at 168. In light of today's decision depriving Stratton residents of the degree of accountability and safety that the permit requirement provides, more and more residents may decide to place these signs in their yards and cut off door-to-door communication altogether.

Syllabus

BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY MISSOURI, ET AL. *v.* GORMAN

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

No. 01–682. Argued April 23, 2002—Decided June 17, 2002

Respondent, a paraplegic, suffered serious injuries that left him unable to work full time when, after arrest, he was transported to a Kansas City police station in a van that was not equipped to accommodate the disabled. He sued petitioner police officials and officers for discriminating against him on the basis of his disability, in violation of § 202 of the Americans with Disabilities Act of 1990 (ADA) and § 504 of the Rehabilitation Act of 1973, by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries. A jury awarded him compensatory and punitive damages, but the District Court vacated as to punitive damages, holding that they are unavailable in private suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act. In reversing, the Eighth Circuit found punitive damages available under the "general rule" of *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 70–71, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violation of a federal right.

Held: Punitive damages may not be awarded in private suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act. These sections are enforceable through private causes of action, whose remedies are coextensive with those available in a private action under Title VI of the Civil Rights Act of 1964. See § 203 of the ADA and § 505(a)(2) of the Rehabilitation Act. Title VI invokes Congress's Spending Clause power to place conditions on the grant of federal funds. This Court has regularly applied a contract-law analogy in defining the scope of conduct for which funding recipients may be held liable in money damages, and in finding a damages remedy available, in private suits under Spending Clause legislation. The same analogy applies in determining the scope of damages remedies. A remedy is appropriate relief only if the recipient is on notice that, by accepting federal funding, it exposes itself to such liability. A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation but also to those traditionally available in breach of contract suits. Title VI mentions no remedies; and punitive damages are

Syllabus

generally not available for breach of contract. Nor could it be said that Title VI funding recipients have, merely by accepting funds, implicitly consented to a remedy which is not normally available for contract actions, and the indeterminate magnitude of which could produce liability exceeding the level of federal funding. Because punitive damages may not be awarded in private suits under Title VI, it follows that they may not be awarded in suits under § 202 of the ADA and § 504 of the Rehabilitation Act. Pp. 184–190.

257 F. 3d 738, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. SOUTER, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 190. STEVENS, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 191.

Lawrence S. Robbins argued the cause for petitioners. With him on the briefs were *Roy T. Englert, Jr.*, *Alan E. Untereiner*, *Arnon D. Siegel*, and *Dale H. Close.*

Gregory G. Garre argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorneys General Boyd* and *McCallum*, *Deputy Solicitor General Clement*, *Jessica Dunsay Silver*, and *Gregory B. Friel.*

Scott L. Nelson argued the cause for respondent. With him on the brief were *Brian Wolfman*, *John M. Simpson*, and *Connie Knight Sieracki.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *Earl I. Anzai*, Attorney General of Hawaii, and *Dorothy D. Sellers* and *Adina L. K. Cunningham*, Deputy Attorneys General, joined by *Robert R. Rigsby*, Corporation Counsel of the District of Columbia, and the Attorneys General for their respective States as follows: *Robert A. Butterworth* of Florida, *Steve Carter* of Indiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *David Samson* of New Jersey, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, and *Hoke MacMillan* of Wyoming; for the California Municipalities et al. by *Samuel L. Jackson*, *Pamela Albers*, *Michael G. Colantuono*, *Ronald R. Ball*, *Michael F. Dean*, *John L. Cook*, *Charles E. Dickerson III*,

JUSTICE SCALIA delivered the opinion of the Court.

We must decide whether punitive damages may be awarded in a private cause of action brought under § 202 of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U. S. C. § 12132 (1994 ed.), and § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794(a).

I

Respondent Jeffrey Gorman, a paraplegic, is confined to a wheelchair and lacks voluntary control over his lower torso, including his bladder, forcing him to wear a catheter attached to a urine bag around his waist. In May 1992, he was arrested for trespass after fighting with a bouncer at a Kansas City, Missouri, nightclub. While waiting for a police van to transport him to the station, he was denied permission to use a restroom to empty his urine bag. When the van arrived, it was not equipped to receive respondent's wheelchair. Over respondent's objection, the officers removed him from his wheelchair and used a seatbelt and his own belt to strap him to a narrow bench in the rear of the van. During the ride to the police station, respondent released his seatbelt, fearing it placed excessive pressure on his urine bag. Eventually, the other belt came loose and respondent fell to the floor, rupturing his urine bag and injuring his shoulder and back. The driver, the only officer in the van, finding it impossible to lift respondent, fastened him to a support for the remainder of the trip. Upon arriv-

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Joel D. Kuperberg, Philip D. Kohn, John Sanford Todd, Robert E. Shannon, Joseph A. Soldani, William B. Conners, Gregory P. Priamos, Hadden Roth, James F. Penman, George Rios, Brien J. Farrell, Valerie J. Armento, Debra E. Corbett, J. Wallace Wortham, Jr., A. Scott Chinn, Karl F. Dean, Michael Cardozo, Nelson A. Diaz, Jeffrey L. Rogers, John C. Wolfe, and *Harry Morrison, Jr.;* and for the International City/County Management Association et al. by *Richard Ruda* and *James I. Crowley.*

Jeffrey Robert White filed a brief for the Association of Trial Lawyers of America et al. as *amici curiae* urging affirmance.

ing at the station, respondent was booked, processed, and released; later he was convicted of misdemeanor trespass. After these events, respondent suffered serious medical problems—including a bladder infection, serious lower back pain, and uncontrollable spasms in his paralyzed areas—that left him unable to work full time.

Respondent brought suit against petitioners—members of the Kansas City Board of Police Commissioners, the chief of police, and the officer who drove the van—in the United States District Court for the Western District of Missouri. The suit claimed petitioners had discriminated against respondent on the basis of his disability, in violation of § 202 of the ADA and § 504 of the Rehabilitation Act, by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries.

A jury found petitioners liable and awarded over $1 million in compensatory damages and $1.2 million in punitive damages. The District Court vacated the punitive damages award, holding that punitive damages are unavailable in suits under § 202 of the ADA and § 504 of the Rehabilitation Act. The Court of Appeals for the Eighth Circuit reversed, relying on this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 70–71 (1992), which stated the "general rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Punitive damages are appropriate relief, the Eighth Circuit held, because they are "an integral part of the common law tradition and the judicial arsenal," 257 F. 3d 738, 745 (2001), and Congress did nothing to disturb this tradition in enacting or amending the relevant statutes, *id.*, at 747. We granted certiorari. 534 U. S. 1103 (2002).

II

Section 202 of the ADA prohibits discrimination against the disabled by public entities; § 504 of the Rehabilitation Act

prohibits discrimination against the disabled by recipients of federal funding, including private organizations, 29 U. S. C. § 794(b)(3). Both provisions are enforceable through private causes of action. Section 203 of the ADA declares that the "remedies, procedures, and rights set forth in [§ 505(a)(2) of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides" for violations of § 202. 42 U. S. C. § 12133. Section 505(a)(2) of the Rehabilitation Act, in turn, declares that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available" for violations of § 504, as added, 92 Stat. 2983, 29 U. S. C. § 794a(a)(2). Thus, the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, which prohibits racial discrimination in federally funded programs and activities.

Although Title VI does not mention a private right of action, our prior decisions have found an *implied* right of action, *e. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 703 (1979), and Congress has acknowledged this right in amendments to the statute, leaving it "beyond dispute that private individuals may sue to enforce" Title VI, *Alexander* v. *Sandoval*, 532 U. S. 275, 280 (2001). It is less clear what remedies are available in such a suit. In *Franklin*, *supra*, at 73, we recognized "the traditional presumption in favor of *any appropriate relief* for violation of a federal right," and held that since this presumption applies to suits under Title IX of the Education Amendments of 1972, 20 U. S. C. §§ 1681–1688, monetary damages were available. (Emphasis added.) And the Court has interpreted Title IX consistently with Title VI, see *Cannon*, *supra*, at 694–698. *Franklin*, however, did not describe the scope of "appropriate relief." We take up this question today.

Title VI invokes Congress's power under the Spending Clause, U. S. Const., Art. I, § 8, cl. 1, to place conditions on

the grant of federal funds. See *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 640 (1999) (Title IX). We have repeatedly characterized this statute and other Spending Clause legislation as "much in the nature of a *contract:* in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981) (emphasis added);[1] see also *Davis*, *supra*, at 640; *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 286 (1998); *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 599 (1983) (opinion of White, J.); *id.*, at 632–633 (Marshall, J., dissenting); *Lau* v. *Nichols*, 414 U. S. 563, 568–569 (1974). Just as a valid contract requires offer and acceptance of its terms, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, *supra*, at 17; see also *Davis*, *supra*, at 640; *Gebser*, *supra*, at 287; *Franklin*, 503 U. S., at 74. Although we have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation, see, *e. g.*, *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 669 (1985) (Title I), we have regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages. Thus,

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[1] JUSTICE STEVENS believes that our reliance on *Pennhurst* is "inappropriate" because that case addressed legislation imposing affirmative obligations on recipients whereas Title VI "simply prohibit[s] certain discriminatory conduct." *Post*, at 192 (opinion concurring in judgment). He does not explain why he thinks this distinction—which played no role in the Court's application of contract-law principles in *Pennhurst*, 451 U. S., at 24–25—ought to make a difference. Whatever his reason, we have regularly applied *Pennhurst*'s contract analogy to legislation that "simply prohibit[s] certain discriminatory conduct." See, *e. g.*, *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 640 (1999) (Title IX); *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 287 (1998) (same).

a recipient may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute, *Davis*, *supra*, at 642, but not for its failure to comply with vague language describing the objectives of the statute, *Pennhurst*, *supra*, at 24–25; and, if the statute implies that only violations brought to the attention of an official with power to correct them are actionable, not for conduct unknown to any such official, see *Gebser*, *supra*, at 290. We have also applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation. *Franklin*, *supra*, at 74–75.

The same analogy applies, we think, in determining the *scope* of damages remedies. We said as much in *Gebser:* "Title IX's contractual nature has implications for our construction of the scope of available remedies." 524 U. S., at 287. One of these implications, we believe, is that a remedy is "appropriate relief," *Franklin*, 503 U. S., at 73, only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature. A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages, *id.*, at 76, and injunction, *Cannon*, *supra*, at 711–712, forms of relief traditionally available in suits for breach of contract. See, *e. g.*, Restatement (Second) of Contracts § 357 (1981); 3 S. Williston, Law of Contracts §§ 1445–1450 (1920); J. Pomeroy, A Treatise on the Specific Performance of Contracts 1–5 (1879). Like Title IX, Title VI mentions no remedies—indeed, it fails to mention even a private right of action (hence this Court's decision finding an *implied* right of action in *Cannon*). But punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract, see 3 E. Farnsworth, Contracts § 12.8,

pp. 192–201 (2d ed. 1998); Restatement (Second) of Contracts § 355; 1 T. Sedgwick, Measure of Damages § 370 (8th ed. 1891).

Nor (if such an interpretive technique were available) could an *implied* punitive damages provision reasonably be found in Title VI. Some authorities say that reasonably implied contractual terms are those that the parties would have agreed to if they had adverted to the matters in question. See 2 Farnsworth, *supra,* § 7.16, at 335, and authorities cited. More recent commentary suggests that reasonably implied contractual terms are simply those that "compor[t] with community standards of fairness," Restatement (Second) of Contracts, *supra,* § 204, Comment *d;* see also 2 Farnsworth, *supra,* § 7.16, at 334–336. Neither approach would support the implication here of a remedy that is not normally available for contract actions and that is of indeterminate magnitude. We have acknowledged that compensatory damages alone "might well exceed a recipient's level of federal funding," *Gebser*, *supra,* at 290; punitive damages on top of that could well be disastrous. Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition. "Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds." *Davis*, *supra,* at 656 (KENNEDY, J., dissenting). And for the same reason of unusual and disproportionate exposure, it can hardly be said that community standards of fairness support such an implication. In sum, it must be concluded that Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages.[2]

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[2] We cannot understand JUSTICE STEVENS' Chicken-Little statement that today's decision "has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case." *Post,* at 192–193. Our decision merely applies a principle expressed and applied many times

Our conclusion is consistent with the "well settled" rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946); see also *Franklin*, *supra*, at 66. When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure. See *Guardians*, 463 U. S., at 633 (Marshall, J., dissenting) ("When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. . . . The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed"). Punitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*.

* * *

Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act.[3] This

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before: that the "contractual nature" of Spending Clause legislation "has *implications* for our construction of the scope of available remedies." *Gebser*, 524 U. S., at 287 (emphasis added). We do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise. Since JUSTICE STEVENS is unable to identify any "far-reaching consequenc[e]" that might reasonably follow from our decision today, and since we are merely occupying ground that the Court has long held, we surely do not deserve his praise that we are "fearless crusaders," *post*, at 193, n. 2.

[3] JUSTICE STEVENS believes that our analysis of Title VI does not carry over to the ADA because the latter is not Spending Clause legislation, and identifies "tortious conduct." *Post*, at 192, 193, n. 2. Perhaps he thinks that it *should not* carry over, but that is a question for Congress, and

makes it unnecessary to reach petitioners' alternative argument—neither raised nor passed on below[4]—invoking the traditional presumption against imposition of punitive damages on government entities. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 784–785 (2000); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 262–263 (1981). The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR joins, concurring.

I join the Court's opinion because I agree that analogy to the common law of contract is appropriate in this instance, with the conclusion that punitive damages are not available under the statute. Punitive damages, as the Court points out, may range in orders of "indeterminate magnitude,"

Congress has unequivocally said otherwise. The ADA could not be clearer that the "remedies, procedures, and rights . . . this subchapter provides" for violations of § 202 are the same as the "remedies, procedures, and rights set forth in" § 505(a)(2) of the Rehabilitation Act, which *is* Spending Clause legislation. 42 U. S. C. § 12133. Section 505(a)(2), in turn, explains that the "remedies, procedures, and rights set forth in title VI . . . shall be available" for violations of § 504 of the Rehabilitation Act. 29 U. S. C. § 794a(a)(2). These explicit provisions make discussion of the ADA's status as a "non Spending Clause" tort statute quite irrelevant.

[4] JUSTICE STEVENS suggests that our decision likewise rests on a theory neither presented nor passed on below. *Post*, at 191–192. But the parties raised, and the courts below passed on, the applicability of *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), to the question presented. That case addressed Spending Clause legislation (Title IX) and cited the contract-analogy discussion in *Pennhurst* as the basis for its acknowledgment of a notice requirement. See 503 U. S., at 74–75. Respondent did argue (quite correctly) that petitioners had failed to rely on the *Newport* ground that JUSTICE STEVENS uses, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 262–263 (1981), see Brief for Respondent 41–43, but not that they had failed to rely on the contract analogy initiated in *Pennhurst*, Brief for Respondent 35–41.

ante, at 188, untethered to compensable harm, and would thus pose a concern that recipients of federal funding could not reasonably have anticipated. I realize, however, and read the Court's opinion as acknowledging, that the contract-law analogy may fail to give such helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation, such as the proper measure of compensatory damages.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

The judgment of the Court of Appeals might be reversed on any of three different theories: (1) as the Court held in *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981), absent clear congressional intent to the contrary, municipalities are not subject to punitive damages; (2) an analysis of the text and legislative history of § 504 of Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA) indicates that Congress did not intend to authorize a punitive damages remedy for violations of either statute;[1] or (3) applying reasoning akin to that used in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), that the remedies for violations of federal statutes enacted pursuant to Congress' spending power should be defined by the common law of contracts, third-party beneficiaries are not allowed to recover punitive damages.

Petitioners did not rely on either the first or the third of those theories in either the District Court or the Court of Appeals. Nevertheless, because it presents the narrowest basis for resolving the case, I am convinced that it is an appropriate exercise of judicial restraint to decide the case

[1] This was the theory that was adopted by the Court of Appeals for the Sixth Circuit in *Moreno* v. *Consolidated Rail Corp.*, 99 F. 3d 782, 788–792 (1996). It was also the only theory discussed and rejected by the Court of Appeals below.

on the theory that petitioners are immune from punitive damages under *Newport.* There is, however, no justification for the Court's decision to reach out and decide the case on a broader ground that was not argued below. The Court's reliance on, and extension of, *Pennhurst*—a case that was not even cited in petitioners' briefs in the Court of Appeals—is particularly inappropriate.

In *Pennhurst* we were faced with the question whether the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010, had imposed affirmative obligations on participating States. Relying in part on the important distinction between statutory provisions that "simply prohibited certain kinds of state conduct" and those that "impose *affirmative* obligations on the States to fund certain services," 451 U. S., at 16–17, we first held that § 6010 was enacted pursuant to the Spending Clause. We then concluded that the "affirmative obligations" that the Court of Appeals had found in § 6010 could "hardly be considered a 'condition' of the grant of federal funds." *Id.*, at 23. "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States." *Id.*, at 24.

The case before us today involves a municipality's breach of a condition that simply prohibits certain discriminatory conduct. The prohibition is set forth in two statutes, one of which, Title II of the ADA, was not enacted pursuant to the Spending Clause. Our opinion in *Pennhurst* says nothing about the remedy that might be appropriate for such a breach. Nor do I believe that the rules of contract law on which the Court relies are necessarily relevant to the tortious conduct described in this record. Moreover, the Court's novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued

in this case.[2] In light of the fact that the petitioners—in addition to most defendants sued for violations of Title II of the ADA and § 504 of the Rehabilitation Act of 1973—are clearly not subject to punitive damages pursuant to our holding in *Newport*, I see no reason to decide the case on the expansive basis asserted by the Court.

Accordingly, I do not join the Court's opinion, although I do concur in its judgment in this case.

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[2] Although rejected by the Sixth Circuit, see *Westside Mothers* v. *Haveman*, 289 F. 3d 852 (2002), one District Court applied the *Pennhurst* contract analogy in order to support its conclusion that Spending Clause legislation is not the "supreme law of the land." *Westside Mothers* v. *Haveman*, 133 F. Supp. 2d 549, 561 (ED Mich. 2001). The Court fortunately does cabin the potential reach of today's decision by stating that "[w]e do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise," *ante*, at 189, n. 2, but whenever the Court reaches out to adopt a broad theory that was not discussed in the early stages of the litigation, and that implicates statutes that are not at issue, its opinion is sure to have unforeseen consequences. When it does so unnecessarily, it tends to assume a legislative, rather than a judicial, role. Reliance on a narrower theory that was not argued below does not create that risk. I am not persuaded that "Chicken-Little," *ante*, at 188, n. 2, is an appropriate characterization of judicial restraint; it is, however, a rhetorical device appropriately used by fearless crusaders.

Syllabus

UNITED STATES *v.* DRAYTON ET AL.

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

No. 01–631. Argued April 16, 2002—Decided June 17, 2002

The driver of the bus on which respondents were traveling allowed three police officers to board the bus as part of a routine drug and weapons interdiction effort. One officer knelt on the driver's seat, facing the rear of the bus, while another officer stayed in the rear, facing forward. Officer Lang worked his way from back to front, speaking with individual passengers as he went. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke. He testified that passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so without argument; that most people are willing to cooperate; that passengers often leave the bus for a cigarette or a snack while officers are on board; and that, although he sometimes informs passengers of their right to refuse to cooperate, he did not do so on the day in question. As Lang approached respondents, who were seated together, he held up his badge long enough for them to identify him as an officer. Speaking just loud enough for them to hear, he declared that the police were looking for drugs and weapons and asked if respondents had any bags. When both of them pointed to a bag overhead, Lang asked if they minded if he checked it. Respondent Brown agreed, and a search of the bag revealed no contraband. Lang then asked Brown whether he minded if Lang checked his person. Brown agreed, and a patdown revealed hard objects similar to drug packages in both thigh areas. Brown was arrested. Lang then asked respondent Drayton, "Mind if I check you?" When Drayton agreed, a patdown revealed objects similar to those found on Brown, and Drayton was arrested. A further search revealed that respondents had taped cocaine between their shorts. Charged with federal drug crimes, respondents moved to suppress the cocaine on the ground that their consent to the patdown searches was invalid. In denying the motions, the District Court determined that the police conduct was not coercive and respondents' consent to the search was voluntary. The Eleventh Circuit reversed and remanded based on its prior holdings that bus passengers do not feel free to disregard officers' requests to search absent some positive indication that consent may be refused.

Held: The Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. Pp. 200–208.

Syllabus

(a) Among its rulings in *Florida* v. *Bostick*, 501 U. S. 429, this Court held that the Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to searches, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter, *id.*, at 436. The Court identified as "particularly worth noting" the factors that the officer, although obviously armed, did not unholster his gun or use it in a threatening way, and that he advised respondent passenger that he could refuse consent to a search. Relying on this last factor, the Eleventh Circuit erroneously adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdictions on buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. Pp. 200–203.

(b) Applying *Bostick*'s framework to this case demonstrates that the police did not seize respondents. The officers gave the passengers no reason to believe that they were required to answer questions. When Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter, or would indicate a command to answer his questions. There were ample grounds to conclude that their encounter was cooperative and not coercive or confrontational. There was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat, and no command, not even an authoritative tone of voice. Had this encounter occurred on the street, it doubtless would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning into an illegal seizure. See *Bostick*, *supra*, at 439–440. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in deciding not to cooperate on a bus than in other circumstances. Lang's display of his badge is not dispositive. See, *e. g.*, *Florida* v. *Rodriguez*, 469 U. S. 1, 5–6. And, because it is well known that most officers are armed, the presence of a holstered firearm is unlikely to be coercive absent active brandishing of the weapon. Officer Hoover's position at the front of the bus also does not tip the scale to respondents, since he did nothing to intimidate passengers and said or did nothing to suggest that people could not exit. See *INS* v. *Delgado*, 466 U. S. 210, 219. Finally, Lang's testimony that only a few passengers refuse to cooperate does not suggest that a reasonable person would not feel free to terminate the encounter. See *id.*, at 216. Drayton argues unsuccessfully that no reasonable person in his position would feel free to terminate the encounter

after Brown was arrested. The arrest of one person does not mean that everyone around him has been seized. Even after arresting Brown, Lang provided Drayton with no indication that he was required to answer Lang's questions. Pp. 203–206.

(c) Respondents were not subjected to an unreasonable search. Where, as here, the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts. For the foregoing reasons, respondents' consent to the search of their luggage and their persons was voluntary. When respondents told Lang they had a bag, he asked to check it. And when he asked to search their persons, he inquired first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Moreover, officers need not always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. See, *e. g.*, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 227. While knowledge of the right to refuse is taken into account, the Government need not establish such knowledge as the *sine qua non* of an effective consent. *Ibid.* Nor does a presumption of invalidity attach if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the totality of the circumstances controls, without giving extra weight to whether this type of warning was given. See, *e. g.*, *Ohio* v. *Robinette*, 519 U. S. 33, 39–40. Although Lang did not give such a warning, the totality of the circumstances indicates that respondents' consent was voluntary, and the searches were reasonable. Pp. 206–208.

231 F. 3d 787, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 208.

Larry D. Thompson argued the cause for the United States. On the briefs were *Solicitor General Olson, Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben, Jeffrey A. Lamken*, and *Kathleen A. Felton.*

Gwendolyn Spivey, by appointment of the Court, 535 U. S. 903, argued the cause for respondents. With her on the brief were *Randolph P. Murrell, Steven L. Seliger,* by ap-

pointment of the Court, 535 U. S. 903, *Jeffrey T. Green,* and *Jacqueline G. Cooper.**

JUSTICE KENNEDY delivered the opinion of the Court.

The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse. *Florida* v. *Bostick*, 501 U. S. 429 (1991). This case requires us to determine whether officers must advise bus passengers during these encounters of their right not to cooperate.

I

On February 4, 1999, respondents Christopher Drayton and Clifton Brown, Jr., were traveling on a Greyhound bus en route from Ft. Lauderdale, Florida, to Detroit, Michigan. The bus made a scheduled stop in Tallahassee, Florida. The passengers were required to disembark so the bus could be refueled and cleaned. As the passengers reboarded, the driver checked their tickets and then left to complete paperwork inside the terminal. As he left, the driver allowed three members of the Tallahassee Police Department to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges.

Once onboard Officer Hoover knelt on the driver's seat and faced the rear of the bus. He could observe the passengers

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**Daniel J. Popeo* and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Leon Friedman and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

James P. Manak, Wayne W. Schmidt, Richard Weintraub, Bernard J. Farber, and *Carl Milazzo* filed a brief for Americans For Effective Law Enforcement, Inc., et al. as *amici curiae.*

and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn went to the rear of the bus. Blackburn remained stationed there, facing forward. Lang worked his way toward the front of the bus, speaking with individual passengers as he went. He asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

According to Lang's testimony, passengers who declined to cooperate with him or who chose to exit the bus at any time would have been allowed to do so without argument. In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel. Lang could recall five to six instances in the previous year in which passengers had declined to have their luggage searched. It also was common for passengers to leave the bus for a cigarette or a snack while the officers were on board. Lang sometimes informed passengers of their right to refuse to cooperate. On the day in question, however, he did not.

Respondents were seated next to each other on the bus. Drayton was in the aisle seat, Brown in the seat next to the window. Lang approached respondents from the rear and leaned over Drayton's shoulder. He held up his badge long enough for respondents to identify him as a police officer. With his face 12-to-18 inches away from Drayton's, Lang spoke in a voice just loud enough for respondents to hear:

> "I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction *[sic]*, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?" App. 55.

Both respondents pointed to a single green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," and Brown responded, "Go ahead." *Id.*, at 56. Lang handed the bag to Officer Blackburn to check. The bag contained no contraband.

Officer Lang noticed that both respondents were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics. The officer thus asked Brown if he had any weapons or drugs in his possession. And he asked Brown: "Do you mind if I check your person?" Brown answered, "Sure," and cooperated by leaning up in his seat, pulling a cell phone out of his pocket, and opening up his jacket. *Id.*, at 61. Lang reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects similar to drug packages detected on other occasions. Lang arrested and handcuffed Brown. Officer Hoover escorted Brown from the bus.

Lang then asked Drayton, "Mind if I check you?" *Id.*, at 65. Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a patdown of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him from the bus. A further search revealed that respondents had duct-taped plastic bundles of powder cocaine between several pairs of their boxer shorts. Brown possessed three bundles containing 483 grams of cocaine. Drayton possessed two bundles containing 295 grams of cocaine.

Respondents were charged with conspiring to distribute cocaine, in violation of 21 U. S. C. §§ 841(a)(1) and 846, and with possessing cocaine with intent to distribute it, in violation of § 841(a)(1). They moved to suppress the cocaine, arguing that the consent to the patdown search was invalid. Following a hearing at which only Officer Lang testified, the

United States District Court for the Northern District of Florida denied their motions to suppress. The District Court determined that the police conduct was not coercive and respondents' consent to the search was voluntary. The District Court pointed to the fact that the officers were dressed in plain clothes, did not brandish their badges in an authoritative manner, did not make a general announcement to the entire bus, and did not address anyone in a menacing tone of voice. It noted that the officers did not block the aisle or the exit, and stated that it was "obvious that [respondents] can get up and leave, as can the people ahead of them." App. 132. The District Court concluded: "[E]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." *Ibid.*

The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions to grant respondents' motions to suppress. 231 F. 3d 787 (2000). The court held that this disposition was compelled by its previous decisions in *United States* v. *Washington*, 151 F. 3d 1354 (1998), and *United States* v. *Guapi*, 144 F. 3d 1393 (1998). Those cases had held that bus passengers do not feel free to disregard police officers' requests to search absent "some positive indication that consent could have been refused." *Washington*, *supra*, at 1357.

We granted certiorari. 534 U. S. 1074 (2002). The respondents, we conclude, were not seized and their consent to the search was voluntary; and we reverse.

II

Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. See, *e. g.*, *Florida* v. *Royer*, 460 U. S. 491, 497 (1983)

(plurality opinion); see *id.*, at 523, n. 3 (REHNQUIST, J., dissenting); *Florida* v. *Rodriguez*, 469 U. S. 1, 5–6 (1984) *(per curiam)* (holding that such interactions in airports are "the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest"). Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. See *Florida* v. *Bostick*, 501 U. S., at 434–435 (citations omitted). If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.

The Court has addressed on a previous occasion the specific question of drug interdiction efforts on buses. In *Bostick*, two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine. In doing so it adopted a *per se* rule that due to the cramped confines onboard a bus the act of questioning would deprive a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment.

This Court reversed. *Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.*, at 439. The Court noted next that the traditional rule, which states that a seizure does not occur so long as a reasonable person would feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U. S. 621, 628 (1991), is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. *Bostick*, 501 U. S., at 434–436. A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says noth-

ing about whether the police conduct is coercive. *Id.*, at 436. The proper inquiry "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Ibid.* Finally, the Court rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. The reasonable person test, the Court explained, is objective and "presupposes an *innocent* person." *Id.*, at 437–438.

In light of the limited record, *Bostick* refrained from deciding whether a seizure occurred. *Id.*, at 437. The Court, however, identified two factors "particularly worth noting" on remand. *Id.*, at 432. First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search. *Ibid.*

Relying upon this latter factor, the Eleventh Circuit has adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. In *United States* v. *Guapi*, *supra*, the Court of Appeals described "[t]he most glaring difference" between the encounters in *Guapi* and in *Bostick* as "the complete lack of any notification to the passengers that they were in fact free to decline the search request. . . . Providing [this] simple notification . . . is perhaps the most efficient and effective method to ensure compliance with the Constitution." 144 F. 3d, at 1395. The Court of Appeals then listed other factors that contributed to the coerciveness of the encounter: (1) the officer conducted the interdiction before the passengers disembarked from the bus at a scheduled stop; (2) the officer explained his presence in the form of a general announcement to the entire bus; (3) the officer wore a police uniform; and (4) the officer questioned passengers as he

moved from the front to the rear of the bus, thus obstructing the path to the exit. *Id.*, at 1396.

After its decision in *Guapi* the Court of Appeals decided *United States* v. *Washington* and the instant case. The court suppressed evidence obtained during similar drug interdiction efforts despite the following facts: (1) the officers in both cases conducted the interdiction after the passengers had reboarded the bus; (2) the officer in the present case did not make a general announcement to the entire bus but instead spoke with individual passengers; (3) the officers in both cases were not in uniform; and (4) the officers in both cases questioned passengers as they moved from the rear to the front of the bus and were careful not to obstruct passengers' means of egress from the bus.

Although the Court of Appeals has disavowed a *per se* requirement, the lack of an explicit warning to passengers is the only element common to all its cases. See *Washington*, 151 F. 3d, at 1357 ("It seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests"); 231 F. 3d, at 790 (noting that "[t]his case is controlled by" *Guapi* and *Washington*, and dismissing any factual differences between the three cases as irrelevant). Under these cases, it appears that the Court of Appeals would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate. The Court of Appeals erred in adopting this approach.

Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he

did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

There were ample grounds for the District Court to conclude that "everything that took place between Officer Lang and [respondents] suggests that it was cooperative" and that there "was nothing coercive [or] confrontational" about the encounter. App. 132. There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. See *Bostick*, 501 U. S., at 439–440. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.

Respondents make much of the fact that Officer Lang displayed his badge. In *Florida* v. *Rodriguez*, 469 U. S., at 5–6, however, the Court rejected the claim that the defendant was seized when an officer approached him in an airport, showed him his badge, and asked him to answer some questions. Likewise, in *INS* v. *Delgado*, 466 U. S. 210, 212–213 (1984), the Court held that Immigration and Naturalization Service (INS) agents' wearing badges and questioning workers in a factory did not constitute a seizure. And while neither Lang nor his colleagues were in uniform or visibly armed, those factors should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort.

Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

Officer Hoover's position at the front of the bus also does not tip the scale in respondents' favor. Hoover did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear. In *Delgado*, the Court determined there was no seizure even though several uniformed INS officers were stationed near the exits of the factory. *Id.*, at 219. The Court noted: "The presence of agents by the exits posed no reasonable threat of detention to these workers, . . . the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Ibid.*

Finally, the fact that in Officer Lang's experience only a few passengers have refused to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. In Lang's experience it was common for passengers to leave the bus for a cigarette or a snack while the officers were questioning passengers. App. 70, 81. And of more importance, bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, *supra*, at 216.

Drayton contends that even if Brown's cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter with the officers after Brown had been arrested. The Court

of Appeals did not address this claim; and in any event the argument fails. The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after arresting Brown, Lang addressed Drayton in a polite manner and provided him with no indication that he was required to answer Lang's questions.

We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, *i. e.*, whether their consent to the suspicionless search was involuntary. In circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts. And, as the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.

The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. See, *e. g.*, *Ohio* v. *Robinette*, 519 U. S. 33, 39–40 (1996); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 227 (1973). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective

consent." *Ibid.* Nor do this Court's decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning. See, *e. g., Schneckloth*, *supra; Robinette*, *supra*, at 39–40. Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

We need not ask the alternative question whether, after the arrest of Brown, there were grounds for a *Terry* stop and frisk of Drayton, *Terry* v. *Ohio*, 392 U. S. 1 (1968), though this may have been the case. It was evident that Drayton and Brown were traveling together—Officer Lang observed the pair reboarding the bus together; they were each dressed in heavy, baggy clothes that were ill-suited for the day's warm temperatures; they were seated together on the bus; and they each claimed responsibility for the single piece of green carry-on luggage. Once Lang had identified Brown as carrying what he believed to be narcotics, he may have had reasonable suspicion to conduct a *Terry* stop and frisk on Drayton as well. That question, however, has not been presented to us. The fact the officers may have had reasonable suspicion does not prevent them from relying on a citizen's consent to the search. It would be a paradox, and one most puzzling to law enforcement officials and courts alike, were

we to say, after holding that Brown's consent was voluntary, that Drayton's consent was ineffectual simply because the police at that point had more compelling grounds to detain him. After taking Brown into custody, the officers were entitled to continue to proceed on the basis of consent and to ask for Drayton's cooperation.

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

It is so ordered.

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

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to "enhanc[e] their own safety and the safety of those around them." *Ante*, at 205. Nor are the other factual assessments underlying the Court's conclusion in favor of the Government more convincing.

The issue we took to review is whether the police's examination of the bus passengers, including respondents, amounted to a suspicionless seizure under the Fourth Amendment.[1] If it did, any consent to search was plainly

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[1] The Court proceeds to resolve the voluntariness issue on the heels of its seizure enquiry, but the voluntariness of respondents' consent was not within the question the Court accepted for review. Accord, Reply Brief for United States 20, n. 7 (stating that the consent issue "is not presented by this case; the question here is whether there was an illegal seizure

invalid as a product of the illegal seizure. See *Florida* v. *Royer*, 460 U. S. 491, 507–508 (1983) (plurality opinion) ("[T]he consent was tainted by the illegality and . . . ineffective to justify the search"); *id.*, at 509 (Powell, J., concurring); *id.*, at 509 (Brennan, J., concurring in result).

Florida v. *Bostick*, 501 U. S. 429 (1991), established the framework for determining whether the bus passengers were seized in the constitutional sense. In that case, we rejected the position that police questioning of bus passengers was a *per se* seizure, and held instead that the issue of seizure was to be resolved under an objective test considering all circumstances: whether a reasonable passenger would have felt "free to decline the officers' requests or otherwise terminate the encounter," *id.*, at 436. We thus applied to a bus passenger the more general criterion, whether the person questioned was free "to ignore the police presence and go about his business," *id.*, at 437 (quoting *Michigan* v. *Chesternut*, 486 U. S. 567, 569 (1988)).

Before applying the standard in this case, it may be worth getting some perspective from different sets of facts. A perfect example of police conduct that supports no colorable claim of seizure is the act of an officer who simply goes up to a pedestrian on the street and asks him a question. See *Royer*, 460 U. S., at 497; see *id.*, at 523, n. 3 (REHNQUIST, J., dissenting). A pair of officers questioning a pedestrian,

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in the first place"). While it is true that the Eleventh Circuit purported to address the question "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary,'" 231 F. 3d 787, 788 (2000), elsewhere the court made it clear that it was applying the test in *Florida* v. *Bostick*, 501 U. S. 429 (1991), which is relevant to the issue of seizure, 231 F. 3d, at 791, n. 6. There is thus no occasion here to reach any issue of consent untainted by seizure. If there were, the consent would have to satisfy the voluntariness test of *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), which focuses on "the nature of a person's subjective understanding," *id.*, at 230, and requires consideration of "the characteristics of the accused [in addition to] the details of the interrogation," *id.*, at 226.

without more, would presumably support the same conclusion. Now consider three officers, one of whom stands behind the pedestrian, another at his side toward the open sidewalk, with the third addressing questions to the pedestrian a foot or two from his face. Finally, consider the same scene in a narrow alley. On such barebones facts, one may not be able to say a seizure occurred, even in the last case, but one can say without qualification that the atmosphere of the encounters differed significantly from the first to the last examples. In the final instance there is every reason to believe that the pedestrian would have understood, to his considerable discomfort, what Justice Stewart described as the "threatening presence of several officers," *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980) (opinion of Stewart, J.). The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable. We all understand this, as well as we understand that a display of power rising to Justice Stewart's "threatening" level may overbear a normal person's ability to act freely, even in the absence of explicit commands or the formalities of detention. As common as this understanding is, however, there is little sign of it in the Court's opinion. My own understanding of the relevant facts and their significance follows.

When the bus in question made its scheduled stop in Tallahassee, the passengers were required to disembark while the vehicle was cleaned and refueled. App. 104. When the passengers returned, they gave their tickets to the driver, who kept them and then left himself, after giving three police officers permission to board the bus in his absence. *Id.*, at 77–78. Although they were not in uniform, the officers displayed badges and identified themselves as police. One stationed himself in the driver's seat by the door at the front, facing back to observe the passengers. The two others went to the rear, from which they worked their way for-

ward, with one of them speaking to passengers, the other backing him up. *Id.*, at 47–48. They necessarily addressed the passengers at very close range; the aisle was only 15 inches wide, and each seat only 18.[2] The quarters were cramped further by the overhead rack, 19 inches above the top of the passenger seats. The passenger by the window could not have stood up straight, *id.*, at 55, and the face of the nearest officer was only a foot or 18 inches from the face of the nearest passenger being addressed, *id.*, at 57. During the exchanges, the officers looked down, and the passengers had to look up if they were to face the police. The officer asking the questions spoke quietly. He prefaced his requests for permission to search luggage and do a body pat-down by identifying himself by name as a police investigator "conducting bus interdiction" and saying, "'We would like for your cooperation. Do you have any luggage on the bus?'" *Id.*, at 82.

Thus, for reasons unexplained, the driver with the tickets entitling the passengers to travel had yielded his custody of the bus and its seated travelers to three police officers, whose authority apparently superseded the driver's own. The officers took control of the entire passenger compartment, one stationed at the door keeping surveillance of all the occupants, the others working forward from the back. With one officer right behind him and the other one forward, a third officer accosted each passenger at quarters extremely close and so cramped that as many as half the passengers could not even have stood to face the speaker. None was asked whether he was willing to converse with the police or to take part in the enquiry. Instead the officer said the police were "conducting bus interdiction," in the course of which they "would like . . . cooperation." *Ibid.* The reasonable inference was that the "interdiction" was not a consensual exercise, but one the police would carry out what-

[2] The figures are from a Lodging filed by respondents (available in Clerk of Court's case file). The Government does not dispute their accuracy.

ever the circumstances; that they would prefer "cooperation" but would not let the lack of it stand in their way. There was no contrary indication that day, since no passenger had refused the cooperation requested, and there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established by this introduction. Later requests to search prefaced with "Do you mind . . ." would naturally have been understood in the terms with which the encounter began.

It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one. It is neither here nor there that the interdiction was conducted by three officers, not one, as a safety precaution. See *id.*, at 47. The fact was that there were three, and when Brown and Drayton were called upon to respond, each one was presumably conscious of an officer in front watching, one at his side questioning him, and one behind for cover, in case he became unruly, perhaps, or "cooperation" was not forthcoming. The situation is much like the one in the alley, with civilians in close quarters, unable to move effectively, being told their cooperation is expected. While I am not prepared to say that no bus interrogation and search can pass the *Bostick* test without a warning that passengers are free to say no, the facts here surely required more from the officers than a quiet tone of voice. A police officer who is certain to get his way has no need to shout.

It is true of course that the police testified that a bus passenger sometimes says no, App. 81, but that evidence does nothing to cast the facts here in a different light. We have no way of knowing the circumstances in which a passenger elsewhere refused a request; maybe that has happened only

when the police have told passengers they had a right to refuse (as the officers sometimes advised them), *id.*, at 81–82. Nor is it fairly possible to see the facts of this case differently by recalling *INS* v. *Delgado*, 466 U. S. 210 (1984), as precedent. In that case, a majority of this Court found no seizure when a factory force was questioned by immigration officers, with an officer posted at every door leading from the workplace. *Id.*, at 219. Whether that opinion was well reasoned or not, the facts as the Court viewed them differed from the case here. *Delgado* considered an order granting summary judgment in favor of respondents, with the consequence that the Court was required to construe the record and all issues of fact favorably to the Immigration and Naturalization Service. See *id.*, at 214; *id.*, at 221 (STEVENS, J., concurring). The Court therefore emphasized that even after "th[e] surveys were initiated, the employees were about their ordinary business, operating machinery and performing other job assignments." *Id.*, at 218. In this case, however, Brown and Drayton were seemingly pinned-in by the officers and the customary course of events was stopped flat. The bus was going nowhere, and with one officer in the driver's seat, it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him.

In any event, I am less concerned to parse this case against *Delgado* than to apply *Bostick*'s totality of circumstances test, and to ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter. In my view the answer is clear. The Court's contrary conclusion tells me that the majority cannot see what Justice Stewart saw, and I respectfully dissent.

Syllabus

CAREY, WARDEN *v.* SAFFOLD

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

No. 01–301. Argued February 27, 2002—Decided June 17, 2002

The Antiterrorism and Effective Death Penalty Act of 1996 requires a state prisoner seeking federal habeas relief to file his petition within one year after his state conviction becomes final, 28 U. S. C. § 2244(d)(1)(A), but excludes from that period the time during which an application for state collateral review is "pending," § 2244(d)(2). Respondent Saffold filed a state habeas petition in California seven days before the federal deadline. Five days after the state trial court denied his petition, he filed a further petition in the State Court of Appeal. Four and one-half months after that petition was denied, he filed a further petition in the State Supreme Court, which denied the petition on the merits and for lack of diligence. The Federal District Court dismissed his subsequent federal habeas petition as untimely, finding that the federal statute of limitations was not tolled during the intervals between the denial of one state petition and the filing of the next because no application was "pending" during that time. In reversing, the Ninth Circuit included the intervals in the "pending" period, and found that Saffold's petition was timely because the State Supreme Court based its decision not only on lack of diligence but also on the merits.

Held:

1. As used in § 2244(d)(2), "pending" covers the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. Most States' collateral review systems require a prisoner to file a petition in a trial court; then to file a notice of appeal within a specified time after entry of the trial court's unfavorable judgment; and, if still unsuccessful, to file a further notice of appeal (or request for discretionary review) to the state supreme court within a specified time. Petitioner warden seeks a uniform national rule that a state petition is not "pending" during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal in the next court, reasoning that the petition is not being considered during that time. Such a reading is not consistent with the ordinary meaning of "pending," which, in the present context, means until the completion of the collateral review process; *i. e.*, until the application has achieved final resolution through the State's postconviction proceedings. Petitioner's reading

would also produce a serious statutory anomaly. Because a federal habeas petitioner has not exhausted his state remedies as long as he has "the right under [state] law . . . to raise" in that State, "by any available procedure, the question presented," § 2254(c), and because petitioner's interpretation encourages state prisoners to file their petitions before the State completes a full round of collateral review, federal courts would have to contend with petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense required by law (because they would otherwise be barred by the 1-year limitations period). Pp. 219–221.

2. The same "pending" rule applies to California's unique collateral review system, even though that system involves, not a notice of appeal, but the filing (within a "reasonable" time) of a further original state habeas petition in a higher court. California's system is not as special in practice as its terminology might suggest. A prisoner typically will seek habeas review in a lower court and later seek appellate review in a higher court. Thus, the system functions very much like that in other States, but for its indeterminate timeliness rule. That rule may make it more difficult for federal courts to determine when a review application comes too late. But the tolling provision seeks to protect the State's interests, and the State can explicate timing requirements more precisely should that prove necessary. In applying a federal statute that interacts with state procedural rules, this Court looks to how a state procedure functions, not its particular name. California's system functions in ways sufficiently like other state collateral review systems to bring intervals between a lower court decision and a filing in a higher court within the scope of "pending." Pp. 221–225.

3. The words "on the merits" by themselves do not indicate that Saffold's petition was timely, but it is not possible to conclude that the Ninth Circuit was wrong in its ultimate conclusion. The State Supreme Court may have included such words in its opinion for a variety of reasons. And the Ninth Circuit's willingness to take them as an absolute bellwether risks the tolling of the federal limitations period even when it is likely that the state petition was untimely, thus threatening the statutory purpose of encouraging prompt filings in order to protect the federal system from being forced to hear stale claims. In reconsidering the timeliness issue, the Ninth Circuit is left to evaluate any special conditions justifying Saffold's delay in filing in the state court and any other relevant considerations, and to decide whether to certify a question to the State Supreme Court to seek clarification of the state law. Pp. 225–227.

250 F. 3d 1262, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post,* p. 227.

Stanley A. Cross, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the brief were *Bill Lockyer*, Attorney General, *Robert R. Anderson*, Chief Assistant Attorney General, and *Jo Graves* and *Arnold O. Overoye*, Senior Assistant Attorneys General.

David W. Ogden argued the cause for respondent. With him on the brief were *Mary Katherine McComb*, by appointment of the Court, 534 U. S. 1053, and *Seth P. Waxman.**

JUSTICE BREYER delivered the opinion of the Court.

The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become "final." 28 U. S. C. § 2244(d)(1)(A). The statute adds, however, that the 1-year period does not include the time during which an

*Briefs of *amici curiae* urging reversal were filed for the State of North Carolina et al. by *Roy A. Cooper III*, Attorney General of North Carolina, *Amy C. Kunstling*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.*, of New Jersey, *Betty D. Montgomery* of Ohio, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Randolph A. Beales* of Virginia, *Christine O. Gregoire* of Washington, and *Hoke MacMillan* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

David M. Porter and *Peter Goldberger* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

application for state collateral review is "pending" in the state courts. § 2244(d)(2).

This case raises three questions related to the statutory word "pending":

(1) Does that word cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?

(2) If so, does it apply similarly to California's unique state collateral review system—a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court?

(3) If so, was the petition at issue here (filed in the California Supreme Court 4½ months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?

We answer the first two questions affirmatively, while remanding the case to the Court of Appeals for its further consideration of the third.

I

In 1990 Tony Saffold, the respondent, was convicted and sentenced in California state court for murder, assault with a firearm, and robbery. His conviction became final on direct review in April 1992. Because Saffold's conviction became final before AEDPA took effect, the federal limitations period began running on AEDPA's effective date, April 24, 1996, giving Saffold one year from that date (in the absence of tolling) to file a federal habeas petition.

A week before the federal deadline, Saffold filed a *state* habeas petition in the state trial court. The state trial court denied the petition. Five days later Saffold filed a further petition in the State Court of Appeal. That court denied his petition. And 4½ months later Saffold filed a further petition in the California Supreme Court. That court also denied Saffold's petition, stating in a single sentence that it did

so "on the merits and for lack of diligence." App. G to Pet. for Cert. 1.

Approximately one week later, in early June 1998, Saffold filed a petition for habeas corpus in the Federal District Court. The District Court noted that AEDPA required Saffold to have filed his petition by April 24, 1997. It recognized that the statute gave Saffold extra time by tolling its limitations period while Saffold's application for state collateral review was "pending" in the state courts. But the District Court decided that Saffold's petition was "pending" only while the state courts were actively considering it, and that period did not include the intervals between the time a lower state court had denied Saffold's petition and the time he had filed a further petition in a higher state court. In Saffold's case those intervals amounted to five days (between the trial court and intermediate court) plus 4½ months (between the intermediate court and Supreme Court), and those intervals made a critical difference. Without counting the intervals as part of the time Saffold's application for state collateral review was "pending," the tolling period was not long enough to make Saffold's federal habeas petition timely. Hence the District Court dismissed the petition.

The Ninth Circuit reversed. It included in the "pending" period, and hence in the tolling period, the intervals between what was, in effect, consideration of a petition by a lower state court and further consideration by a higher state court—at least assuming a petitioner's request for that further higher court consideration was timely. *Saffold* v. *Newland*, 250 F. 3d 1262, 1266 (2001). It added that Saffold's petition to the California Supreme Court was timely despite the 4½ months that had elapsed since the California Court of Appeal decision. That is because the California Supreme Court had denied Saffold's petition, not only because of "lack of diligence" but also "on the merits," a circumstance that showed the California Supreme Court had "applied its untimeliness bar only after considering to some degree the

underlying federal constitutional questions raised." *Id.*, at 1267.

We granted certiorari. We now vacate the judgment and remand the case.

II

In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within, say, 30 or 45 days after entry of the trial court's judgment. See, *e. g.*, Ala. Rule App. Proc. 4 (2001); Colo. App. Rule 4(b)(1) (2001); Ky. Rule Crim. Proc. 12.04(3) (2002). Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time, say, 20 or 30 days, after entry of the court of appeals judgment. See, *e. g.*, Ala. Rule App. Proc. 5 (2001); Colo. Rev. Stat. § 13–4–108 (2001); Conn. Rule App. Proc. 80–1 (2002); Ky. Rule Civ. Proc. 76.20(2)(b) (2002). California argues here for a "uniform national rule" to the effect that an application for state collateral review is not "pending" in the state courts during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal (or petition for review) in the next court. Brief for Petitioner 36. Its rationale is that, during this period of time, the petition is not under court consideration.

California's reading of the word "pending," however, is not consistent with that word's ordinary meaning. The dictionary defines "pending" (when used as an adjective) as "in continuance" or "not yet decided." Webster's Third New International Dictionary 1669 (1993). It similarly defines the term (when used as a preposition) as "through the period of continuance . . . of," "until the . . . completion of." *Ibid.* That definition, applied in the present context, means that an application is pending as long as the ordinary state collateral

review process is "in continuance"—*i. e.*, "until the completion of" that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains "pending."

California's reading would also produce a serious statutory anomaly. A federal habeas petitioner must exhaust state remedies before he can obtain federal habeas relief. The statute makes clear that a federal petitioner has not exhausted those remedies as long as he maintains "the right under the law of the State to raise" in that State, "by any available procedure, the question presented." 28 U. S. C. § 2254(c). We have interpreted this latter provision to require the federal habeas petitioner to "invok[e] one complete round of the State's established appellate review process." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999). The exhaustion requirement serves AEDPA's goal of promoting "comity, finality, and federalism," *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000), by giving state courts "the first opportunity to review [the] claim," and to "correct" any "constitutional violation in the first instance." *Boerckel*, *supra*, at 844–845. And AEDPA's limitations period—with its accompanying tolling provision—ensures the achievement of this goal because it "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan* v. *Walker*, 533 U. S. 167, 178 (2001). California's interpretation violates these principles by encouraging state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review. This would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations).

It is therefore not surprising that no circuit court has interpreted the word "pending" in the manner proposed by

California. Every Court of Appeals to consider the argument has rejected it. *Melancon* v. *Kaylo*, 259 F. 3d 401, 406 (CA5 2001); *Payton* v. *Brigano*, 256 F. 3d 405, 408 (CA6 2001); *Hizbullahankhamon* v. *Walker*, 255 F. 3d 65, 72 (CA2 2001); *Nyland* v. *Moore*, 216 F. 3d 1264, 1267 (CA11 2000); *Swartz* v. *Meyers*, 204 F. 3d 417, 421–422 (CA3 2000); *Taylor* v. *Lee*, 186 F. 3d 557, 560–561 (CA4 1999); *Nino* v. *Galaza*, 183 F. 3d 1003, 1005 (CA9 1999); *Barnett* v. *LeMaster*, 167 F. 3d 1321, 1323 (CA10 1999). Like these courts, we answer the first question in the affirmative.

III

Having answered the necessarily predicate question of how the tolling provision ordinarily treats applications for state collateral review in typical "appeal" States, we turn to the question whether this rule applies in California. California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new "original" habeas petition. And it determines the timeliness of each filing according to a "reasonableness" standard. These differences, it is argued, require treating California differently from "appeal" States, in particular by not counting a petition as "pending" during the interval between a lower court's determination and filing of another petition in a higher court. See, *e. g.*, Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 5–18.

California's "original writ" system, however, is not as special in practice as its terminology might suggest. As interpreted by the courts, California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first. *In re Ramirez*, 89 Cal. App. 4th 1312, 1316, 108 Cal. Rptr. 2d 229, 232 (2001) (appellate court "has discretion to refuse to issue the writ . . . on the ground that application has not [first] been made . . . in a lower court"); *Harris* v. *Superior Court*

of Cal., 500 F. 2d 1124, 1126 (CA9 1974) (same); 6 B. Witkin & N. Epstein, California Criminal Law § 20, p. 540 (3d ed. 2000) (describing general policy that reviewing court will require application to have been made first in lower court). And a prisoner who files a subsequent and similar petition in another lower court (say, another trial court) will likely find consideration of that petition barred as successive. See, *e. g.*, *In re Clark*, 5 Cal. 4th 750, 767–771, 855 P. 2d 729, 740–744 (1993). At the same time, a prisoner who files that same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it is dubbed an "original" petition. See *In re Resendiz*, 25 Cal. 4th 230, 250, 19 P. 3d 1171, 1184 (2001) (reviewing court grants substantial deference to lower court's factual findings). Thus, typically a prisoner will seek habeas review in a lower court and later seek appellate review in a higher court—just as occurred in this case.

The upshot is that California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate. Other States (with the exception of North Carolina, see *Allen* v. *Mitchell*, 276 F. 3d 183, 186 (CA4 2001)), specify precise time limits, such as 30 or 45 days, within which an appeal must be taken, while California applies a general "reasonableness" standard. Still, we do not see how that feature of California law could make a critical difference. As mentioned, AEDPA's tolling rule is designed to protect the principles of "comity, finality, and federalism," by promoting "the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan*, *supra*, at 178 (internal quotation marks omitted). It modifies the 1-year filing rule (a rule that prevents prisoners from delaying their federal filing) in order to give States the opportunity to complete one full round of review, free of federal interference. Inclusion of California's "reasonableness" periods carries out that purpose in the same way, and to the same degree, as does inclu-

sion of the more specific appellate filing periods prevalent in other States. And exclusion of those periods in California would undermine AEDPA's statutory goals just as it would in those States. See Part II, *supra.*

The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (*i. e.*, a filing in a higher court) comes too late. But it is the State's interests that the tolling provision seeks to protect, and the State, through its supreme court decisions or legislation, can explicate timing requirements more precisely should that prove necessary.

Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears. See *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 72 (1946) (looking to function rather than "designation" that state law gives a state-court judgment for purposes of determining federal jurisdiction); *Department of Banking of Neb.* v. *Pink*, 317 U. S. 264, 268 (1942) *(per curiam)* (same). We find that California's system functions in ways sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word "pending."

The dissent contends that this application of the federal tolling provision to California's "original writ" system "will disrupt the sound operation of the federal limitations period in at least 36 States." *Post*, at 227 (opinion of KENNEDY, J.). This is so, the dissent believes, because the prisoner is given two choices when his petition has been denied by the intermediate court: He can file a "petition for hearing" in the supreme court within 10 days, or he can file a "new petition" in the supreme court. *In re Reed*, 33 Cal. 3d 914, 918, and n. 2, 663 P. 2d 216, 217, and n. 2 (1983). Why is California different, the dissent asks, from "appeal" States that *also*

give their supreme courts the power to entertain original habeas petitions? Won't our interpretation of the federal tolling rule, as it applies to California, apply equally to those other States, meaning that even after the statutory time to *appeal* to the supreme court has expired, the federal limitations period may still be tolled because a prisoner might, at any time, file an original petition?

The answer to this question is "no." In "appeal" systems, the original writ plays a different role. As the Supreme Court of Idaho (one of the States cited by the dissent) explains:

> "The Supreme Court, having jurisdiction to *review on appeal* decisions of the district courts in habeas corpus proceedings . . . will not exercise its power . . . to grant an *original* writ of habeas corpus, except in *extraordinary cases.*" *In re Barlow*, 48 Idaho 309, 282 P. 380 (1929).

See also, *e. g.*, *Commonwealth* v. *Salzinger*, 406 Pa. 268, 269, 177 A. 2d 619, 620 (1962) ("extraordinary circumstances" required for exercise of original jurisdiction); *La Belle* v. *Hancock*, 99 N. H. 254, 255, 108 A. 2d 545 (1954) *(per curiam)* ("original authority" to grant habeas relief "not ordinarily exercised"); *Ex parte Lambert*, 37 Tex. Crim. 435, 436, 36 S. W. 81, 82 (1896) ("[E]xcept in extraordinary cases, we will not entertain jurisdiction as a court to grant original writs of habeas corpus").

California, in contrast, has engrained original writs—both at the appellate level and in the supreme court—into its normal collateral review process. As we have explained, and as the dissent recognizes, the only avenue for a prisoner to challenge the denial of his application in the superior court is to file a "new petition" in the appellate court. And to challenge an appellate court denial, "*[f]urther review* [of a habeas application] may be sought in [the supreme] court

either by a new petition for habeas corpus or, preferably, by a petition for hearing." *In re Reed*, *supra*, at 918, n. 2, 663 P. 2d, at 216, n. 2 (emphasis added). Unlike States such as, say, Idaho, see *In re Barlow*, *supra*, the original writ in California is not "extraordinary"—it is *interchangeable* with the petition for hearing, with neither option bringing adverse consequences to the petitioner. Consequently, we treat California both as *similar* to other States (in that its "original writ" system functions like the "appeal" systems of those other States), and *differently* from other States (in that the rule we apply to original writs in California does not apply to original writs in other States, precisely because original writs in California function like appeals). And of course, as we have said, California remains free, through legislative or judicial action, to adjust its "original writ" system accordingly.

IV

It remains to ask whether Saffold delayed "unreasonably" in seeking California Supreme Court review. If so, his application would no longer have been "pending" during this period. Saffold filed his petition for review in the California Supreme Court 4½ months after the California Court of Appeal issued its decision. The Ninth Circuit held that this filing was nonetheless timely. It based its conclusion primarily upon the fact that the California Supreme Court wrote that it denied the petition "on the merits and for lack of diligence." These first three words, the Ninth Circuit suggested, showed that the California Supreme Court could not have considered the petition too late, for, if so, why would it have considered the merits? 250 F. 3d, at 1267.

There are many plausible answers to this question. A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for deci-

sion; or where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. See, *e. g.*, *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001) (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims. See *Duncan*, 533 U. S., at 179.

If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was "unreasonable," that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was "entangled" with the merits. 250 F. 3d, at 1267. We cannot say in this case, however, that the Ninth Circuit was wrong in its ultimate conclusion. Saffold argues that special circumstances were present here: He was not notified of the Court of Appeal's decision for several months, and he filed within days after receiving notification. And he contends it is more likely that the phrase "lack of diligence" referred to the delay between the date his conviction became final and the date he first sought state postconviction relief—a matter irrelevant to the question whether his application was "pending" during the 4½-month interval. We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme Court

for the purpose of seeking clarification in this area of state law.

* * *

For the foregoing reasons, we answer the first two issues presented in this case in the affirmative, vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

Respondent is a California prisoner who did not file a notice of appeal. The Court, however, begins by considering a question not presented, whether the statute of limitations would have been tolled for a hypothetical prisoner who filed an appeal somewhere else. This is a strong indication that the Court is off in the wrong direction. After holding that tolling applies for its hypothetical appellant, the Court finally gets to California, where no appeal was filed. On the Court's view, California's procedures are "unique," *ante,* at 217, so giving them special treatment under the statute will affect only that one State. It is quite wrong about this. In fact, today's ruling will disrupt the sound operation of the federal limitations period in at least 36 States. This is what happens when the Court departs from the text of a nationwide statute to reach a result in one particular State.

The Court's conclusion that an application is pending before the filing of an original writ in the California Supreme Court rests on three propositions: First, "application" means "petition, appeal from the denial of a petition, and anything else that functions as an appeal." Second, California's procedures are very different from those in other States. Third, a petition for an original writ in the California Supreme Court functions as an appeal. The first is an untenable interpretation of statutory text. The second and third, however, are wrong on both the facts and the law. The rem-

edies available in the California Supreme Court are no different from those available in most other state supreme courts. Like 36 other States, California allows its high court both to reverse the denial of habeas corpus in the lower court and to grant an original petition for habeas outright. In California, as in other States, these procedures differ in more than name. They differ with respect to the question in this case: whether an application was pending in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d)(1), provides a 1-year statute of limitations for filing a federal habeas corpus petition, but it tolls the limitations period while a "properly filed application" for collateral review is "pending" in the state courts. The Court now holds that on the day before respondent filed an original petition in the California Supreme Court, his application was "properly filed" and "pending" somewhere. The Court does not say what that application was, nor does it identify the court in which it was filed. This is because nothing had been under consideration or awaiting the result of an appeal for four months, since the California Court of Appeal had denied respondent's previous application.

Instead of identifying a particular pending application, the Court relies upon an expansive definition of the term. The Court begins by defining "pending," offering one definition for when the word is used as an adjective and another for when used as a preposition. See *ante*, at 219. As the statute only uses the word as an adjective (tolling while the application "is pending"), the latter definition is irrelevant and misleading. When used as an adjective, the definition does not help the Court. The Court says "pending" means "'in continuance' or 'not yet decided.'" *Ibid.* (quoting Webster's Third New International Dictionary 1669 (1993)). The real

issue though is not what "pending" means, but when is an "application . . . pending." The Court asserts that "an application is pending as long as the ordinary state collateral review process is 'in continuance' . . . ." *Ante*, at 219–220. That is only true, of course, if "application" means the "ordinary state collateral review process," a proposition that finds no support in Webster's Third. Indeed, it is inconsistent with *Artuz* v. *Bennett*, 531 U. S. 4 (2000), which recognized that an "application" is a "document" distinct from the legal claims contained within it. *Id.*, at 8, 9. The word, "application," appears in numerous other places in the laws governing federal habeas corpus. *E. g.*, 28 U. S. C. § 2242 ("application for a writ of habeas corpus shall be in writing signed and verified"); § 2243 (a "judge entertaining an application for a writ of habeas corpus"). In each place, it is clear that the statute refers to a specific legal document; in none is the word used as a substitute for the ordinary collateral review process. Without discussing *Artuz* or these many statutory references, the Court gives "application" a new meaning, one that does not even require the existence of any document evidencing the "application," and one that embraces the multiple petitions, appeals, and other filings that constitute the "ordinary state collateral review process." *Ante*, at 219–220.

The Court explains that the original petition in the California Supreme Court is part of the ordinary collateral review process because it functions as an appeal under California law. California, the Court says, "does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition." *Ante*, at 221. This is an incorrect statement of California law. While California does not permit appeals of the California Superior Court's denial of habeas corpus, it does provide for "appellate review" of the denial of a petition for habeas corpus by the California Court of Appeal. That appeal is not just available; as the Court concedes, *ante*, at 224–225, the California Supreme

Court has said that it is the preferred practice. See *In re Reed*, 33 Cal. 3d 914, 918, and n. 2, 663 P. 2d 216, 217, and n. 2 (1983). Section 1506 of the Cal. Penal Code Ann. (West 2000) provides: "[I]n all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court." Respondent had 10 days after the Court of Appeal denied his petition to file a petition for review. Cal. App. Rules of Court 28(b), 50(b) (2002). The Court's analysis is thus premised on a misinterpretation of California law.

Had respondent filed the appeal provided by Cal. Penal Code Ann. § 1506 (West 2000), his application might have remained pending during the 10 days while he prepared his appeal and while the appeal was under consideration by the California Supreme Court. This is because an appeal is not a new application; rather, it is a request that the appellate court order the lower court to grant the original application. Congress used the word "application" in precisely this way for federal petitions for habeas corpus—distinguishing between "appeals," see 28 U. S. C. § 2253, and second or successive "applications," see § 2244. Thus, an application may remain "pending" in the lower court while the prisoner pursues his appeal, because the lower court may grant the original application at some point in the future.

An application does not remain pending, however, once the court that has denied it loses the power to ever grant it. When the Court of Appeal denied respondent's petition and respondent did not appeal, the petition became final and was no longer pending before that court. See Cal. App. Rule of Court 24 (2002) ("When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court . . ."). Respondent could not ask the Court of Appeal to grant the application, and respondent could not request that the California Supreme Court order the Court of Appeal to grant the application.

Instead respondent filed a new application, a petition for a writ of habeas corpus, invoking the original jurisdiction of the California Supreme Court. See Cal. Const., Art. VI, § 10 (Supp. 2001). Under California law, the original petition began a new proceeding that had no proximate connection to the proceedings in the California Court of Appeal. See *People* v. *Romero*, 8 Cal. 4th 728, 737, 883 P. 2d 388, 391 (1994). The California Supreme Court had no power to grant the previous petition, and it did not even have the power to vacate the judgment of the lower state court. See *In re Michael E.*, 15 Cal. 3d 183, 192–193, n. 15, 538 P. 2d 231, 237, n. 15 (1975). There is no sense in which, before or after the filing of a petition for an original writ, an application remained pending below.

Even if California recognized an original writ as an equivalent procedure to an appeal for purposes of state law, the two procedures would differ with respect to the federal statutory question in this case. When a prisoner files an appeal, the original application remains pending in the lower court, but when a prisoner files an original writ, there is no application pending in any lower court. As it turns out, however, California law does not regard an appeal and an original writ as equivalents. California recognizes that a prisoner may obtain relief through either procedure, but the California Supreme Court has said an appeal is preferred. *In re Reed*, *supra*, at 918–919, and n. 2, 663 P. 2d, at 217, n. 2. At the same time, a prisoner may use an original writ in circumstances where an appeal is not available. Although California encourages prisoners to exhaust claims in the lower courts, the claims within an original petition need not be the same as those presented earlier. *E. g.*, *In re Black*, 66 Cal. 2d 881, 428 P. 2d 293 (1967); Cal. App. Rule of Court 56(a)(1) (2002) (directing prisoners to explain why the exhaustion rule should not apply). Indeed, the California Supreme Court may grant relief even if the prisoner has not filed any petition in the lower courts. *E. g.*, *In re Moss*, 175 Cal. App.

3d 913, 922, 221 Cal. Rptr. 645, 649 (1985). As the new petition constitutes a new application in form and function, the California Supreme Court has long recognized what our Court today refuses to see. After the denial of a habeas petition, there is no application "pending" in any court:

> "Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein,* he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court." *In re Zany,* 164 Cal. 724, 727, 130 P. 710 (1913).

The petition thus is not pending even under state law: Each habeas petition is a "*new proceeding* for relief," *ibid.*, and is not the same case, let alone the same application. Each time a California court denies a petition, the application is "no longer a matter *pending*," *ibid.*, before any court, because it can no longer be granted by that court or any other court in the future.

The Court's contrary conclusion does not depend upon any reasonable construction of a "pending application." It depends entirely upon the proposition that when California says "original writ," it means "appeal," and federal courts must not privilege form over substance. But California provides for an appeal, see Cal. Penal Code Ann. § 1506 (West 2000), and none was taken here. It is impossible to understand why the Court has ignored this provision by which California provides for an appeal, just like every other State.

The Court also has ignored the fact that most other States provide for original writs, just like California. As a consequence, the Court's error is of substantial significance beyond this case; for the California Supreme Court's original jurisdiction to issue writs of habeas corpus is not some quirk

of California law. At least 36 other States grant their supreme courts original jurisdiction over petitions for habeas corpus as well as appellate jurisdiction over a habeas determination in the lower courts. See Appendix, *infra*. Congress, of course, understands this distinction, since it has provided both procedures for our own Court. A state prisoner seeking to challenge the validity of his sentence may seek review of a lower court's decision by filing a petition for certiorari, 28 U. S. C. § 1257, or he may file a petition for an original writ of habeas corpus, § 2241. While the prisoner may obtain relief through either procedure, there is a clear distinction between an appeal—which requests that we order the lower court to grant an application pending before it—and a petition for a writ of habeas corpus—which requests that we grant the relief ourselves. Before this case no one thought that distinction to be merely one of form and not substance.

The Court is thus quite mistaken to conclude that its decision concerns only the procedures within California. The Court distinguishes California from other States because California "has engrained original writs—both at the appellate level and in the supreme court—into its normal collateral review process." *Ante*, at 224. This statement is not correct even for California. See *supra*, at 231–232. It may or may not be true for the four other States the Court cites, but even so the federal courts will have to test that point for dozens more. The Court's distinction between "appeal States" and "original writ States" is its own creation with no clear meaning under state law, not to mention a tie to the law Congress has enacted. Having departed from the sensible meaning of application, and the well-understood distinction between an appeal and an original writ, the Court now requires federal courts to define the ordinary collateral review procedures in each State. It may not be clear in how many States original writs will fall on the side of the ordinary, but it is clear that the question will be litigated. In

many, if not all, of the States mentioned above, a prisoner like respondent, relying upon today's decision, will be able to extend the federal tolling period, perhaps indefinitely, by filing a petition for an original writ of habeas corpus in a state supreme court many months after his state appeal has been denied. See *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001) (tolling the federal limitations for a 4-year gap).

In those jurisdictions the Court will create a strange anomaly. Now an application can be both pending and not pending, taking on what the Seventh Circuit has described as a "Cheshire-cat like quality, both there and not there at the same time." *Fernandez* v. *Sternes*, 227 F. 3d 977, 980 (2000). If, for instance, the Court's hypothetical prisoner declined to file an appeal to the State's highest court, and he went to federal court more than a year later, his petition would be dismissed as time barred. As no application had been on the docket of any court for a year, and no petition that he had addressed to any state court could ever be granted, no "properly filed application" was "pending" anywhere. Under the Court's view, however, it would be premature to say that the federal statute of limitations had expired. The prisoner could file a new petition invoking the original jurisdiction of the state high court, and if the court denied it on the merits (or without comment), a subsequent federal application could be timely even though the earlier one was too late.

Under today's ruling, the federal court would be required to rule that the state petition, which was not pending before, had retroactively become so, and the prisoner's new federal application was timely. This is not a sensible way of determining when an application is "pending" under the federal tolling provision. Whether an application is pending at any given moment should be susceptible of a yes or no answer. On the Court's theory the answer will often be "impossible to tell," because it depends not on whether an application is

under submission in a particular court but upon events that may occur at some later time.

The Court's insistence on treating an original writ as an appeal will create serious confusion in California—and elsewhere—for another reason. Federal courts will have to determine when an original writ is timely under California law because on the Court's holding only timely petitions cause an application to be (retroactively) pending. The problem, however, is that an original writ in California—like original writs elsewhere and unlike appeals in California and most everywhere else—does not have a strict time limit. Under California law the question is not whether a petition is "timely" but whether the prisoner exercised "due diligence" in filing his petition within a reasonable time after he becomes aware of the grounds for relief. *In re Harris*, 5 Cal. 4th 813, 828, n. 7, 855 P. 2d 391, 398, n. 7 (1993). This equitable concept is designed to be flexible, and it allows California courts to correct miscarriages of justice, even those which happened long ago. *E. g.*, *In re Stankewitz*, 40 Cal. 3d 391, 396, n. 1, 708 P. 2d 1260, 1262, n. 1 (1985) (hearing the merits despite an 18-month delay); *In re Moss*, 175 Cal. App. 3d, at 921, 221 Cal. Rptr., at 648 (hearing the merits despite a 9-month delay). Nothing about AEDPA suggests that Congress wanted to inject this degree of unpredictability into the 1-year statute of limitations, and it is hard to see how federal courts are to approach this state-law inquiry.

While there may be cases, like this one, where the California courts expressly deny a petition for lack of diligence, the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay. Brief for Respondent 40–41, n. 27. Under the Court's rule, federal courts will be required to assess, without clear guidance from state law, whether respondent exercised due diligence. This inquiry will create substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time. The uncer-

tainty may vex prisoners as well, for they cannot know whether the federal statute of limitations is running while they prepare their state petitions.

The Court's disposition in this very case proves that the timing question is often unanswerable. Even though this is the rare case where the California Supreme Court made a specific finding of "lack of diligence," the Court does not hold respondent's petition untimely. Instead, the Court concludes that the lack of diligence finding is ambiguous, because it might refer, not to respondent's 4-month delay in filing his final writ, but to his 5-year delay in pursuing any collateral relief at all. *Ante,* at 226. This ambiguity, however, should not benefit respondent. If the California court held that all of respondent's state habeas petitions were years overdue, then they were not "properly filed" at all, and there would be no tolling of the federal limitations period. See *Artuz* v. *Bennett,* 531 U. S., at 8. Our consideration whether respondent's petition was "pending" presupposes that it was "properly filed" in the California courts.

The Court takes a different view, but in delivering the case back to the Court of Appeals, it provides no guidance for resolving the ambiguity. As the question has been thoroughly briefed before our Court, it is difficult to see how the lower court would resolve it, if we could not. The Court says that the Court of Appeals might certify a question to the California Supreme Court, but it gives no indication what that court might ask. Presumably, it is not suggesting that in every case where the California Supreme Court issues a summary denial, the Court of Appeals should certify the factbound question of what it really meant to say.

The Court begins in a hypothetical jurisdiction, and it ends without answering the question presented. Both points are telling. By leaving the text of the federal statute behind and calling California's procedures something they are not, the Court has complicated the disposition of the thousands of petitions filed each year in the federal district courts in

California. See U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U. S. District Courts, 2000, with Trends 1980–2000, p. 3 (Jan. 2002) (California state prisoners filed 4,017 federal petitions in 2000). The Court also raises these questions in the numerous jurisdictions that permit original writs in addition to appeals. Applying the clear words of the statute to the clear law in California would have been much easier.

I would reverse the judgment of the Court of Appeals.

APPENDIX TO OPINION OF KENNEDY, J.

Ala. Code § 12–2–7(3) (1995); Ariz. Const., Art. VI, § 5(1); Ark. Const., Art. VII, § 4; Colo. Const., Art. VI, § 3; Fla. Rule App. Proc. 9.030(a)(3) (2002); Haw. Rev. Stat. § 660–3 (1993); Idaho Code § 19–4202(1) (Supp. 2001); Ill. Const., Art. VI, § 4(a); Iowa Const., Art. V, § 4; Kan. Const., Art. III, § 3; La. Const., Art. V, § 2; Me. Rev. Stat. Ann., Tit. 14, § 5301 (1980); Md. Cts. & Jud. Proc. Code Ann. § 3–701 (1974–1998); Mich. Comp. Laws Ann. § 600.4304(1) (West 2000); Mo. Const., Art. V, § 4(1); Mont. Const., Art. VII, § 2(1); Neb. Rev. Stat. § 24–204 (1995); Nev. Const., Art. VI, § 4; N. H. Rev. Stat. Ann. § 490:4 (1997); N. M. Const., Art. VI, § 3; N. C. Gen. Stat. § 7A–32(a) (1999); N. D. Cent. Code § 27–02–04 (1991); Ohio Const., Art. IV, § 2; Okla. Const., Art. VII, § 4; Ore. Const., Art. VII, § 2; 42 Pa. Cons. Stat. § 721(1) (1981); R. I. Gen. Laws § 8–1–2 (1997); S. C. Code Ann. § 14–3–310 (1977); S. D. Const., Art. V, § 5 (1978); Tex. Const., Art. V, § 3 (Supp. 2002); Utah Code Ann. § 78–2–2 (2001 Supp.); Vt. Stat. Ann., Tit. 4, § 2(b) (1999); Va. Const., Art. VI, § 1; Wash. Rev. Code § 2.04.010 (1994); W. Va. Code § 51–1–3 (2000); Wyo. Const., Art. V, § 3.

Syllabus

UNITED STATES *v.* FIOR D'ITALIA, INC.

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

No. 01–463. Argued April 22, 2002—Decided June 17, 2002

Employers must pay Federal Insurance Contributions Act (FICA) taxes, calculated as a percentage of the wages, including tips, that their employees receive. 26 U. S. C. §§ 3101, 3111, 3121(q). An employee reports the tip amount to the employer, who sends copies of the reports to the Internal Revenue Service (IRS). 26 CFR § 31.6011(a)–1(a). In 1991 and 1992, respondent Fior D'Italia restaurant paid FICA taxes based on the tip amount its employees reported, but the reports also showed that the tips listed on customers' credit card slips far exceeded the reported amount. The IRS made a compliance check and assessed additional FICA taxes using an "aggregate estimation" method, under which it examined the credit card slips; found the average percentage tip paid by those customers; assumed that cash-paying customers paid at same rate; calculated total tips by multiplying the tip rates by Fior D'Italia's total receipts; subtracted the tips already reported; applied the FICA tax rate to the remainder; and assessed additional taxes owed. After paying a portion of the taxes, Fior D'Italia filed this refund suit, claiming that the tax statutes did not authorize the IRS to use the aggregate estimation method, but required it to first determine the tips that each individual employee received and then use that information to calculate the employer's total FICA tax liability. Fior D'Italia agreed that it would not dispute the accuracy of the particular calculation in this case. The District Court ruled for Fior D'Italia, and the Ninth Circuit affirmed.

Held: The tax law authorizes the IRS to use the aggregate estimation method. Pp. 242–252.

(a) An assessment is entitled to a legal presumption of correctness. By granting the IRS assessment authority, 26 U. S. C. § 6201(a) must simultaneously grant it power to decide *how* to make that assessment within certain limits, which are not exceeded when the IRS estimates tax liability using a reasonable method. Pp. 242–244.

(b) The FICA statute's language, taken as a whole, does not prevent using an aggregate estimation method. Fior D'Italia claims that, because § 3121(q) speaks in the singular—"tips received by *an* employee in the course of *his* employment"—an employer's liability attaches to each individual payment, not when the payments are later summed and

reported. However, § 3121(q) is a definitional section. Sections 3111(a) and (b), which impose the tax, speak in the plural—"wages" paid to "individuals" by the employer "with respect to employment"—and thus impose liability for the *totality* of the "wages" paid, which totality, says the definitional section, includes each individual employee's tips. Pp. 244–245.

(c) Contrary to the Ninth Circuit's view, there is no reason to read § 446(b)—which authorizes the IRS to use estimation methods for determining income tax liability—or § 6205(a)(1)—which authorizes the Secretary to adopt regulations prescribing mechanisms for employers to adjust FICA tax liability—as limiting the IRS' authority to use an aggregate estimation method to compute in computing FICA tax liability. Pp. 245–246.

(d) Certain features of an aggregate estimate—that it includes tips that should not count in calculating FICA tax, *e. g.*, tips amounting to less than $20 per month; and that a calculation based on credit card slips can overstate the aggregate amount because, *e. g.*, cash-paying customers tend to leave a lower percentage tip—do not show that the method is so unreasonable as to violate the law. Absent Fior D'Italia's stipulation that it would not challenge the IRS calculation's accuracy, a taxpayer would be free and able to present evidence that the assessment is inaccurate in a particular case. Pp. 246–248.

(e) The fact that the employer is placed in an awkward position by the requirement that it pay taxes only on tips reported by its employees, even when it knows those reports are inaccurate, does not make aggregate estimation unlawful. Section 3121(q) makes clear that penalties will not attach and interest will not accrue unless the IRS actually demands the money and the restaurant refuses to pay the amount demanded in a timely fashion. Pp. 248–249.

(f) Finally, even assuming that an improper motive on the IRS' part could render unlawful its use of a statutorily permissible enforcement method in certain circumstances, Fior D'Italia has not shown that the IRS has acted illegally in this case. It has presented a general claim that the aggregate estimation method lends itself to abusive agency action. But agency action cannot be found unreasonable in all cases simply because of a general possibility of abuse, which exists in respect to many discretionary enforcement powers. Pp. 250–252.

242 F. 3d 844, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, and GINSBURG, JJ., joined. SOUTER, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 252.

Assistant Attorney General O'Connor argued the cause for the United States. With her on the briefs were *Solicitor General Olson*, *Deputy Solicitor General Wallace*, *Kent L. Jones*, *Bruce R. Ellisen*, and *Jeffrey R. Meyer.*

Tracy J. Power argued the cause for respondent. With her on the brief were *Thomas W. Power*, *Donald B. Ayer*, and *Elizabeth Rees.**

JUSTICE BREYER delivered the opinion of the Court.

Employers must pay Federal Insurance Contributions Act taxes (popularly known as Social Security taxes or FICA taxes), calculated as a percentage of the wages—including the tips—that their employees receive. 26 U. S. C. §§ 3101, 3111, 3121(q). This case focuses upon the Government's efforts to assess a restaurant for FICA taxes based upon tips that its employees may have received but did not report. We must decide whether the law authorizes the Internal Revenue Service (IRS) to base that assessment upon its *aggregate estimate* of all the tips that the restaurant's customers paid its employees, or whether the law requires the IRS instead to determine total tip income by estimating each *individual employee's* tip income separately, then adding individual estimates together to create a total. In our view, the law authorizes the IRS to use the aggregate estimation method.

I

The tax law imposes, not only on employees, but also "on every employer," an "excise tax," *i. e.*, a FICA tax, in an amount equal to a percentage "of the wages . . . paid by him with respect to employment." § 3111(a) (setting forth basic Social Security tax); § 3111(b) (using identical language to set

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*Briefs of *amici curiae* urging affirmance were filed for the American Gaming Association by *Robert H. Kapp*, *John G. Roberts, Jr.*, and *Frank J. Fahrenkopf, Jr.;* for the National Restaurant Association by *Peter G. Kilgore;* and for Patricia R. Guancial by *Lawrence R. Jones, Jr.*

forth additional hospital insurance tax). It specifies that "tips received by an employee in the course of his employment shall be considered remuneration" and "deemed to have been paid by the employer" for purposes of the FICA tax sections. § 3121(q). It also requires an employee who receives wages in the form of tips to report the amount of those tips to the employer, who must send copies of those reports to the IRS. 26 CFR § 31.6011(a)–1(a) (2001).

In 1991 and 1992 the reports provided to San Francisco's Fior D'Italia restaurant (and ultimately to the IRS) by the restaurant's employees showed that total tip income amounted to $247,181 and $220,845, in each year respectively. And Fior D'Italia calculated and paid its FICA tax based on these amounts. The same reports, however, also showed that customers had listed tips on their credit card slips amounting to far more than the amount reported by the employees ($364,786 in 1991 and $338,161 in 1992). Not surprisingly, this discrepancy led the IRS to conduct a compliance check. And that check led the IRS to issue an assessment against Fior D'Italia for additional FICA tax.

To calculate the added tax it found owing, the IRS used what it calls an "aggregate estimation" method. That method was a very simple one. The IRS examined the restaurant's credit card slips for the years in question, finding that customers had tipped, on average, 14.49% of their bills in 1991 and 14.29% in 1992. Assuming that cash-paying customers on average tipped at those rates also, the IRS calculated total tips by multiplying the tip rates by the restaurant's total receipts. It then subtracted tips already reported and applied the FICA tax rate to the remainder. The results for 1991 showed total tips amounting to $403,726 and unreported tips amounting to $156,545. The same figures for 1992 showed $368,374 and $147,529. The IRS issued an assessment against Fior D'Italia for additional FICA taxes owed, amounting to $11,976 for 1991 and $11,286 for 1992.

After paying a portion of the taxes assessed, the restaurant brought this refund suit, while the IRS filed a counterclaim for the remainder. The restaurant argued that the tax statutes did not authorize the IRS to use its "aggregate estimation" method; rather, they required the IRS first to determine the tips that each individual employee received and then to use that information to calculate the employer's total FICA tax liability. Simplifying the case, the restaurant agreed that "[f]or purpose[s] of this litigation," it would "not dispute the facts, estimates and/or determinations" that the IRS had "used . . . as a basis for its calculation" of the employees' "aggregate unreported tip income." App. 35. And the District Court decided the sole remaining legal question—the question of the *statutory authority* to estimate tip income in the aggregate—in Fior D'Italia's favor.

The Court of Appeals affirmed the District Court by a vote of 2 to 1, the majority concluding that the IRS is not legally authorized to use its aggregate estimation method, at least not without first adopting its own authorizing regulation. In light of differences among the Circuits, compare 242 F. 3d 844 (CA9 2001) (case below) with *330 West Hubbard Restaurant Corp.* v. *United States*, 203 F. 3d 990, 997 (CA7 2000), *Bubble Room, Inc.* v. *United States*, 159 F. 3d 553, 568 (CA Fed. 1998), and *Morrison Restaurants, Inc.* v. *United States*, 118 F. 3d 1526, 1530 (CA11 1997), we granted the Government's petition for certiorari. We now reverse.

II

An "assessment" amounts to an IRS determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes. It is well established in the tax law that an assessment is entitled to a legal presumption of correctness—a presumption that can help the Government prove its case against a taxpayer in court. See, *e. g.*, *United States* v. *Janis*, 428 U. S. 433, 440 (1976); *Palmer* v. *IRS*, 116 F. 3d 1309, 1312 (CA9 1997); *Psaty* v. *United States*, 442 F. 2d 1154,

1160 (CA3 1971); *United States* v. *Lease*, 346 F. 2d 696, 700 (CA2 1965). We consider here the Government's authority to make an assessment in a particular way, namely, by directly estimating the aggregate tips that a restaurant's employees have received rather than estimating (and then summing) the tips received by each individual employee.

The Internal Revenue Code says that the IRS, as delegate of the Secretary of Treasury,

> "is authorized and required to make the inquiries, determinations, and *assessments* of all taxes . . . which have not been duly paid . . . ." 26 U. S. C. § 6201(a) (emphasis added).

This provision, by granting the IRS assessment authority, must simultaneously grant the IRS power to decide *how* to make that assessment—at least within certain limits. And the courts have consistently held that those limits are not exceeded when the IRS *estimates* an individual's tax liability—as long as the method used to make the estimate is a "reasonable" one. See, *e. g.*, *Erickson* v. *Commissioner*, 937 F. 2d 1548, 1551 (CA10 1991) (estimate made with reference to taxpayer's purchasing record was "presumptively correct" when based on "reasonable foundation"). See also *Janis*, *supra*, at 437 (upholding estimate of tax liability over 77-day period made by extrapolating information based on gross proceeds from 5-day period); *Dodge* v. *Commissioner*, 981 F. 2d 350, 353–354 (CA8 1992) (upholding estimate using bank deposits by taxpayer); *Pollard* v. *Commissioner*, 786 F. 2d 1063, 1066 (CA11 1986) (upholding estimate using statistical tables reflecting cost of living where taxpayer lived); *Gerardo* v. *Commissioner*, 552 F. 2d 549, 551–552 (CA3 1977) (upholding estimate using extrapolation of income over 1-year period based on gross receipts from two days); *Mendelson* v. *Commissioner*, 305 F. 2d 519, 521–522 (CA7 1962) (upholding estimate of waitress' tip income based on restaurant's gross receipts and average tips earned by all wait-

resses employed by restaurant); *McQuatters* v. *Commissioner*, 32 TCM 1122 (1973), ¶ 73,240 P–H Memo TC (same).

Fior D'Italia does not challenge this basic principle of law. Rather, it seeks to explain why this principle should not apply here, or why it should not determine the outcome of this case in the Government's favor.

A

Fior D'Italia's primary argument rests upon the statute that imposes the FICA tax. It points out that the tax law says there is "imposed on every employer" an "excise tax" calculated on the basis of "wages . . . paid by him" as those "wages" are "defined in" § 3121. §§ 3111(a), (b). It adds that the subsection of § 3121 which specifies that "wages" includes tips (subsection q) refers to "tips" as those "received by *an* employee in the course of *his* employment," *i. e.*, to tips received by each employee individually. (Emphasis added.) Fior D'Italia emphasizes § 3121(q)'s reference to the employee in the singular to conclude that the "employer's liability for FICA taxes therefore attaches to *each* of these individual payments, not when they are later summed and reported." Brief for Respondent 28 (emphasis in original).

In our view Fior D'Italia's linguistic argument makes too much out of too little. The language it finds key, the words "tips received by an employee," is contained in a definitional section, § 3121(q), not in the sections that impose the tax, §§ 3111(a), (b). The definitional section speaks in the singular. It says that an employee's (singular) tips "shall be considered remuneration" for purposes of the latter, tax imposing sections. § 3121(q). But the latter operational sections speak in the plural. They impose on employers a FICA tax calculated as a percentage of the "wages" (plural) paid to "individuals" (plural) by the employer "with respect to employment." §§ 3111(a), (b). The operational sections consequently impose liability for the *totality* of the "wages" that the employer pays, which totality of "wages," says the defi-

nitional section, shall include the tips that each individual employee earns. It is as if a tax were imposed on "all of a restaurant's dishes," with a definitional section specifying that "dishes" shall "include each customer's silverware." We simply do not see how this kind of language, taken as a whole, argues against use of an aggregate estimation method that seeks to determine the restaurant's total FICA tax liability.

B

The Ninth Circuit relied in part upon two other statutory provisions. The first, 26 U. S. C. § 446(b), has been interpreted to authorize the IRS to use methods of estimation for determining *income* tax liability. See, *e. g.*, *Mendelson*, *supra*, at 521–522 (authorizing estimate of waitress' gross receipts). The court felt this provision negatively implies a lack of IRS authority to use the aggregate estimation method in respect to other taxes, such as employer FICA taxes, where no such provision applies. 242 F. 3d, at 849. The second, 26 U. S. C. § 6205(a)(1), authorizes the Secretary to adopt regulations that prescribe mechanisms for employers to adjust FICA tax liability. The court felt this provision negatively implies a lack of IRS authority to use an aggregate estimation method in the absence of a regulation. 242 F. 3d, at 851.

After examining the statutes, however, we cannot find any negative implication. The first says that, where a taxpayer has used "a method of accounting" that "does not clearly reflect income," or has used "no method of accounting" at all, "the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income." § 446(b). This provision applies to only one corner of income tax law, and even within that corner it says nothing about any particular method of calculation. To read it negatively would significantly limit IRS authority in that respect both within and outside the field of income tax law.

And there is simply no reason to believe that Congress intended any such limitation.

Section 6205(a)(1) refers to certain employment taxes, including FICA taxes, and says that when an employer initially pays "less than the correct amount of tax," then "proper adjustments . . . shall be made, without interest," in accordance with "regulations." The IRS has made clear that this provision refers to an employer's "adjustments," say, in an initially underreported tax liability, made *before* the IRS has assessed an underpayment. See generally 26 CFR § 31.6205–1 (2001). Again, there is simply no reason to believe that Congress, in writing this provision applicable to a small corner of tax law, intended, through negative implication, to limit the IRS' general power to assess tax deficiencies. Indeed, Fior D'Italia has not advanced in this Court either "negative implication" argument relied on by the Ninth Circuit.

C

Fior D'Italia next points to several features of an "aggregate" estimate that, in its view, make it "unreasonable" (and therefore contrary to law) for the IRS to use that method. First, it notes that an aggregate estimate will sometimes include tips that should not count in calculating the FICA tax the employer owes. The law excludes an employee's tips from the FICA wages base insofar as those tips amount to less than $20 in a month. 26 U. S. C. § 3121(a)(12)(B). It also excludes the portion of tips and other wages (including fixed salary) an employee receives that rises above a certain annual level—$53,400 in 1991 and $55,500 in 1992. § 3121(a)(1); 242 F. 3d, at 846, n. 4. These ceilings mean that if a waiter earns, say, $36,000 in fixed salary, reports $20,000 in tips, and fails to report $10,000 in tips, the restaurant would *not* owe additional taxes, because the waiter's reported income ($56,000) already exceeds the FICA ceiling. But if that waiter earns $36,000 in fixed salary, reports $10,000 in tips, and fails to report another $10,000 in tips,

the restaurant *would* owe additional taxes on the unreported amount, because the waiter's reported income of $46,000 falls below the FICA ceiling.

Second, Fior D'Italia points out that an aggregate calculation based on credit card slips can overstate the aggregate amount of tips because it fails to account for the possibilities that: (1) customers who pay cash tend to leave a lower percentage of the bill as a tip; (2) some customers "stiff" the waiter, leaving no tip at all; (3) some customers write a high tip on the credit card slip, but ask for some cash back, leaving a net lower amount; and (4) some restaurants deduct the credit card company fee from the tip, leaving the employees with a lower net amount.

Fior D'Italia adds that these potential errors can make an enormous difference to a restaurant, for restaurant profits are often low, while the tax is high. Brief for Respondent 9–10, n. 6 (asserting that an assessment for unreported tips for all years since employer FICA tax provision was enacted would amount to two years' total profits). Indeed, the restaurant must pay this tax on the basis of amounts that the restaurant itself cannot control, for the restaurant's customers, not the restaurant itself, determine the level of tips. Fior D'Italia concludes that the IRS should avoid these problems by resting its assessment upon individual calculations of employee tip earnings, and argues that the IRS' failure to do so will always result in an overstatement of tax liability, rendering any assessment that results from aggregate estimates unreasonable and outside the limits of any delegated IRS authority.

In our view, these considerations do not show that the IRS' aggregate estimating method falls outside the bounds of what is reasonable. It bears repeating that in this litigation, Fior D'Italia stipulated that it would not challenge the particular IRS calculation as inaccurate. Absent such a stipulation, a taxpayer would remain free to present evidence that an assessment is inaccurate in a particular case. And we do

not accept Fior D'Italia's claim that restaurants are unable to do so—that they "simply do not have the information to dispute" the IRS assessment. Tr. of Oral Arg. 36. Why does a restaurant owner not know, or why is that owner unable to find out: how many busboys or other personnel work for only a day or two—thereby likely earning less than $20 in tips; how many employees were likely to have earned more than $55,000 or so in 1992; how much less cash-paying customers tip; how often they "stiff" waiters or ask for a cash refund; and whether the restaurant owner deducts a credit card charge of, say 3%, from employee tips? After all, the restaurant need not prove these matters with precision. It need only demonstrate that use of the aggregate method in the particular case has likely produced an inaccurate result. And in doing so, it may well be able to convince a judge to insist upon a more accurate formula. See, *e. g.*, *Erickson*, 937 F. 2d, at 1551 ("*Some* reasonable foundation for the assessment is necessary to preserve the presumption of correctness" (emphasis in original)).

Nor has Fior D'Italia convinced us that individualized employee assessments will inevitably lead to a more "reasonable" assessment of employer liability than an aggregate estimate. After all, individual audits will be plagued by some of the same inaccuracies Fior D'Italia attributes to the aggregate estimation method, because they are, of course, *based on estimates themselves.* See, *e. g.*, *Mendelson*, 305 F. 2d, at 521–522; *McQuatters* v. *Commissioner*, 32 TCM 1122 (1973), ¶ 73,240 P–H Memo TC. Consequently, we cannot find that the aggregate method is, as a general matter, so unreasonable as to violate the law.

D

Fior D'Italia also mentions an IRS regulation that it believes creates a special problem of fairness when taken together with the "aggregate" assessment method. That regulation says that an employer, when calculating its FICA

tax, must "include wages received by an employee in the form of tips *only to the extent of the tips reported . . . to the employer.*" 26 CFR § 31.6011(a)–1(a) (2001) (emphasis added). How, then, asks Fior D'Italia, could the employer have calculated tax on a different amount, namely: (1) the amount of tips "reported"; plus (2) the amount of tips *received but not reported?* Indeed, Fior D'Italia itself did not do so initially, presumably because this regulation said it should not do so. See Brief for Respondent 16–17. And, if it should not do so, is it not seriously unfair for the IRS later to assess against it a tax deficiency based on this latter figure? "[T]here is no practical or legally authorized way," Fior D'Italia complains, for the restaurant to include the additional amount of tips for which the IRS might later seek tax payment. *Id.*, at 16.

The statute itself, however, responds to this concern. It says that, insofar as tips were received but not reported to the employer, *that* remuneration (*i. e.*, the unreported tips) shall not be deemed to have been paid by the employer until "the date on which notice and demand for such taxes is made to the employer by the Secretary." 26 U. S. C. § 3121(q). This provision makes clear that it is not unfair or illegal to assess a tax deficiency on the unreported tips, for penalties will not attach and interest will not accrue unless the IRS actually demands the money *and* the restaurant refuses subsequently to pay the amount demanded in a timely fashion. See generally Rev. Rul. 95–7, 1995–4 I. R. B. 44. Indeed, the statute (and its accompanying Revenue Ruling) contemplates both a restaurant that does not police employee tip reporting and a later assessment based on unreported tips. It makes clear that, at most, such a restaurant would have to create a reserve for potential later tax liability. Although the reporting scheme may place restaurants in an awkward position, the Tax Code seems to contemplate that position; and its bookkeeping awkwardness consequently fails to support the argument that aggregate estimation is unlawful.

E

Finally, Fior D'Italia suggests that the IRS is putting its "aggregate estimate" method to improper use. It traces a lengthy history of disagreement among restaurant workers, restaurant owners, and the IRS as to how best to enforce the restaurants' legal obligation to pay FICA taxes on unreported tip income. It notes that the IRS has agreed to create a special program, called the "Tip Reporting Alternative Commitment," whereby a restaurant promises to establish accurate tip reporting procedures in return for an IRS promise to base FICA tax liability on reported tips alone. It adds that any coercion used to force a restaurant to enter such a program (often unpopular with employees) would conflict with the views of Members of Congress and IRS officials, who have said that a restaurant should not be held responsible for its employees' failure to report all their tips as income. See, *e. g.*, Letter of Members of Congress to Secretary of Treasury Lloyd Bentsen, 32 Tax Analysts' Daily Tax Highlights & Documents 3913 (Mar. 4, 1994); App. 106, 107. It adds that Congress has enacted this view into two special laws: the first of which gives restaurants a nonrefundable tax credit on FICA taxes paid, *i. e.*, permits restaurants to offset any FICA it pays on employee tips on a dollar for dollar basis against its own income tax liability, 26 U. S. C. § 45B; and the second of which prohibits the IRS from "threaten[ing] to audit" a restaurant in order to "coerce" it into entering the special tip-reporting program. Internal Revenue Service Restructuring and Reform Act of 1998, 112 Stat. 755.

Fior D'Italia says that the IRS' recent use of an "aggregate estimate" approach runs contrary to the understanding that underlies this second statute, for it "effectively forces the employer into . . . verifying, investigating, monitoring, and policing compliance by its employees—responsibilities which Congress and the Courts have considered, evaluated, and steadfastly refused to transfer from IRS to the em-

ployer." Brief for Respondent 9. And it suggests that the IRS intends to use a legal victory here as a "threat," say, to reopen back tax years, in order to require restaurant owners "to force" their "employees to report" all tips. *Id.*, at 14. Why else, asks Fior D'Italia, would the IRS bring this case? After all, given the dollar for dollar FICA/income tax setoff, this case may not even produce revenue for the Government.

Fior D'Italia's "abuse of power" argument, however, does not constitute a ground for holding unlawful the IRS' use of aggregate estimates. Even if we assume, for argument's sake, that an improper motive could render unlawful the use of a statutorily permissible enforcement method in certain circumstances, cf. *United States* v. *Powell*, 379 U. S. 48, 58 (1964), we note that Fior D'Italia has not demonstrated that the IRS has acted illegally *in this case.* Instead it has presented a general claim to the effect that the aggregate estimation method lends itself to abusive agency action. But we cannot find agency action unreasonable in all cases simply because of a general *possibility* of abuse—a possibility that exists in respect to many discretionary enforcement powers. Cf. *Heckler* v. *Chaney*, 470 U. S. 821, 831 (1985).

The statutes and congressional documents that protect restaurants from onerous monitoring requirements consequently do not support Fior D'Italia's argument that aggregate estimates are statutorily prohibited. For example, the Internal Revenue Service Restructuring and Reform Act prohibits the IRS from "threaten[ing] to audit" restaurants as a means to "coerce" them into policing employee tip reporting, *supra*, at 250, but Fior D'Italia does not claim that the IRS has violated this statute. Nor, for that matter, has Fior D'Italia presented evidence that this particular litigation would fail to yield revenue to the Government (due to the availability of the FICA tax credit), or convincingly explained, even if so, why that fact, while making the case unremunerative, would automatically make it improper. And while other documents show that Congress has expressed

concern regarding a restaurant's difficulty in trying to supervise its employees' reporting of their tips, they do not suggest that the aggregate estimate method is an unreasonable way of ascertaining unpaid FICA taxes for which the employer is indisputably liable (particularly when one recalls that the taxpayer generally remains free to challenge the accuracy of the calculation at issue, even though this taxpayer has waived its right to do so). Rather, as we have shown, the relevant Code provisions and case law support the use of aggregate estimates. See *supra*, at 242–244, 248–249.

We conclude that Fior D'Italia's discussion of IRS "abuse" is insufficient to show that the agency's use of aggregate estimates is prohibited by law. In saying this, we recognize that Fior D'Italia remains free to make its policy-related arguments to Congress.

III

For these reasons, and because Fior D'Italia has stipulated that it does not challenge the accuracy of the IRS assessment in this case, the judgment of the Court of Appeals is

Reversed.

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

The Court holds that the Internal Revenue Service's statutory authorization to make assessments for unpaid taxes is reasonably read to cover a restaurateur's FICA taxes based on an aggregate estimate of all unreported employee tips. I believe that reading the statute so broadly saddles employers with a burden unintended by Congress, and I respectfully dissent.

I

Taxes on earned income imposed by the Federal Insurance Contributions Act (FICA) pay for employees' benefits under the Social Security Act, 49 Stat. 622, as amended, 42 U. S. C.

§ 401 *et seq.* (1994 ed. and Supp. V). In the simplest case, the employee is taxed on what he receives, and the employer is taxed on what he pays. See 26 U. S. C. §§ 3101, 3111. For a long time, an employee's income from tips was not recognized as remuneration paid by the employer, and the corresponding FICA tax was imposed only on the employee. See Social Security Amendments of 1965, § 313(c), 79 Stat. 382. In 1987, however, the Internal Revenue Code was amended to treat tip income within the remuneration on which the employer, too, is taxed, 26 U. S. C. § 3121(q), and that is the present law.

The scheme is simple. The tips are includible in the employee's wages. The employee must report the amount of taxable tip income to the employer. § 6053(a). "[L]arge food or beverage establishment[s]" must pass on that information to the Internal Revenue Service, § 6053(c)(1), and must also report the total amount of tips shown on credit card slips, *ibid.* The employer is subject to tax on the same amount of tip income listed on an employee's report to him and in turn reported by him to the IRS. For both the employer and the employee, however, taxable tip income is limited to income within what is known as the "wage band"; there is no tax on tips that amount to less than $20 in a given month, or on total remuneration in excess of the Social Security wage base ($53,400 and $55,500, respectively, in the years relevant to this case).

Because many employees report less tip income than they receive, their FICA taxes and their employers' matching amounts are less than they would be in a world of complete reporting. The IRS has chosen to counter dishonesty on the part of restaurant employees not by moving directly against them, but by going against their employers with assessments of unpaid FICA taxes based on an estimate of all tip income paid to all employees aggregated together. The Court finds these aggregated assessments authorized by the general provision for assessments of unpaid taxes, § 6201, which benefits

the Government with a presumption of correctness. See *United States* v. *Janis*, 428 U. S. 433, 440 (1976).[1] The practice of assessing FICA taxes against an employer on estimated aggregate tip income, however, raises anomaly after anomaly, to the point that one has to suspect that the Government's practice is wrong. An appreciation of these consequences, in fact, calls for a reading of the crucial provision, 26 U. S. C. § 3121(q), in a straightforward way, which bars aggregate assessments and the anomalies that go with them.

II

A

The Social Security scheme of benefits and the FICA tax funding it have been characterized as a kind of "social insurance," *Flemming* v. *Nestor*, 363 U. S. 603, 609 (1960), in which employers and employees contribute matching amounts. Compare 26 U. S. C. § 3101 with § 3111. The payments that beneficiaries are entitled to receive are determined by the records of their wages earned. *Nestor*, *supra*, at 608.

Notwithstanding this basic structure, the IRS's aggregate estimation method creates a disjunction between amounts presumptively owed by an employer and those owed by an employee. It creates a comparable disproportion between the employer's tax and the employee's ultimate benefits, since an aggregate assessment does nothing to revise the earnings records of the individual employees for whose benefit the taxes are purportedly collected.[2] Thus, from the outset, the aggregate assessment fits poorly with the design of the system.

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[1] In 1998, Congress altered the burdens of proof for tax cases, but the changes do not implicate FICA. See 26 U. S. C. § 7491(a).

[2] Although the scheme does not create a vested right to benefits in any employee, see *Flemming* v. *Nestor*, 363 U. S. 603, 608–611 (1960), the legislative choice to tie benefits to earnings history evinces a general intent to create a rough parity between taxes paid and benefits received.

B

As the majority acknowledges, the next problem is that the aggregate estimation necessarily requires the use of generalized assumptions for calculating such estimates, and the assumptions actually used tend to inflate liability. In the first place, while the IRS's assumption that many employees are underreporting is indisputably sound, the assumption that every patron is not only tipping, but tipping 14.49% in 1991 and 14.29% in 1992, is probably not. Those percentages are based on two further assumptions: that patrons who pay with credit cards tip at the same rate as patrons who pay in cash, and that all patrons use the tip line of the credit card slip for tips, rather than to obtain cash. But what is most significant is that the IRS's method of aggregate estimation ignores the wage band entirely, assuming that all tips are subject to FICA tax, although this is not true in law, and certainly not always the case in fact.

C

The tendency of the Government's aggregation method to overestimate liability might not count much against it if it were fair to expect employers to keep the reports that would carry their burden to refute any contested assessment based on an aggregate estimate. But it is not fair.

Obviously, the only way an employer can refute probable inflation by estimate is to keep track of every employee's tips, *ante*, at 248, and at first blush, there might seem nothing unusual about expecting employers to do this.[3] The Code

[3] Of course, even the IRS has not explained the precise manner in which the employer is expected to generate such records. Before the Court of Appeals, the IRS argued that the employer could require employees to pool all tips, and thereby keep track of them. See 242 F. 3d 844, 848, n. 6 (CA9 2001). The court properly rejected this contention as "alter[ing] the way a restaurant does business . . . . It would be akin to saying that a restaurant must charge a fixed service charge in lieu of tips." *Ibid.* Before this Court, the IRS instead argued that "every employer should

imposes a general obligation upon all taxpayers to keep records relevant to their liability according to regulations promulgated by the Secretary, 26 U. S. C. § 6001, and, for the most part, the courts have viewed the burden on taxpayers to maintain such records as reasonable and, hence, as the justification for requiring taxpayers to disprove IRS estimates; the taxpayer who fails to attend to § 6001 has only himself to blame. See, *e. g.*, *Kikalos* v. *Commissioner*, 190 F. 3d 791, 792, n. 1 (CA7 1999); *Cracchiola* v. *Commissioner*, 643 F. 2d 1383, 1385 (CA9 1981); *Meneguzzo* v. *Commissioner*, 43 T. C. 824, 831 (1965).[4] But the first blush ignores the one feature of § 6001 relevant here. The provision states a single, glaring exception: employers need not keep records "in connection with charged tips" other than "charge receipts, records necessary to comply with section 6053(c), and copies of statements furnished by employees under section 6053(a)." *Ibid.* Employers are expressly excused from any effort to determine whether employees are properly reporting their tips; the Code tells them that they need not keep the information specific to each employee that would be necessary to determine if any tips fell short of the estimates or outside the wage band.[5] Presumably because of this statu-

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hire reliable people who they can trust to follow the rules." The official transcript records "Laughter." Tr. of Oral Arg. 27.

[4] Such is in keeping with the general rule that burdens shift to those with peculiar knowledge of the relevant facts. *Campbell* v. *United States*, 365 U. S. 85, 96 (1961) ("[T]he ordinary rule . . . does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"); *National Communications Assn.* v. *AT&T Corp.*, 238 F. 3d 124, 130 (CA2 2001) ("[A]ll else being equal, the burden is better placed on the party with easier access to relevant information"); 9 J. Wigmore, Evidence § 2486, p. 290 (J. Chadbourn rev. ed. 1981) ("[T]he burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge" (emphasis deleted)).

[5] The statute refers only to charged tips, rather than cash tips, but the IRS does not dispute that the employer has no obligation to keep any records beyond those specifically required under 26 U. S. C. § 6053, and the IRS's regulations on the subject do not impose any requirements with

tory exception, the Secretary's regulations regarding employer recordkeeping do not impose any obligations beyond those mentioned in § 6001. See 26 CFR § 31.6001–5 (2001) (describing required records). This absolution from recordkeeping is mirrored by the fact that tips are uniquely excepted from the general rule that remuneration must be reported in W–2 statements. See 26 U. S. C. § 6041(e). The upshot is that Congress has enacted a singular exception to the duty to keep records that would allow any ready wage band determinations or other checks on estimates, while the aggregate assessment practice of the IRS virtually reads the exception out of the Code.

The majority doubts that there is any practical difference between determining the liability of one employee, very possibly with an estimation similar to the one used here, and estimating the aggregate amount for an employer. *Ante,* at 248. But determinations limited to an individual employee will necessarily be more tailored, if only by taking the wage band into account. In fact, any such determination would occur in consequence of some audit of the employee, who would have an incentive to divulge information to contest the IRS's figures where possible, and generate the very paper trail an employer would need to contest liability while availing himself of the exception in § 6001.

D

The strangeness of combining a statute excusing employers from recordkeeping with an administrative practice of

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respect to cash tips. See 26 CFR § 31.6001–5 (2001). Moreover, it would be irrational to read 26 U. S. C. § 6001 to require an employer to keep detailed records only of cash tips, while, for example, being relieved of the burden to record which employees received which charged tips, or whether the tip space was used for something other than tips, or how employees allocated charged tips amongst themselves via the process of "tipping out" (sharing tips with supporting waitstaff who do not receive their own tips, such as bartenders and hosts).

making probably inflated assessments stands out even more starkly in light of the eccentric route the Government has to follow in a case like this in order to benefit from the presumption of correctness that an aggregate assessment carries. Under the general authorization to make assessments, 26 U. S. C. § 6201, on which the Government relies, any assessment is preceded by liability for taxes. § 6201(a) ("The Secretary is authorized . . . to make the inquiries, determinations, and assessments of all taxes . . . which have not been duly paid . . ."); *ante,* at 242 ("An 'assessment' amounts to an IRS determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes"). After, but only after, assessment can the IRS take the further step of issuing notice and demand for the unpaid taxes assessed, § 6303, so as to authorize the IRS to levy upon the taxpayer's property, or impose liens, §§ 6321, 6331.

In the case of an employer's liability for FICA taxes on tips, however, this sequence cannot be followed if the employee does not report the tips to the employer in the first place, for it is the report, not the employee's receipt of the tips, that raises the employer's liability to pay the FICA tax. The employer may know from the credit slips that the employees' reports are egregiously inaccurate (wage band or no wage band), but the employer is still liable only on what the employee declares. In fact, the effect of § 6053(c) is such that employers cannot help but know when underreporting is severe, since they are required to give the IRS a summary of the amount of reported tips and the amount of charged tips. Nonetheless, the employer remains liable solely for taxes on the reported tips.[6]

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[6] In fact, the obligation to report charged tips was imposed before employers had any FICA tax obligation beyond tips that substituted for minimum wage, and the reporting obligations of § 6053(c) were devised to assist the IRS in its collections efforts against employees, despite the IRS's use of it here as a basis for auditing Fior D'Italia.

Indeed, even if the employer, seeing a disparity, paid extra FICA taxes on the assumption that the employees had underreported tips, the extra payment would be treated as an overpayment. See Tr. of Oral Arg. 8; *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 531 (1947) (overpayment is "any payment in excess of that which is properly due"). The overall implication is that employers are meant to pay taxes based on specific information provided by others. As a practical matter, the tips themselves are not the true basis for liability; instead, it is an employee report that creates the obligation.

Some event must therefore trigger liability for taxes on unreported tips before the IRS can make the assessment, and this event turns out to be the notice and demand for which § 3121(q) makes special provision in such a case.[7] Only after notice and demand can the Government proceed to assessment under § 6201. Whereas the usual sequence is assessment, then notice and demand, see § 6303, here it is notice and demand, then assessment.

The IRS does not dispute this. It concedes that it does not rely upon § 6201 before issuing the notice, see Reply Brief for United States 15–16, but instead performs a "preassessment" estimate (for which, incidentally, no statutory authorization exists). Then it issues notice and (liability having now attached) uses the same estimate for the official assessment under § 6201.

Again, at first blush, it is tempting to say that the sequence of events may be unusual, but under the aggregate assessment practice the employer-taxpayer ends up in the same position he would have been in if he failed to pay FICA taxes on reported tips. But there are two very significant

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[7] The majority takes note of this unusual scheme, but finds significance only in the fact that until notice issues (and liability arises), interest does not run. *Ante,* at 249. But to interpret the statute as nothing more than a method of preventing the running of interest avoids the significance of § 3121(q), because there is already a statute that prevents interest running on unpaid FICA taxes. § 6205(a)(1).

differences. It is true that the employer who is delinquent as to reported tips ends up subject to liability on the basis of third-party action (the employee's report) which assessment invests with a presumption of correctness, and which notice and demand then make a basis for possible liens and levies. But in that case the employer's liability, and exposure to collection mechanisms, is subject to the important safeguard of the employee's report. Whatever the employee may do, it will not be in his interest to report more tips than he received, exposing himself (and, incidentally, his employer) to extra taxation. But this safeguard is entirely lost to the employer, through no fault of his own, if the Government can make aggregate assessments. The innocent employer has few records and no protection derived from the employee's interest. Yet without any such protection he is, on the Government's theory, immediately liable for the consequences of notice and demand at the very instant liability arises.

The second difference goes to the authority for estimating liability. The IRS finds this authority implicit in § 6201, which authorizes assessments. *Ante*, at 243. In the usual case, the estimate is thus made in calculating the assessment, which occurs after the event that creates the liability being estimated and assessed. But in the case of the tips unreported by the employee, there would be no liability until notice and demand is made under § 3121(q), and it is consequently at this point that the estimate is required. The upshot is that the estimate has to occur before the statute claimed to authorize it, § 6201, is even applicable. That is, the IRS says it can estimate because it can assess, and it can assess because it can previously estimate. Reasoning this circular may warrant suspicion.

E

There is one more source of suspicion. In 1993, Congress enacted an income tax credit for certain employers in the amount of FICA taxes paid on tips in excess of the minimum

wage. 26 U. S. C. § 45B. The existence of the credit creates a peculiar scheme, for unless we are to assume that restaurateurs are constantly operating on the knife-edge of solvency, never able to use the credit (even with its 20-year carryforward, see § 39), the IRS has little reason to expect to gain much from the employer-taxpayer; the collection effort will probably result in no net benefit to the Government (except, perhaps, as an interest-free loan).[8] And because, as noted, the aggregate method chosen by the IRS will not affect individual employees' wage-earning records, the estimates do not even play much of a bookkeeping role. There is something suspect, then, in the IRS's insistence on conducting audits of employers, without corresponding audits of employees, for the purpose of collecting FICA taxes that will ultimately be refunded, that do not increase the accuracy of individual earnings records, and probably overestimate the true amount of taxable earnings.

In fact, the only real advantage to the IRS seems to be that the threat of audit, litigation, and immediate liability may well force employers to assume the job of monitoring their employees' tips to ensure accurate reporting. But if that explanation for the Government's practice makes sense of it, it also flips the Government from the frying pan into the fire. Congress has previously stymied every attempt the IRS has made to impose such a burden on employers. In the days when employers were responsible only for withholding the employee's share of the FICA tax, the IRS attempted to force employers to include tip income on W–2 forms; this effort was blocked when Congress modified 26 U. S. C. § 6041 to exclude tip income expressly from the W–2 requirements. See Revenue Act of 1978, § 501(b), 92 Stat. 2878. When the IRS interpreted the credit available under

[8] At oral argument, the Government contended that the payment of the FICA tax, coupled with the § 45B credit, benefited its accounting by permitting payments to be appropriately allocated between the Social Security trust fund and general revenue. See Tr. of Oral Arg. 20–21.

§ 45B to apply only to tips reported by the employee pursuant to 26 U. S. C. § 6053(a), Congress overruled the IRS and clarified that the credit would apply to all FICA taxes paid on tips above those used to satisfy the employer's minimum wage obligations. See Small Business Job Protection Act of 1996, Pub. L. 104–188, § 1112(a), 110 Stat. 1759. Finally, when the IRS developed its Tip Reporting Alternative Commitment (TRAC) program, *ante*, at 250, Congress forbade the IRS from "threaten[ing] to audit any taxpayer in an attempt to coerce the taxpayer" into participating. Internal Revenue Service Restructuring and Reform Act of 1998, § 3414, 112 Stat. 755.[9] And although the use of a threatened aggregate estimate (after an audit) to induce monitoring of employee tips may not technically run afoul of that statute, it is difficult to imagine that Congress would allow the aggregation practice as a lever on employers, when it forbade the use of an audit for the same purpose.

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[9] To some extent, the modification of the § 45B credit and TRAC may be taken as congressional awareness of the IRS's practice of making aggregate assessments. After all, there is no need to clarify that § 45B is available for taxes on unreported tips unless such taxes are, in fact, being paid, and the TRAC program itself depends on the existence of aggregate assessments, because the "carrot" offered to employers to encourage participation is the IRS's promise to refrain from such assessments.

With respect to § 45B, however, prior to Congress's modifications, the IRS regulations did not allow for the credit even when an individual employee was assessed and corresponding notice and demand issued to the employer. See 58 Fed. Reg. 68033 (1993) (temporary regulation § 1.45B–1T). Thus, Congress's clarification did not depend on the existence of aggregate assessments. As for TRAC, at the time that Congress prohibited the IRS from coercing participation, the IRS had actually halted the aggregate assessment practice. See Director, Office of Employment Tax Administration and Compliance, Memorandum for Regional Chief Compliance Officers (June 16, 1998), App. 106–107. Moreover, the simple (and realistic) answer is just that Congress did as asked; restaurateurs complained about a specific practice, *i. e.*, threatened audits, and Congress responded with a targeted statute.

III

Consider an alternative. I have noted already that even the Government tacitly acknowledges the crucial role of § 3121(q), the source of its authority to issue notice and demand, without which there is no liability on the employer's part for FICA taxes on unreported tips and thus no possibility of assessment under § 6201. It makes sense, then, to understand the scope of authority to make the assessment as being limited by the scope of the authority to issue notice and demand, and it likewise makes sense to pay close attention to the text of that authorization.

The special provision in § 3121(q) for notice and demand against an employer says nothing and suggests nothing about aggregate assessments. It reads that when an employer was furnished "no statement including such tips" or was given an "inaccurate or incomplete" one, the remuneration in the form of "such tips" shall be treated as if paid on the date notice and demand is made to the employer. "[S]uch tips" are described as "tips received by an employee in the course of his employment." *Ibid.* Thus, by its terms, the statute provides for notice and demand for the tax on the tips of "an employee," not on the tips of "employees" or "all employees" aggregated together. And, of course, if notice and demand is limited to taxes on tips of "an employee," that is the end of aggregate estimates.

It is true that under the Dictionary Act, 1 U. S. C. § 1, a statutory provision in the singular may include the plural where that would work in the context. "[A]n employee" could cover "employees" and the notice and demand could cover tips received during "their employment," "unless the context indicates otherwise," *ibid.* But here the context does indicate otherwise. The anomalies I have pointed out occur when the singular "employee" in § 3121(q) is read to include the plural, which in turn is crucial to allowing aggregate notice, demand, and assessment; and it turns out that

reading the statute to refer only to a particular employee's tips and limiting notice, demand, and assessment accordingly, goes far to abridge the catalog of oddities that come with the Government's position.

First, sticking to the singular means that the employer will not be assessed more tax than the employee himself should pay; whether or not the employee is sued for a like amount, the respective liabilities of employer and employee will be restored to parity. And by keying the employer's liability to a particular employee, the near certainty of overassessment will be replaced with a likelihood of an accurate assessment taking into consideration the wage band of taxability under FICA.

Second, the fact that the employer has exercised his express, statutory option to decline to keep tipping records on his work force will no longer place him at such an immediate disadvantage. It will be relatively easy to discover the basis for the tax calculation in a particular instance.

Third, if indeed the Government first establishes the employee's liability for unreported tips, notice and demand under § 3121(q) will then serve what on its face seems to be its obvious purpose, to provide the employer with reliable information, like the employee tip reports that similarly trigger liability, so that the employer will have no further need for keeping track of employee tips. Although this is not the time to decide whether the IRS must formally audit the employee's own tax liability first, there is at least one reason to think Congress assumed that it would. There is no statute of limitations on an employer's FICA tax liability for unreported tips (because the statute does not run until after liability attaches, and no time limits are imposed upon the issuance of the notice that triggers liability). But there is a statute of limitations for assessments against employees. 26 U. S. C. § 6501. Conditioning the employer's liability on a parallel obligation of the employee would in effect place a limitation period on the employer's exposure.

Finally, of course, the tension with Congress's admonition that the IRS not "threaten to audit any taxpayer in an attempt to coerce the taxpayer" into participating in TRAC, 112 Stat. 755, will be eliminated. If the employer is liable only after an individual employee's delinquency has been calculated, the use of mass assessments to force an employer, in self-defense, to institute TRAC will simply vanish.

Thus, the context establishes that a singular reading is the one that makes sense by eliminating the eccentricities entailed by the aggregate reading, some of which seem unfair to employer taxpayers. Of course, this means that the problem of underreporting tips will be harder to solve, but it seems clear that Congress did not mean to solve it by allowing the IRS to use its assessment power to shift the problem to employers. I would therefore affirm the judgment of the Ninth Circuit.

Syllabus

HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BANKS

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

No. 01–1385. Decided June 17, 2002

A Pennsylvania trial court sentenced respondent to death on each of his 12 convictions of first-degree murder. The verdict form in the trial's penalty phase required, in relevant part, the jury to check a box indicating that it found unanimously either at least one aggravating circumstance and no mitigating circumstances or one or more aggravating circumstances outweighing any mitigating circumstances. The jury marked the latter box. After respondent's direct appeal was denied, this Court held that the Constitution prohibits a State from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they may consider that circumstance in their sentencing determination, *Mills* v. *Maryland*, 486 U. S. 367, 374. In subsequent state postconviction proceedings, the Pennsylvania Supreme Court rejected respondent's claim that the instructions to the jury and the verdict forms in his case suggested that the mitigating circumstance findings had to be unanimous. In denying his later federal habeas petition, the District Court did not address whether *Mills* was retroactive, finding instead the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) review standard dispositive. The Third Circuit reversed in part, granting relief under *Mills*. It found that it did not need to evaluate whether *Mills* applied retroactively per *Teague* v. *Lane*, 489 U. S. 288, because the State Supreme Court had not ruled on retroactivity, and it found the state court's application of federal law unreasonable under *Mills* and *Boyde* v. *California*, 494 U. S. 370.

Held: The Third Circuit erred when it failed to perform a *Teague* analysis. Whether to apply the *Teague* rule—that new constitutional rules of criminal procedure generally do not apply to cases that became final before the new rules were announced, 489 U. S., at 310—is a threshold question in every habeas case. A federal court may decline to apply *Teague* if a State does not argue it; but if the State does argue *Teague*, the court must apply it before considering the claim's merits. *Caspari* v. *Bohlen*, 510 U. S. 383. Here, petitioners raised the *Teague* issue both in the District Court and in the Third Circuit. To the extent that the latter court's opinion can be read to imply that AEDPA has changed *Caspari*'s legal principles, none of this Court's post-AEDPA cases have

suggested that habeas should automatically issue if a prisoner satisfies the AEDPA review standard or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments.

Certiorari granted; reversed and remanded.

PER CURIAM.

The Court of Appeals for the Third Circuit granted respondent federal habeas corpus relief from his death sentence. 271 F. 3d 527 (2001). Applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard of review,[1] the Court of Appeals concluded that the Pennsylvania Supreme Court had unreasonably applied federal law in evaluating respondent's claim that his penalty phase jury instructions and verdict forms were improper under *Mills* v. *Maryland*, 486 U. S. 367 (1988). The Court of Appeals found it unnecessary to evaluate whether *Mills* applies retroactively to cases on habeas review per *Teague* v. *Lane*, 489 U. S. 288 (1989), because the Pennsylvania Supreme Court had not ruled on retroactivity. 271 F. 3d, at 541–543. In avoiding the *Teague* issue, the Court of Appeals directly contravened *Caspari* v. *Bohlen*, 510 U. S. 383 (1994), in which we held that federal courts must address the *Teague* question when it is properly argued by the government. We thus grant the petition for a writ of certiorari and reverse the Court of Appeals' determination that a *Teague* analysis was unnecessary.[2]

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[1] Title 28 U. S. C. § 2254(d) was modified by AEDPA and now provides, in part, that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

[2] We also grant respondent's motion for leave to proceed *in forma pauperis*.

Respondent, George Banks, was convicted of 12 counts of first-degree murder stemming from a series of shootings on September 25, 1982. During the penalty phase of his trial, the jury was instructed, in part:

> "The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." *Commonwealth* v. *Banks,* 540 Pa. 143, 150, 656 A. 2d 467, 470 (1995).

In relevant part, the verdict form required the jury to check a box indicating that "[w]e the jury have found unanimously" either "[a]t least one aggravating circumstance and no mitigating circumstances," or "[o]ne or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." 271 F. 3d, at 549–550. The jury marked the latter box, and also checked two other boxes indicating the aggravating circumstance (multiple offenses punishable by at least life in prison) and mitigating circumstance (extreme mental or emotional disturbance) that it had found. Respondent was sentenced to death on each count of first-degree murder.

After respondent's direct appeal was denied, we decided *Mills,* in which we held that the Constitution prohibits a State from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they are permitted to consider that circumstance in their sentencing determination. 486 U. S., at 374. Subsequently, in state postconviction proceedings, respondent raised a *Mills* challenge to the jury instructions and verdict forms in his case, arguing that they improperly "suggested to the jury that its

findings as to mitigating circumstances must be unanimous." 540 Pa., at 149, 656 A. 2d, at 470. The Pennsylvania Supreme Court rejected his claim: "[B]oth the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances." *Id.*, at 153, 656 A. 2d, at 471.

Respondent petitioned for federal habeas relief, which the United States District Court for the Middle District of Pennsylvania denied. 63 F. Supp. 2d 525 (1999). The District Court rejected respondent's *Mills* claim on the merits, applying the AEDPA standard of review articulated in 28 U. S. C. § 2254(d): "Supreme Court precedent . . . did not require an outcome contrary to that reached by the state courts." 63 F. Supp. 2d, at 544. Because the court found the AEDPA standard of review dispositive, it did "not address the parties' arguments concerning the retroactivity of *Mills*." *Ibid.*

The Court of Appeals for the Third Circuit reversed the District Court in part, granting respondent relief from his death sentence under *Mills*. The Court of Appeals first asked: "Are we compelled to conduct a retroactivity analysis under *Teague?*" 271 F. 3d, at 541. It recognized that, per *Teague*, retroactivity is a " 'threshold question,' " but it found "*Teague* not to govern [its] analysis" in this case because "we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court," which had not ruled on retroactivity. 271 F. 3d, at 541, and n. 13.[3] It rejected petitioners' contention that the state court's failure to rule on retroactivity was irrelevant to whether *Teague* should apply in federal court:

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[3] In deciding not to conduct a *Teague* analysis, the Court of Appeals "acknowledge[d] further that the Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills*" and has disagreed with the Court of Appeals' resolution of *Mills* claims similar to respondent's. 271 F. 3d, at 542.

> "*Teague* teaches that the federal courts habeas corpus proceeding should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. . . Here, however as we have noted, the Pennsylvania Supreme Court applied *Mills.* We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it. In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards." 271 F. 3d, at 543 (citation omitted).

Freed from performing a *Teague* analysis concerning *Mills*' retroactivity, a question which has created some disagreement among the Federal Circuits,[4] the Court of Appeals asked "whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills.*" 271 F. 3d, at 544. It then found the state court's application of federal law unreasonable under the standards of 28 U. S. C. § 2254(d), relying on both *Mills* and *Boyde* v. *California*, 494 U. S. 370 (1990). 271 F. 3d, at 551. The Court of Appeals explained that, "[c]onsidered as a whole, the jury instructions leave no doubt that 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Id.*, at 549 (quoting *Boyde*, *supra*, at 380).

[4] Compare *Gall* v. *Parker*, 231 F. 3d 265, 322 (CA6 2000) (*Teague* does not bar retroactive application of *Mills*), and *Williams* v. *Dixon*, 961 F. 2d 448, 456 (CA4 1992) (same), with *Miller* v. *Lockhart*, 65 F. 3d 676, 685–686 (CA8 1995) (*Teague* bars retroactive application of *Mills*), and *Cordova* v. *Collins*, 953 F. 2d 167, 173 (CA5 1992) (same).

Petitioners seek a writ of certiorari, arguing that the Court of Appeals erred by not performing a *Teague* analysis, by applying *Mills* retroactively to respondent's case, and by concluding that the state court's decision was unreasonable under *Mills*. We find it unnecessary to resolve the latter two of these claims, because we determine that the Court of Appeals committed a clear error by failing to perform a *Teague* analysis.

In *Teague*, we explained that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U. S., at 310.[5] And in *Caspari*, we held that "[a] threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. . . . [A] federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." 510 U. S., at 389 (citations omitted). Here, petitioners raised the *Teague* issue both in the District Court, see 63 F. Supp. 2d, at 544, and in the Court of Appeals, see 271 F. 3d, at 542–543. Thus, per *Caspari*, a case not cited in the opinion below, it was incumbent upon the Court of Appeals to perform a *Teague* analysis before granting respondent relief under *Mills*. The Court of Appeals erred in concluding that it did "not need to focus on anything other than the reason-

[5] We have recognized two exceptions to *Teague*'s rule. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Saffle* v. *Parks*, 494 U. S. 484, 494 (1990) (citations omitted). "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, at 495.

ing and determination of the Pennsylvania Supreme Court." 271 F. 3d, at 541.

Although the Court of Appeals may have simply overlooked *Caspari*, its opinion can also be read to imply that AEDPA has changed the relevant legal principles articulated in *Caspari*, see 271 F. 3d, at 541, n. 13 ("We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA"). While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U. S. C. § 2254(d) ("[a]n application . . . shall not be granted . . . *unless*" the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. See, *e. g.*, *Tyler* v. *Cain*, 533 U. S. 656, 669–670 (2001) (O'Connor, J., concurring) (construing successive application provisions of AEDPA, 28 U. S. C. § 2244(b)(2)(A)); *Williams* v. *Taylor*, 529 U. S. 362, 412–413 (2000) (construing § 2254(d)). Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.

We reverse the Court of Appeals' holding that "*Teague* is not implicated" by this case, 271 F. 3d, at 543, and remand for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

GONZAGA UNIVERSITY ET AL. *v.* DOE

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 01–679. Argued April 24, 2002—Decided June 20, 2002

As a student at petitioner Gonzaga University, a private educational institution in Washington State, respondent planned to become a public elementary schoolteacher in that State after graduation. Washington at the time required all new teachers to obtain an affidavit of good moral character from their graduating colleges. Petitioner League, Gonzaga's teacher certification specialist, overheard one student tell another that respondent had engaged in sexual misconduct. League then launched an investigation; contacted the state agency responsible for teacher certification, identifying respondent by name and discussing the allegations; and, finally, told him that he would not receive his certification affidavit. Respondent sued Gonzaga and League in state court under, *inter alia*, 42 U. S. C. § 1983, alleging a violation of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U. S. C. § 1232g, which prohibits the federal funding of schools that have a policy or practice of permitting the release of students' education records without their parents' written consent. A jury awarded respondent compensatory and punitive damages on the FERPA claim. The Washington Court of Appeals reversed in relevant part, concluding that FERPA does not create individual rights and thus cannot be enforced under § 1983. Reversing in turn, the State Supreme Court acknowledged that FERPA does not give rise to a private cause of action, but reasoned that the nondisclosure provision creates a federal right enforceable under § 1983.

Held: Respondent's action is foreclosed because the relevant FERPA provisions create no personal rights to enforce under § 1983. Pp. 278–291.

(a) This Court has never held, and declines to do so here, that spending legislation drafted in terms resembling FERPA's can confer enforceable rights. FERPA directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions, § 1232g(f), by establishing an office and review board to investigate, process, review, and adjudicate FERPA violations, § 1232g(g), and to terminate funds only upon determining that a recipient school is failing to comply substantially with any FERPA requirement and that such compliance cannot be secured voluntarily, §§ 1234c(a), 1232g(f). In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, the Court made clear that unless Congress "speak[s] with a clear voice," and manifests an

"unambiguous" intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983, *id.*, at 17, 28, and n. 21. Since *Pennhurst*, the Court has found that spending legislation gave rise to rights enforceable under § 1983 only in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 426, 432, and *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 522–523, where statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs, and there was no sufficient administrative means of enforcing the requirements against defendants that failed to comply. The Court's more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes whose language did not unambiguously confer such a right upon the Act's beneficiaries. See, *e. g.*, *Suter* v. *Artist M.*, 503 U. S. 347, 363; *Blessing* v. *Freestone*, 520 U. S. 329, 340, 343. Respondent's attempt to read this line of cases to establish a relatively loose standard for finding rights enforceable by § 1983 is unavailing. Because § 1983 provides a remedy only for the deprivation of "rights . . . secured by the [Federal] Constitution and laws," it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced thereunder. Thus, the Court further rejects the notion that its implied right of action cases are separate and distinct from its § 1983 cases. To the contrary, the former cases should guide the determination whether a statute confers rights enforceable under § 1983. Although the question whether a statutory violation may be enforced through § 1983 is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute, *Wilder*, *supra*, at 508, n. 9, the inquiries overlap in one meaningful respect—in either case it must first be determined whether Congress *intended to create a federal right*, see *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 576. For a statute to create private rights, its text must be phrased in terms of the persons benefited. *E. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 692, n. 13. Once the plaintiff demonstrates that the statute confers rights on a particular class of persons, *California* v. *Sierra Club*, 451 U. S. 287, 294, the right is presumptively enforceable by § 1983. Conversely, where a statute provides no indication that Congress intends to create new individual rights, there is no basis for a private suit under § 1983. Pp. 278–286.

(b) There is no question that FERPA's confidentiality provisions create no rights enforceable under § 1983. The provisions entirely lack the sort of individually focused rights-creating language that is critical. FERPA's provisions speak only to the Secretary, directing that "[n]o funds shall be made available" to any "educational . . . institution" which has a prohibited "policy or practice," § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents

Syllabus

and clearly does not confer the sort of *individual* entitlement that is enforceable under § 1983. *E. g.*, *Cannon*, *supra*, at 690–693. Furthermore, because FERPA's confidentiality provisions speak only in terms of institutional "policy or practice," not individual instances of disclosure, see §§ 1232g(b)(1)–(2), they have an "aggregate" focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights, *Blessing*, *supra*, at 344. The fact that recipient institutions can avoid termination of funding so long as they "comply substantially" with FERPA's requirements, § 1234c(a), also supports a finding that FERPA fails to support a § 1983 suit. 520 U. S., at 335, 343. References in §§ 1232g(b)(1) and (2) to individual parental consent cannot make out the requisite congressional intent to confer individually enforceable rights because each of those references is made in the context of describing the type of "policy or practice" that triggers a funding prohibition. The conclusion that FERPA fails to confer enforceable rights is buttressed by the mechanism that Congress provided for enforcing FERPA violations. The Secretary is expressly authorized to "deal with violations," § 1232g(f), and required to establish a review board to investigate and adjudicate such violations, § 1232g(g). For these purposes, the Secretary created the Family Policy Compliance Office, which has promulgated procedures for resolving student complaints about suspected FERPA violations. These procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism. Finally, because FERPA prohibits most of the Secretary's functions from being carried out in regional offices, § 1232g(g), in order to allay the concern that regionalizing enforcement might lead to multiple interpretations of FERPA, it is implausible to presume that Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges. Pp. 287–290.

143 Wash. 2d 687, 24 P. 3d 390, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which SOUTER, J., joined, *post*, p. 291. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 293.

John G. Roberts, Jr., argued the cause for petitioners. With him on the briefs were *Martin Michaelson*, *Charles K. Wiggins*, and *Kenneth W. Masters*.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Alisa B. Klein*, and *Anne Murphy*.

Beth S. Brinkmann argued the cause for respondent. With her on the brief were *Drew S. Days III* and *Lois K. Perrin*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether a student may sue a private university for damages under Rev. Stat. § 1979, 42 U. S. C. § 1983 (1994 ed., Supp. V), to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 88 Stat. 571, 20 U. S. C. § 1232g, which prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons. We hold such an action foreclosed because the relevant provisions of FERPA create no personal rights to enforce under 42 U. S. C. § 1983 (1994 ed., Supp. V).

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *James E. Ryan*, Attorney General of Illinois, *Joel D. Bertocchi*, Solicitor General, *Michael P. Doyle*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *David Samson* of New Jersey, *Betty D. Montgomery* of Ohio, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, *Christine O. Gregoire* of Washington, and *Hoke MacMillan* of Wyoming; for the American Association of Community Colleges et al. by *Philip Burling*, *John M. Stevens*, and *Sheldon E. Steinbach;* and for the Reporters Committee for Freedom of the Press et al. by *Gregg P. Leslie*, *Lucy A. Dalglish*, *Bruce W. Sanford*, and *S. Mark Goodman*.

Aaron H. Caplan, *Jordan Gross*, and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Respondent John Doe is a former undergraduate in the School of Education at Gonzaga University, a private university in Spokane, Washington. He planned to graduate and teach at a Washington public elementary school. Washington at the time required all of its new teachers to obtain an affidavit of good moral character from a dean of their graduating college or university. In October 1993, Roberta League, Gonzaga's "teacher certification specialist," overheard one student tell another that respondent engaged in acts of sexual misconduct against Jane Doe, a female undergraduate. League launched an investigation and contacted the state agency responsible for teacher certification, identifying respondent by name and discussing the allegations against him. Respondent did not learn of the investigation, or that information about him had been disclosed, until March 1994, when he was told by League and others that he would not receive the affidavit required for certification as a Washington schoolteacher.

Respondent then sued Gonzaga and League (petitioners) in state court. He alleged violations of Washington tort and contract law, as well as a pendent violation of § 1983 for the release of personal information to an "unauthorized person" in violation of FERPA.[1] A jury found for respondent on all counts, awarding him $1,155,000, including $150,000 in compensatory damages and $300,000 in punitive damages on the FERPA claim.

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[1] The Washington Court of Appeals and the Washington Supreme Court found petitioners to have acted "under color of state law" for purposes of § 1983 when they disclosed respondent's personal information to state officials in connection with state-law teacher certification requirements. 143 Wash. 2d 687, 710–711, 24 P. 3d 390, 401–402 (2001). Although the petition for certiorari challenged this holding, we agreed to review only the question posed in the first paragraph of this opinion, a question reserved in *Owasso Independent School Dist. No. I–011* v. *Falvo*, 534 U. S. 426, 430–431 (2002). We therefore assume without deciding that the relevant disclosures occurred under color of state law.

The Washington Court of Appeals reversed in relevant part, concluding that FERPA does not create individual rights and thus cannot be enforced under § 1983. 99 Wash. App. 338, 992 P. 2d 545 (2000). The Washington Supreme Court reversed that decision, and ordered the FERPA damages reinstated. 143 Wash. 2d 687, 24 P. 3d 390 (2001). The court acknowledged that "FERPA itself does not give rise to a private cause of action," but reasoned that FERPA's nondisclosure provision "gives rise to a federal right enforceable under section 1983." *Id.*, at 707–708, 24 P. 3d, at 400.

Like the Washington Supreme Court and the State Court of Appeals below, other state and federal courts have divided on the question of FERPA's enforceability under § 1983.[2] The fact that all of these courts have relied on the same set of opinions from this Court suggests that our opinions in this area may not be models of clarity. We therefore granted certiorari, 534 U. S. 1103 (2002), to resolve the conflict among the lower courts and in the process resolve any ambiguity in our own opinions.

Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records. The Act directs the Secretary of Education to withhold federal funds from any public or private "educational agency or institution" that fails to comply with these conditions. As relevant here, the Act provides:

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[2] Compare *Gundlach* v. *Reinstein*, 924 F. Supp. 684, 692 (ED Pa. 1996) (FERPA confers no enforceable rights because it contains "no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records"), aff'd, 114 F. 3d 1172 (CA3 1997); and *Meury* v. *Eagle-Union Community School Corp.*, 714 N. E. 2d 233, 239 (Ind. Ct. App. 1999) (same), with *Falvo* v. *Owasso Independent School Dist. No. I–011*, 233 F. 3d 1203, 1210 (CA10 2000) (concluding that release of records in "violation of FERPA is actionable under . . . § 1983"), rev'd on other grounds, 534 U. S. 426 (2002); and *Brown* v. *Oneonta*, 106 F. 3d 1125, 1131–1132 (CA2 1997) (same).

> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization." 20 U. S. C. § 1232g(b)(1).

The Act directs the Secretary of Education to enforce this and other of the Act's spending conditions. § 1232g(f). The Secretary is required to establish an office and review board within the Department of Education for "investigating, processing, reviewing, and adjudicating violations of [the Act]." § 1232g(g). Funds may be terminated only if the Secretary determines that a recipient institution "is failing to comply substantially with any requirement of [the Act]" and that such compliance "cannot be secured by voluntary means." §§ 1234c(a), 1232g(f).

Respondent contends that this statutory regime confers upon any student enrolled at a covered school or institution a federal right, enforceable in suits for damages under § 1983, not to have "education records" disclosed to unauthorized persons without the student's express written consent. But we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights.

In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), six years after Congress enacted FERPA, we recognized for the first time that § 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as by the Constitution. There we held that plaintiffs could recover payments wrongfully withheld by a state agency in violation of the Social Security Act. *Id.*, at 4. A year later, in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), we rejected a claim that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 conferred enforceable rights, saying:

> "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.*, at 28.

We made clear that unless Congress "speak[s] with a clear voice," and manifests an "unambiguous" intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983. *Id.*, at 17, 28, and n. 21.

Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights. In *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987), we allowed a § 1983 suit by tenants to recover past overcharges under a rent-ceiling provision of the Public Housing Act, on the ground that the provision unambiguously conferred "a mandatory [benefit] focusing on the individual family and its income." *Id.*, at 430. The key to our inquiry was that Congress spoke in terms that "could not be clearer," *ibid.*, and conferred entitlements "sufficiently specific and definite to qualify as enforceable rights under *Pennhurst*." *Id.*, at 432. Also significant was that the federal agency charged with administering the Public Housing Act "ha[d] never provided a procedure by which tenants could complain to it about the alleged failures [of state welfare agencies] to abide by [the Act's rent-ceiling provision]." *Id.*, at 426.

Three years later, in *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990), we allowed a § 1983 suit brought by health care providers to enforce a reimbursement provision of the Medicaid Act, on the ground that the provision, much like the rent-ceiling provision in *Wright*, explicitly conferred specific monetary entitlements upon the plaintiffs. Congress left no doubt of its intent for private enforcement, we said, because the provision required States to pay an "objective" monetary entitlement to individual health care providers, with no sufficient administrative means of enforcing the

requirement against States that failed to comply. 496 U. S., at 522–523.

Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes. In *Suter* v. *Artist M.*, 503 U. S. 347 (1992), the Adoption Assistance and Child Welfare Act of 1980 required States receiving funds for adoption assistance to have a "plan" to make "reasonable efforts" to keep children out of foster homes. A class of parents and children sought to enforce this requirement against state officials under § 1983, claiming that no such efforts had been made. We read the Act "in the light shed by *Pennhurst*," *id.*, at 358, and found no basis for the suit, saying:

> "Careful examination of the language . . . does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner [of reducing or eliminating payments]." *Id.*, at 363.

Since the Act conferred no specific, individually enforceable rights, there was no basis for private enforcement, even by a class of the statute's principal beneficiaries. *Id.*, at 357.

Similarly, in *Blessing* v. *Freestone*, 520 U. S. 329 (1997), Title IV–D of the Social Security Act required States receiving federal child-welfare funds to "substantially comply" with requirements designed to ensure timely payment of child support. Five Arizona mothers invoked § 1983 against state officials on grounds that state child-welfare agencies consistently failed to meet these requirements. We found no basis for the suit, saying:

> "Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV–D program. Thus, the Secretary must look to

> the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied." *Id.*, at 343 (emphases in original).

Because the provision focused on "the aggregate services provided by the State," rather than "the needs of any particular person," it conferred no individual rights and thus could not be enforced by § 1983. We emphasized: "[T]o seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.*, at 340 (emphases in original).

Respondent reads this line of cases to establish a relatively loose standard for finding rights enforceable by § 1983. He claims that a federal statute confers such rights so long as Congress intended that the statute "benefit" putative plaintiffs. Brief for Respondent 40–46. He further contends that a more "rigorous" inquiry would conflate the standard for inferring a private right of action under § 1983 with the standard for inferring a private right of action directly from the statute itself, which he admits would not exist under FERPA. *Id.*, at 41–43. As authority, respondent points to *Blessing* and *Wilder*, which, he says, used the term "benefit" to define the sort of statutory interest enforceable by § 1983. See *Blessing*, *supra*, at 340–341 ("Congress must have intended that the provision in question benefit the plaintiff"); *Wilder*, *supra*, at 509 (same).

Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983. *Blessing*, for example, set forth three "factors" to guide judicial inquiry into whether or not a statute confers a right: "Congress must have intended that the provision in question benefit the plaintiff," "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." 520 U. S., at 340–341. In

the same paragraph, however, *Blessing* emphasizes that it is only violations of *rights*, not *laws*, which give rise to § 1983 actions. *Id.*, at 340. This confusion has led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action. Fueling this uncertainty is the notion that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983. *Wilder* appears to support this notion, 496 U. S., at 508–509, n. 9, while *Suter*, 503 U. S., at 363–364, and *Pennhurst*, 451 U. S., at 28, n. 21, appear to disavow it.

We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.

We have recognized that whether a statutory violation may be enforced through § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." *Wilder*, *supra*, at 508, n. 9. But the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*. Thus we have held that "[t]he question whether Congress . . . intended to create a private right of action [is] definitively an-

swered in the negative" where a "statute by its terms grants no private rights to any identifiable class." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 576 (1979). For a statute to create such private rights, its text must be "phrased in terms of the persons benefited." *Cannon* v. *University of Chicago*, 441 U. S. 677, 692, n. 13 (1979). We have recognized, for example, that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create individual rights because those statutes are phrased "with an *unmistakable focus* on the benefited class." *Id.*, at 691 (emphasis added).[3] But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private *right* but also a private *remedy*." *Alexander* v. *Sandoval*, 532 U. S. 275, 286 (2001) (emphases added).

Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. See *supra*, at 279–281. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.[4] But

[3] Title VI provides: "*No person* in the United States *shall* . . . be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin. 78 Stat. 252, 42 U. S. C. § 2000d (1994 ed.) (emphasis added). Title IX provides: "*No person* in the United States *shall*, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 86 Stat. 373, 20 U. S. C. § 1681(a) (emphasis added). Where a statute does not include this sort of explicit "right- or duty-creating language," we rarely impute to Congress an intent to create a private right of action. See *Cannon*, 441 U. S., at 690, n. 13 (listing provisions); *Alexander* v. *Sandoval*, 532 U. S. 275, 288 (2001) (existence or absence of rights-creating language is critical to the Court's inquiry).

[4] The State may rebut this presumption by showing that Congress "specifically foreclosed a remedy under § 1983." *Smith* v. *Robinson*, 468 U. S. 992, 1004–1005, n. 9 (1984). The State's burden is to demonstrate that Congress shut the door to private enforcement either expressly, through

the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute "confer[s] rights on a particular class of persons." *California* v. *Sierra Club*, 451 U. S. 287, 294 (1981). This makes obvious sense, since § 1983 merely provides a mechanism for enforcing individual rights "secured" elsewhere, *i. e.*, rights independently "secured by the Constitution and laws" of the United States. "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 617 (1979).

A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Compare *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107–108, n. 4 (1989) ("[A] claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff"), with *Cannon*, *supra*, at 690, n. 13 (statute is enforceable under implied right only where Congress "explicitly conferred a right directly on a class of persons that included the plaintiff in the case"). Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries. Compare *Wright*, 479 U. S., at 423 (statute must be "intended to rise to the level of an enforce-

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"specific evidence from the statute itself," *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423 (1987), or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing* v. *Freestone*, 520 U. S. 329, 341 (1997). See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20 (1981). These questions do not arise in this case due to our conclusion that FERPA confers no individual rights and thus cannot give rise to a presumption of enforceability under § 1983.

able right"), with *Alexander* v. *Sandoval*, *supra*, at 289 (statute must evince "congressional intent to create new rights"); and *California* v. *Sierra Club*, *supra*, at 294 ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries" (citing *Cannon*, *supra*, at 690–693, n. 13)). Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.

JUSTICE STEVENS disagrees with this conclusion principally because separation-of-powers concerns are, in his view, more pronounced in the implied right of action context as opposed to the § 1983 context. *Post*, at 300–301 (dissenting opinion) (citing *Wilder*, 496 U. S., at 509, n. 9). But we fail to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not. Nor are separation-of-powers concerns within the Federal Government the only guideposts in this sort of analysis. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); citing *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984))).[5]

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[5] This case illustrates the point well. JUSTICE STEVENS would conclude that Congress intended FERPA's nondisclosure provisions to confer individual rights on millions of school students from kindergarten through graduate school without having ever said so explicitly. This conclusion entails a judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials, *e. g.*, *Falvo*, 534 U. S., at 435 (rejecting proposed

With this principle in mind, there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights. To begin with, the provisions entirely lack the sort of "rights-creating" language critical to showing the requisite congressional intent to create new rights. *Alexander* v. *Sandoval*, 532 U. S., at 288–289; *Cannon*, 441 U. S., at 690, n. 13. Unlike the individually focused terminology of Titles VI and IX ("No person . . . shall . . . be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." 20 U. S. C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "*individual* entitlement" that is enforceable under § 1983. *Blessing*, 520 U. S., at 343 (emphasis in original). As we said in *Cannon:*

> "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." 441 U. S., at 690–693.

See also *Alexander* v. *Sandoval*, *supra*, at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons' " (quoting *California* v. *Sierra Club*, *supra*, at 294)).

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interpretation of FERPA because "[w]e doubt Congress meant to intervene in this drastic fashion with traditional state functions"); *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 226 (1985) (noting tradition of "reluctance to trench on the prerogatives of state and local educational institutions"), by subjecting them to private suits for money damages whenever they fail to comply with a federal funding condition.

FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. See §§ 1232g(b)(1)–(2) (prohibiting the funding of "any educational agency or institution which has a *policy or practice* of permitting the release of education records" (emphasis added)). Therefore, as in *Blessing*, they have an "aggregate" focus, 520 U. S., at 343, they are not concerned with "whether the needs of any particular person have been satisfied," *ibid.*, and they cannot "give rise to individual rights," *id.*, at 344. Recipient institutions can further avoid termination of funding so long as they "comply substantially" with the Act's requirements. § 1234c(a). This, too, is not unlike *Blessing*, which found that Title IV–D failed to support a § 1983 suit in part because it only required "substantial compliance" with federal regulations. 520 U. S., at 335, 343. Respondent directs our attention to subsection (b)(2), but the text and structure of subsections (b)(1) and (b)(2) are essentially the same.[6] In each provision the reference to individual consent is in the context of describing the type of "policy or practice" that triggers a funding prohi-

[6] Subsection (b)(2) provides in relevant part:

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . unless—

"(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents." 20 U. S. C. § 1232g(b)(2)(A).

Respondent invokes this provision to assert the very awkward "individualized right to withhold consent and prevent the unauthorized release of personally identifiable information in education records by an educational institution that has a policy or practice of releasing, or providing access to, such information." Brief for Respondent 14. That is a far cry from the sort of individualized, concrete monetary entitlement found enforceable in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), *Wright*, and *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990). See *supra*, at 279–281.

bition. For reasons expressed repeatedly in our prior cases, however, such provisions cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983.[7]

Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to "*deal with violations*" of the Act, § 1232g(f) (emphasis added), and required the Secretary to "establish or designate [a] review board" for investigating and adjudicating such violations, § 1232g(g). Pursuant to these provisions, the Secretary created the Family Policy Compliance Office (FPCO) "to act as the Review Board required under the Act [and] to enforce the Act with respect to all applicable programs." 34 CFR §§ 99.60(a) and (b) (2001). The FPCO permits students and parents who suspect a violation of the Act to file individual written complaints. § 99.63. If a complaint is timely and contains required information, the FPCO will initiate an investigation, §§ 99.64(a)–(b), notify the educational institution of the charge, § 99.65(a), and request a written response, § 99.65. If a violation is found, the FPCO distributes a notice of factual findings and a "statement of the specific steps that the agency or institution must take to comply" with FERPA. §§ 99.66(b) and (c)(1). These admin-

[7] JUSTICE STEVENS would have us look to other provisions in FERPA that use the term "rights" to define the obligations of educational institutions that receive federal funds. See *post,* at 293–294, 296. He then suggests that any reference to "rights," even as a shorthand means of describing standards and procedures imposed on funding recipients, should give rise to a statute's enforceability under § 1983. *Ibid.* This argument was rejected in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 18–20 (1981) (no presumption of enforceability merely because a statute "speaks in terms of 'rights'"), and it is particularly misplaced here since Congress enacted FERPA years before *Thiboutot* declared that statutes can ever give rise to rights enforceable by § 1983.

istrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism, see *supra*, at 280–281, and further counsel against our finding a congressional intent to create individually enforceable private rights.[8]

Congress finally provided that "[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education. 20 U. S. C. § 1232g(g). This centralized review provision was added just four months after FERPA's enactment due to "concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions." 120 Cong. Rec. 39863 (1974) (joint statement). Cf. *Wright*, 479 U. S., at 426 ("Congress' aim was to provide a *decentralized* . . . administrative process" (emphasis added; internal quotation marks omitted)). It is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of "multiple interpretations" the Act explicitly sought to avoid.

In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983. Accordingly, the judgment of the

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[8] We need not determine whether FERPA's procedures are "sufficiently comprehensive" to offer an independent basis for precluding private enforcement, *Middlesex County Sewerage Authority*, 453 U. S., at 20, due to our finding that FERPA creates no private right to enforce.

Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring in the judgment.

The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U. S. C. § 1983 or otherwise, is a question of congressional intent. In my view, the factors set forth in this Court's § 1983 cases are helpful indications of that intent. See, *e. g.*, *Blessing* v. *Freestone*, 520 U. S. 329, 340–341 (1997); *Suter* v. *Artist M.*, 503 U. S. 347, 357 (1992); *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509–511 (1990); *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423–427 (1987). But the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance. I would not, in effect, predetermine an outcome through the use of a presumption—such as the majority's presumption that a right is conferred only if set forth "unambiguously" in the statute's "text and structure." See *ante*, at 280, 288.

At the same time, I do not believe that Congress intended private judicial enforcement of this statute's "school record privacy" provisions. The Court mentions most of the considerations I find persuasive: The phrasing of the relevant prohibition (stating that "[n]o funds shall be made available" to institutions with a "policy or practice" of permitting the release of "education records"), see *ante*, at 288, n. 6, 288–289; the total absence (in the relevant statutory provision) of any reference to individual "rights" or the like, see *ante*, at 287; the related provisions that make clear, by creating administrative enforcement processes, that the Spending Clause was not simply a device to obtain federal jurisdiction,

see *ante*, at 289–290; and later statutory insistence upon centralized federal enforcement at the national, not the regional, level, see *ante*, at 290.

I would add one further reason. Much of the statute's key language is broad and nonspecific. The statute, for example, defines its key term, "education records," as (with certain enumerated exceptions) "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational . . . institution." 20 U. S. C. § 1232g(a)(4)(A). This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information. It has led, or could lead, to legal claims that would limit, or forbid, such practices as peer grading, see *Owasso Independent School Dist. No. I–011* v. *Falvo*, 534 U. S. 426 (2002), teacher evaluations, see *Moore* v. *Hyche*, 761 F. Supp. 112 (ND Ala. 1991), school "honor society" recommendations, see *Price* v. *Young*, 580 F. Supp. 1 (ED Ark. 1983), or even roll call responses and "bad conduct" marks written down in class, see Tr. of Oral Arg. in *Falvo*, *supra*, O. T. 2001, No. 00–1073, pp. 37–38. And it is open to interpretations that invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances, say, where individuals are being considered for work with young children or other positions of trust.

Under these circumstances, Congress may well have wanted to make the agency remedy that it provided exclusive—both to achieve the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking and to avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages. This factor, together with the others to which the majority refers, convinces me that Congress did not intend private judicial enforcement actions here.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The Court's *ratio decidendi* in this case has a "now you see it, now you don't" character. At times, the Court seems to hold that the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 20 U. S. C. § 1232g, simply does not create any federal rights, thereby disposing of the case with a negative answer to the question "whether Congress *intended to create a federal right*," *ante*, at 283. This interpretation would explain the Court's studious avoidance of the rights-creating language in the title and the text of the Act. Alternatively, its opinion may be read as accepting the proposition that FERPA does indeed create both parental rights of access to student records and student rights of privacy in such records, but that those federal rights are of a lesser value because Congress did not intend them to be enforceable by their owners. See, *e. g.*, *ante*, at 290 (requiring of respondent "no less and no more" than what is required of plaintiffs attempting to prove that a statute creates an implied right of action). I shall first explain why the statute does, indeed, create federal rights, and then explain why the Court's novel attempt to craft a new category of second-class statutory rights is misguided.

I

Title 20 U. S. C. § 1232g, which embodies FERPA in its entirety, includes 10 subsections, which create rights for both students and their parents, and describe the procedures for enforcing and protecting those rights. Subsection (a)(1)(A) accords parents "the right to inspect and review the education records of their children."[1] Subsection (a)(1)(D) pro-

[1] The following portions of 20 U. S. C. §§ 1232g(a)(1)(A) and (B) identify the parents' right. After stating that no funds shall be made available to an institution that has a policy of denying parents "the right to inspect and review the education records of their children," subsection (a)(1)(A) clarifies that if an education record pertains to more than one student, "the parents of one of such students shall have the right to inspect and

vides that a "student or a person applying for admission" may waive "his right of access" to certain confidential statements. Two separate provisions protect students' privacy rights: subsection (a)(2) refers to "the privacy rights of students," and subsection (c) protects "the rights of privacy of students and their families." And subsection (d) provides that after a student has attained the age of 18, "the rights accorded to the parents of the student" shall thereafter be extended to the student. Given such explicit rights-creating language, the title of the statute, which describes "family educational rights," is appropriate: The entire statutory scheme was designed to protect such rights.

Of course, as we have stated previously, a "blanket approach" to determining whether a statute creates rights enforceable under 42 U. S. C. § 1983 (1994 ed., Supp. V) is inappropriate. *Blessing* v. *Freestone*, 520 U. S. 329, 344 (1997). The precise statutory provision at issue in this case is § 1232g(b).[2] Although the rights-creating language in this subsection is not as explicit as it is in other parts of the statute, it is clear that, in substance, § 1232g(b) formulates an individual right: in respondent's words, the "right of parents to withhold consent and prevent the unauthorized release of education record information by an educational

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review only" the parts pertaining to that student. That subsection then provides that the educational institution "shall establish appropriate procedures" for the granting of parental requests for access within 45 days. *Ibid.* Subsection (a)(1)(B) also refers to the parents' "right to inspect and review the education records" of their children.

[2] In relevant part, § 1232g(b)(2) states that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . unless" either "there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents," or a court order dictating release of information.

institution . . . that has a policy or practice of releasing such information." Brief for Respondent 11. This provision plainly meets the standards we articulated in *Blessing* for establishing a federal right: It is directed to the benefit of individual students and parents; the provision is binding on States, as it is "couched in mandatory, rather than precatory, terms"; and the right is far from "'vague and amorphous,'" 520 U. S., at 340–341. Indeed, the right at issue is more specific and clear than rights previously found enforceable under § 1983 in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987), and *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990), both of which involved plaintiffs' entitlement to "reasonable" amounts of money.[3] As such, the federal right created by § 1232g(b) is "presumptively enforceable by § 1983," *ante*, at 284.

The Court claims that § 1232g(b), because it references a "policy or practice," has an aggregate focus and thus cannot qualify as an individual right. See *ante*, at 288 (emphasis deleted). But § 1232g(b) does not simply ban an institution from having a policy or practice—which would be a more systemic requirement. Rather, it permits a policy or practice of releasing information, *so long as* "there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents." 20 U. S. C. § 1232g(b)(2)(A). The provision speaks of the individual "student," not students generally. In light of FERPA's stated purpose to "protect such individuals' rights to privacy by limiting the transferability of their records without their consent," 120 Cong. Rec. 39862 (1974) (statement of Sen.

[3] In *Wright*, the right claimed was "that a 'reasonable' amount for utilities be included in rent that a [public housing authority] was allowed to charge." 479 U. S., at 430. In *Wilder*, health care providers asserted the right to "reasonable and adequate rates" from "States participating in the Medicaid program." 496 U. S., at 512.

Buckley), the individual focus of § 1232g(b) is manifest. Moreover, simply because a "pattern or practice" is a precondition to individual relief does not mean that the right asserted is not an individually enforceable right. Cf. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690–695 (1978) (authorizing municipal liability under § 1983 when a municipality's "policy or custom" has caused the violation of an individual's federal rights).

Although § 1232g(b) alone provides strong evidence that an individual federal right has been created, this conclusion is bolstered by viewing the provision in the overall context of FERPA. Not once in its opinion does the Court acknowledge the substantial number of references to "rights" in the FERPA provisions surrounding § 1232g(b), even though our past § 1983 cases have made clear that a given statutory provision's meaning is to be discerned "in light of the entire legislative enactment," *Suter* v. *Artist M.*, 503 U. S. 347, 357 (1992).[4] Rather, ignoring these provisions, the Court asserts that FERPA—not just § 1232g(b)—"entirely lack[s]" rights-creating language, *ante*, at 287. The Court also claims that "we have never before held . . . that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." *Ante*, at 279. In making this claim, the Court contrasts FERPA's "[n]o funds shall be made available" language with "individually focused termi-

[4] The Court correctly states that "rights" language alone does not necessarily create rights enforceable under § 1983, *ante*, at 289, n. 7 (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981)), but such language is certainly relevant to whether a statute creates rights, see *ante*, at 287 (describing "'rights-creating' language" as "critical to showing the requisite congressional intent to create new rights"). Moreover, in *Pennhurst*, the Court treated the "rights" language as the only arguable evidence that the statute created rights; here, the "'overall' or 'specific' purposes of the Act," 451 U. S., at 18, also show an intent to create individual rights. See *supra*, at 295 and this page (discussing FERPA's "stated purpose").

nology" characteristic of federal antidiscrimination statutes, such as "[n]o person . . . shall . . . be subjected to discrimination," *ante*, at 287. But the sort of rights-creating language idealized by the Court has *never* been present in our § 1983 cases; rather, such language ordinarily gives rise to an implied cause of action. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 690, n. 13 (1979). None of our four most recent cases involving whether a Spending Clause statute created rights enforceable under § 1983—*Wright*, *Wilder*, *Suter*, and *Blessing*—involved the sort of "no person shall" rights-creating language envisioned by the Court. And in two of those cases—*Wright* and *Wilder*—we concluded that individual rights enforceable under § 1983 existed. See n. 3, *supra*.

Although a "presumptively enforceable" right, *ante*, at 284, has been created by § 1232g(b), one final question remains. As our cases recognize, Congress can rebut the presumption of enforcement under § 1983 either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement [actions]." *Blessing*, 520 U. S., at 341. FERPA has not explicitly foreclosed enforcement under § 1983. The only question, then, is whether the administrative enforcement mechanisms provided by the statute are "comprehensive" and "incompatible" with § 1983 actions. As the Court explains, *ante*, at 289, FERPA authorizes the establishment of an administrative enforcement framework, and the Secretary of Education has created the Family Policy Compliance Office (FPCO) to "deal with violations" of the Act, 20 U. S. C. § 1232g(f). FPCO accepts complaints from the public concerning alleged FERPA violations and, if it so chooses, may follow up on such a complaint by informing institutions of the steps they must take to comply with FERPA, see 34 CFR §§ 99.63–99.67 (2001), and, in exceptional cases, by administrative adjudication against noncomplying institutions, see 20 U. S. C. § 1234. These ad-

ministrative avenues fall far short of what is necessary to overcome the presumption of enforceability. We have only found a comprehensive administrative scheme precluding enforceability under § 1983 in two of our past cases—*Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), and *Smith* v. *Robinson*, 468 U. S. 992 (1984). In *Sea Clammers*, the relevant statute not only had "unusually elaborate enforcement provisions," but it also permitted private citizens to bring enforcement actions in court. 453 U. S., at 13–14. In *Smith*, the statute at issue provided for "carefully tailored" administrative proceedings followed by federal judicial review. 468 U. S., at 1009. In contrast, FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to administrative discretion the decision whether to follow up on individual complaints. As we said in *Blessing*, 520 U. S., at 348, the enforcement scheme here is "far more limited than those in *Sea Clammers* and *Smith*," and thus does not preclude enforcement under § 1983.[5]

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[5] The Court does not test FERPA's administrative scheme against the "comprehensive enforcement scheme," *Blessing*, 520 U. S., at 341, standard for rebutting the presumptive enforceability of a federal right, *ante*, at 290, n. 8, because it concludes that there is no federal right to trigger this additional analysis. Yet, at the same time, the Court imports "enforcement scheme" considerations into the initial question whether the statute creates a presumptively enforceable right. See *ante*, at 289 ("Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing [FERPA violations]"). Folding such considerations into the rights question renders the rebuttal inquiry superfluous. Moreover, the Court's approach is inconsistent with our past cases, which have kept separate the inquiries whether there is a right and whether an enforcement scheme rebuts presumptive enforceability. Thus, the Court's discussion of the schemes in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987), and *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990), is inapposite, see *ante*, at 289–290, because neither of those cases considered the existence of an enforcement scheme relevant to whether a federal right had been created in the first instance.

II

Since FERPA was enacted in 1974, all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under § 1983.[6] Nearly all other federal and state courts reaching the issue agree with these Circuits.[7] Congress has not overruled these decisions by amending FERPA to expressly preclude recourse to § 1983. And yet, the Court departs from over a quarter century of settled law in concluding that FERPA creates no enforceable rights. Perhaps more pernicious than its disturbing of the settled status of FERPA rights, though, is the Court's novel use of our implied right of action cases in determining whether a federal right exists for § 1983 purposes.

In my analysis of whether § 1232g(b) creates a right for § 1983 purposes, I have assumed the Court's forthrightness in stating that the question presented is "whether Congress *intended to create a federal right*," *ante*, at 283, and that "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy," *ante*, at 284. Rather than proceeding with a straightforward analysis

[6] See *Falvo* v. *Owasso Independent School Dist. No. I–011*, 233 F. 3d 1203, 1210 (CA10 2000), rev'd on other grounds, 534 U. S. 426 (2002); *Tarka* v. *Cunningham*, 917 F. 2d 890, 891 (CA5 1990); *Brown* v. *Oneonta*, 106 F. 3d 1125, 1131 (CA2 1997) (citing *Fay* v. *South Colonie Central School Dist.*, 802 F. 2d 21, 33 (CA2 1986)). The Court does not cite—nor can it—a circuit or state high court opinion to the contrary. See *ante*, at 278, n. 2.

[7] To justify its statement that courts are "divided," *ante*, at 278, concerning FERPA's enforceability under § 1983, the Court cites only *two* cases disagreeing with the overwhelming majority position of courts reaching the issue. See *ante*, at 278, n. 2 (citing *Gundlach* v. *Reinstein*, 924 F. Supp. 684 (ED Pa. 1996), aff'd, 114 F. 3d 1172 (CA3 1997), and *Meury* v. *Eagle-Union Community School Corp.*, 714 N. E. 2d 233, 239 (Ind. Ct. App. 1999)). And *Gundlach* did not even squarely hold that FERPA rights are unenforceable; rather, the court merely rejected a claim under § 1232 in which the plaintiff "failed to allege that Defendants released the alleged educational records pursuant to university policy," 924 F. Supp., at 692.

under these principles, however, the Court has undermined both of these assertions by needlessly borrowing from cases involving implied rights of action—cases which place a more exacting standard on plaintiffs. See *ante*, at 283–286. By using these cases, the Court now appears to require a heightened showing from § 1983 plaintiffs: "[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Ante*, at 290.

A requirement that Congress intend a "right to support a cause of action," *ante*, at 283, as opposed to simply the creation of an individual federal right, makes sense in the implied right of action context. As we have explained, our implied right of action cases "reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder*, 496 U. S., at 509, n. 9. However, imposing the implied right of action framework upon the § 1983 inquiry, see *ante*, at 283–286, is not necessary: The separation-of-powers concerns present in the implied right of action context "are not present in a § 1983 case," because Congress expressly authorized private suits in § 1983 itself. *Wilder*, 496 U. S., at 509, n. 9. Nor is it consistent with our precedent, which has always treated the implied right of action and § 1983 inquiries as separate. See, *e. g.*, *ibid.*[8]

It has been long recognized that the pertinent question in determining whether a statute provides a basis for a § 1983 suit is whether Congress intended to create individual rights binding on States—as opposed to mere "precatory terms" that do not "unambiguously" create state obligations, *Penn-*

[8] Indeed, endorsing such a framework *sub silentio* overrules cases such as *Wright* and *Wilder*. In those cases we concluded that the statutes at issue created rights enforceable under § 1983, but the statutes did not "clear[ly] and unambiguous[ly]," *ante*, at 290, intend *enforceability under § 1983*.

hurst State School and Hospital v. *Halderman*, 451 U. S. 1, 17, 18 (1981), or "generalized," "*systemwide*" duties on States, *Blessing*, 520 U. S., at 343; *Suter*, 503 U. S., at 363. What has never before been required is congressional intent specifically to make the right *enforceable under § 1983*. Yet that is exactly what the Court, at points, appears to require by relying on implied right of action cases: the Court now asks whether "Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges," *ante*, at 290.

If it were true, as the Court claims, that the implied right of action and § 1983 inquiries neatly "overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*," *ante*, at 283, then I would have less trouble referencing implied right of action precedent to determine whether a federal right exists. Contrary to the Court's suggestion, however, our implied right of action cases do not necessarily cleanly separate out the "right" question from the "cause of action" question. For example, in the discussion of rights-creating language in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), which the Court characterizes as pertaining only to whether there is a right, *ante*, at 287, *Cannon*'s reasoning is explicitly based on whether there is "reason to infer a private remedy," 441 U. S., at 691, and the "propriety of implication of a cause of action," *id.*, at 690, n. 13. Because *Cannon* and other implied right of action cases do not clearly distinguish the questions of "right" and "cause of action," it is inappropriate to use these cases to determine whether a statute creates rights enforceable under § 1983.

The Court, however, asserts that it has not imported the entire implied right of action inquiry into the § 1983 context, explaining that while § 1983 plaintiffs share with implied right of action plaintiffs the burden of establishing a federal right, § 1983 plaintiffs "do not have the burden of showing an intent to create a private remedy because § 1983 generally

supplies a remedy for the vindication of rights secured by federal statutes." *Ante,* at 284. If the Court has not adopted such a requirement in the § 1983 context—which it purports not to have done—then there should be no difference between the Court's "new" approach to discerning a federal right in the § 1983 context and the test we have "traditionally" used, as articulated in *Blessing:* whether Congress intended to benefit individual plaintiffs, whether the right asserted is not "'vague and amorphous,'" and whether Congress has placed a binding obligation on the State with respect to the right asserted. 520 U. S., at 340–341. Indeed, the Court's analysis, in part, closely tracks *Blessing*'s factors, as it examines the statute's language, and the asserted right's individual versus systematic thrust. See *ante,* at 287–289.

The Court's opinion in other places, however, appears to require more of plaintiffs. By defining the § 1983 plaintiff's burden concerning "whether a statute confers any right at all," *ante,* at 285, as whether "Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges," *ante,* at 290, the Court has collapsed the ostensible two parts of the implied right of action test ("is there a right" and "is it enforceable") into one. As a result, and despite its statement to the contrary, *ante,* at 284, the Court seems to place the unwarranted "burden of showing an intent to create a private remedy," *ibid.,* on § 1983 plaintiffs. Moreover, by circularly defining a right actionable under § 1983 as, in essence, "a right which Congress intended to make enforceable," the Court has eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under § 1983. Under this reading of the Court's opinion, a right under *Blessing* is second class compared to a right whose enforcement Congress has clearly intended. Creating such a hierarchy of rights is not only

novel, but it blurs the long-recognized distinction between rights and remedies. And it does nothing to clarify our § 1983 jurisprudence.

Accordingly, I respectfully dissent.

Syllabus

ATKINS *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 00–8452. Argued February 20, 2002—Decided June 20, 2002

Petitioner Atkins was convicted of capital murder and related crimes by a Virginia jury and sentenced to death. Affirming, the Virginia Supreme Court relied on *Penry* v. *Lynaugh*, 492 U. S. 302, in rejecting Atkins' contention that he could not be sentenced to death because he is mentally retarded.

Held: Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment. Pp. 311–321.

(a) A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. *E. g.*, *Weems* v. *United States*, 217 U. S. 349, 367. An excessiveness claim is judged by currently prevailing standards of decency. *Trop* v. *Dulles*, 356 U. S. 86, 100–101. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, see, *e. g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 1000, the clearest and most reliable of which is the legislation enacted by the country's legislatures, *Penry*, 492 U. S., at 331. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 597. Pp. 311–313.

(b) Much has changed since *Penry*'s conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U. S., at 334. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition.

Syllabus

Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon. Pp. 313–317.

(c) An independent evaluation of the issue reveals no reason for the Court to disagree with the legislative consensus. Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey* v. *Georgia*, 446 U. S. 420, 433, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes. Pp. 317–321.

260 Va. 375, 534 S. E. 2d 312, reversed and remanded.

Stevens, J., delivered the opinion of the Court, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, *post*, p. 321. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined, *post*, p. 337.

James W. Ellis argued the cause for petitioner. With him on the briefs were *Robert E. Lee*, by appointment of the Court, 534 U. S. 1122, *Mark E. Olive*, and *Charles E. Haden.*

Pamela A. Rumpz, Assistant Attorney General of Virginia, argued the cause for respondent. With her on the brief was *Randolph A. Beales*, Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the

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*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Bill Pryor*, Attorney General of Alabama, and *J. Clayton Crenshaw, Henry M. Johnson, James R. Houts, A. Vernon Barnett IV, Michael B. Billingsley*, and *David R. Clark*, Assistant Attorneys General, *Michael C. Moore*, Attorney General of Mississippi, *Frankie Sue Del Papa*, Attorney General of Nevada, *Charles M. Condon*, Attorney General of South Carolina, and *Mark L. Shurtleff*, Attorney General of Utah; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

[REPORTER'S NOTE: On December 3, 2001, 534 U. S. 1053, the Court granted the motion of *amici curiae* filers in *McCarver* v. *North Carolina*, No. 00–8727, cert. dism'd, 533 U. S. 975, to have their *amici curiae* briefs considered in support of petitioner in this case. Such briefs were filed for the American Association on Mental Retardation et al. by *James W. Ellis, April Land, Christian G. Fritz, Michael B. Browde*, and *Stanley S. Herr;* for the American Bar Association by *Martha W. Barnett* and *David M. Gossett;* for the American Civil Liberties Union et al. by *Larry W. Yackle, Bryan A. Stevenson, Steven R. Shapiro*, and *Diann Y. Rust-Tierney;* for the American Psychological Association et al. by *Paul M. Smith, William M. Hohengarten, Nathalie F. P. Gilfoyle, James L. McHugh*, and *Richard G. Taranto;* for the European Union by *Richard J. Wilson;* for the United States Catholic Conference et al. by *Mark E. Chopko, Jeffrey Hunter Moon*, and *Michael R. Moses;* and for Morton Abramowitz et al. by *Harold Hongju Koh* and *Stanley S. Herr.*]

reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins' trial.[1] Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was sufficient to establish Atkins' guilt.[2] At the penalty

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[1] Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

[2] Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded."[3] His conclusion was based on interviews with people who knew Atkins,[4] a review of school and court

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[3] The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70. *Id.*, at 42–43.

[4] The doctor interviewed Atkins, members of his family, and deputies at the jail where he had been incarcerated for the preceding 18 months. Dr. Nelson also reviewed the statements that Atkins had given to the police and the investigative reports concerning this case.

records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59.[5]

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form. 257 Va. 160, 510 S. E. 2d 445 (1999). At the resentencing, Dr. Nelson again testified. The State presented an expert rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder.[6] App. 476. The jury again sentenced Atkins to death.

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[5] Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS–III), the standard instrument in the United States for assessing intellectual functioning. AAMR, Mental Retardation, *supra.* The WAIS–III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, Essentials of WAIS–III Assessment 60 (1999). It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000).

At the sentencing phase, Dr. Nelson testified: "[Atkins'] full scale IQ is 59. Compared to the population at large, that means less than one percentile. . . . Mental retardation is a relatively rare thing. It's about one percent of the population." App. 274. According to Dr. Nelson, Atkins' IQ score "would automatically qualify for Social Security disability income." *Id.,* at 280. Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. *Id.,* at 310. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an "aberration, malingered result, or invalid test score." *Id.,* at 308.

[6] Dr. Samenow's testimony was based upon two interviews with Atkins, a review of his school records, and interviews with correctional staff. He did not administer an intelligence test, but did ask Atkins questions taken from the 1972 version of the Wechsler Memory Scale. *Id.,* at 524–525,

The Supreme Court of Virginia affirmed the imposition of the death penalty. 260 Va. 375, 385, 534 S. E. 2d 312, 318 (2000). Atkins did not argue before the Virginia Supreme Court that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but he did contend "that he is mentally retarded and thus cannot be sentenced to death." *Id.*, at 386, 534 S. E. 2d, at 318. The majority of the state court rejected this contention, relying on our holding in *Penry*. 260 Va., at 387, 534 S. E. 2d, at 319. The court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." *Id.*, at 390, 534 S. E. 2d, at 321.

Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow's opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.*, at 394, 395–396, 534 S. E. 2d, at 323–324. In their opinion, "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Id.*, at 397, 534 S. E. 2d, at 325.

Because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* case. 533 U. S. 976 (2001).

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529. Dr. Samenow attributed Atkins' "academic performance [that was] by and large terrible" to the fact that he "is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." *Id.*, at 480–481.

II

The Eighth Amendment succinctly prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems* v. *United States*, 217 U. S. 349 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.*, at 367. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin* v. *Michigan*, 501 U. S. 957, 997–998 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also *id.*, at 1009–1011 (White, J., dissenting).[7] Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson* v. *California*, 370 U. S. 660, 666–667 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson:* "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667.

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop* v. *Dulles*, 356 U. S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the

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[7] Thus, we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100–101.

Proportionality review under those evolving standards should be informed by "'objective factors to the maximum possible extent,'" see *Harmelin*, 501 U. S., at 1000 (quoting *Rummel* v. *Estelle*, 445 U. S. 263, 274–275 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U. S., at 331. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker* v. *Georgia*, 433 U. S. 584, 593–596 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund* v. *Florida*, 458 U. S. 782, 789–793 (1982). In *Coker*, we focused primarily on the then-recent legislation that had been enacted in response to our decision 10 years earlier in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." *Coker*, 433 U. S., at 596. The "current legislative judgment" relevant to our decision in *Enmund* was less clear than in *Coker* but "nevertheless weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U. S., at 793.

We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S., at 597. For example, in *Enmund*, we concluded by expressing our own judgment about the issue:

> "For purposes of imposing the death penalty, Enmund's criminal *culpability* must be limited to his participation

> in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of *the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment* for purposes of construing and applying the Eighth Amendment." 458 U. S., at 801 (emphasis added).

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, 433 U. S., at 597, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

III

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia[8] apparently led to the enact-

[8] Jerome Bowden, who was identified as having mental retardation when he was 14 years old, was scheduled for imminent execution in Georgia in June 1986. The Georgia Board of Pardons and Paroles granted a stay following public protests over his execution. A psychologist selected by the State evaluated Bowden and determined that he had an IQ of 65, which is consistent with mental retardation. Nevertheless, the board lifted the stay and Bowden was executed the following day. The board concluded that Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible. See Montgomery, Bowden's Execution Stirs Protest, Atlanta Journal, Oct. 13, 1986, p. A1.

ment of the first state statute prohibiting such executions.[9] In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded."[10] In 1989, Maryland enacted a similar prohibition.[11] It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U. S., at 334.

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994.[12] In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded.[13] Nebraska followed suit in 1998.[14] There appear

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[9] Ga. Code Ann. § 17–7–131(j) (Supp. 1988).

[10] The Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001(*l*), 102 Stat. 4390, 21 U. S. C. § 848(*l*). Congress expanded the federal death penalty law in 1994. It again included a provision that prohibited any individual with mental retardation from being sentenced to death or executed. Federal Death Penalty Act of 1994, 18 U. S. C. § 3596(c).

[11] Md. Ann. Code, Art. 27, § 412(f)(1) (1989).

[12] Ky. Rev. Stat. Ann. §§ 532.130, 532.135, 532.140; Tenn. Code Ann. § 39–13–203; N. M. Stat. Ann. § 31–20A–2.1; Ark. Code Ann. § 5–4–618; Colo. Rev. Stat. § 16–9–401; Wash. Rev. Code § 10.95.030; Ind. Code §§ 35–36–9–2 through 35–36–9–6; Kan. Stat. Ann. § 21–4623.

[13] N. Y. Crim. Proc. Law § 400.27. However, New York law provides that a sentence of death "may not be set aside . . . upon the ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." N. Y. Crim. Proc. Law § 400.27.12(d) (McKinney 2001–2002 Interim Pocket Part).

[14] Neb. Rev. Stat. § 28–105.01.

to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession.[15] The Texas Legislature unanimously adopted a similar bill,[16] and bills have passed at least one house in other States, including Virginia and Nevada.[17]

It is not so much the number of these States that is significant, but the consistency of the direction of change.[18] Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the

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[15] S. D. Codified Laws § 23A–27A–26.1; Ariz. Rev. Stat. Ann. § 13–703.02; Conn. Gen. Stat. § 53a–46a; Fla. Stat. § 921.137; Mo. Rev. Stat. § 565.030; 2001–346 N. C. Sess. Laws p. 45.

[16] House Bill No. 236 passed the Texas House on April 24, 2001, and the Senate version, S. 686, passed the Texas Senate on May 16, 2001. Governor Perry vetoed the legislation on June 17, 2001. In his veto statement, the Texas Governor did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. In fact, he stated: "We do not execute mentally retarded murderers today." See Veto Proclamation for H. B. No. 236. Instead, his motivation to veto the bill was based upon what he perceived as a procedural flaw: "My opposition to this legislation focuses on a serious legal flaw in the bill. House Bill No. 236 would create a system whereby the jury and judge are asked to make the same determination based on two different sets of facts. . . . Also of grave concern is the fact that the provision that sets up this legally flawed process never received a public hearing during the legislative process." *Ibid.*

[17] Virginia Senate Bill No. 497 (2002); House Bill No. 957 (2002); see also Nevada Assembly Bill 353 (2001). Furthermore, a commission on capital punishment in Illinois has recently recommended that Illinois adopt a statute prohibiting the execution of mentally retarded offenders. Report of the Governor's Commission on Capital Punishment 156 (Apr. 2002).

[18] A comparison to *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont. Code Ann. § 45–5–102 (1999); Ind. Code § 35–50–2–3 (1998).

complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.[19] Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.[20] The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.[21]

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[19] App. D to Brief for AAMR et al. as *Amici Curiae.*

[20] Those States are Alabama, Texas, Louisiana, South Carolina, and Virginia. D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb. 1997) (updated by Death Penalty Information Center, available at http://www.advocacyone.org/deathpenalty.html (as visited June 18, 2002)).

[21] Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae;* Brief for AAMR et al. as *Amici Curiae.* In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." Brief for United States Catholic Conference et al. as *Amici Curiae* 2. More-

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416–417.[22]

IV

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

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over, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR et al. as *Amici Curiae* (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 830, 831, n. 31 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

[22] The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*.

As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.[23] There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.[24] Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as

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[23] J. McGee & F. Menolascino, The Evaluation of Defendants with Mental Retardation in the Criminal Justice System, in The Criminal Justice System and Mental Retardation 55, 58–60 (R. Conley, R. Luckasson, & G. Bouthilet eds. 1992); Appelbaum & Appelbaum, Criminal-Justice Related Competencies in Defendants with Mental Retardation, 14 J. of Psychiatry & L. 483, 487–489 (Winter 1994).

[24] See, *e. g.,* Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 429 (1985); Levy-Shiff, Kedem, & Sevillia, Ego Identity in Mentally Retarded Adolescents, 94 Am. J. Mental Retardation 541, 547 (1990); Whitman, Self Regulation and Mental Retardation, 94 Am. J. Mental Retardation 347, 360 (1990); Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212–213, 535 (1999) (hereinafter Everington & Fulero).

a basis for the death penalty applies to mentally retarded offenders. *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U. S., at 798.

With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.*, at 433. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence—the interest in preventing capital crimes by prospective offenders—"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" *Enmund*, 458 U. S., at 799. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U. S., at 186. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded

offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions,[25] but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and

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[25] See Everington & Fulero 212–213. Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit. See Baker, Death-Row Inmate Gets Clemency; Agreement Ends Day of Suspense, Washington Post, Jan. 15, 1994, p. A1.

are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U. S., at 323–325. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Ford*, 477 U. S., at 405.

The judgment of the Virginia Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner, *i. e.*, those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. The Court pronounces

the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime. See *ante*, at 314–315.

I agree with JUSTICE SCALIA, *post*, at 337–338 (dissenting opinion), that the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency. I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. See *ante*, at 316–317, n. 21. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." *Stanford* v. *Kentucky*, 492 U. S. 361, 377 (1989) (plurality opinion). The Court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.

In making determinations about whether a punishment is "cruel and unusual" under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the "clearest and most reliable objective

evidence of contemporary values." *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989). See also *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987). The reason we ascribe primacy to legislative enactments follows from the constitutional role legislatures play in expressing policy of a State. "'[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" *Gregg* v. *Georgia*, 428 U. S. 153, 175–176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 383 (1972) (Burger, C. J., dissenting)). And because the specifications of punishments are "peculiarly questions of legislative policy," *Gore* v. *United States*, 357 U. S. 386, 393 (1958), our cases have cautioned against using "'the aegis of the Cruel and Unusual Punishment Clause'" to cut off the normal democratic processes, *Gregg*, *supra*, at 176 (quoting *Powell* v. *Texas*, 392 U. S. 514, 533 (1968) (plurality opinion)).

Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable objective index of contemporary values,'" *Coker* v. *Georgia*, 433 U. S. 584, 596 (1977) (plurality opinion) (quoting *Gregg*, *supra*, at 181), because of the jury's intimate involvement in the case and its function of "'maintain[ing] a link between contemporary community values and the penal system,'" *Gregg*, *supra*, at 181 (quoting *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, n. 15 (1968)). In *Coker*, *supra*, at 596–597, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund* v. *Florida*, 458 U. S. 782, 793–794 (1982), where evidence of the current legislative judgment was not as "compelling" as that in *Coker* (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries . . . repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.

In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.* Instead, it adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders, see *ante*, at 316–317, n. 21 (citing the Brief for European Union as *Amicus Curiae* 2). I fail to see, how-

*Apparently no such statistics exist. See Brief for American Association on Mental Retardation et al. as *Amici Curiae* 19, n. 29 (noting that "actions by individual prosecutors and by juries are difficult to quantify with precision"). Petitioner's inability to muster studies in his favor ought to cut against him, for it is his "heavy burden," *Stanford* v. *Kentucky*, 492 U. S. 361, 373 (1989) (internal quotation marks omitted), to establish a national consensus against a punishment deemed acceptable by the Virginia Legislature and jury who sentenced him. Furthermore, it is worth noting that experts have estimated that as many as 10 percent of death row inmates are mentally retarded, see R. Bonner & S. Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000, p. A1, a number which suggests that sentencing juries are not as reluctant to impose the death penalty on defendants like petitioner as was the case in *Coker* v. *Georgia*, 433 U. S. 584 (1977), and *Enmund* v. *Florida*, 458 U. S. 782 (1982).

ever, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," *Coker*, *supra*, at 596, n. 10, to reinforce a conclusion regarding evolving standards of decency, see *Thompson* v. *Oklahoma*, 487 U. S. 815, 830 (1988) (plurality opinion); *Enmund*, *supra*, at 796–797, n. 22; *Trop* v. *Dulles*, 356 U. S. 86, 102–103 (1958) (plurality opinion); we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." *Stanford*, 492 U. S., at 369, n. 1 (emphasizing that "*American* conceptions of decency . . . are dispositive" (emphasis in original)).

Stanford's reasoning makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant. And nothing in *Thompson*, *Enmund*, *Coker*, or *Trop* suggests otherwise. *Thompson*, *Enmund*, and *Coker* rely only on the bare citation of international laws by the *Trop* plurality as authority to deem other countries' sentencing choices germane. But the *Trop* plurality—representing the view of only a minority of the Court—offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*.

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally retarded offenders. See *ante*, at 316–317, n. 21 (citing Brief for American Psychological Association et al. as *Amici Curiae*; Brief for American Association on Mental Retardation et al. as *Amici Curiae;* noting that "representatives of widely diverse reli-

gious communities . . . reflecting Christian, Jewish, Muslim, and Buddhist traditions . . . 'share a conviction that the execution of persons with mental retardation cannot be morally justified' "; and stating that "polling data shows a widespread consensus among Americans . . . that executing the mentally retarded is wrong"). In my view, none should be accorded any weight on the Eighth Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action. In *Penry*, 492 U. S., at 334–335, we were cited similar data and declined to take them into consideration where the "public sentiment expressed in [them]" had yet to find expression in state law. See also *Stanford*, 492 U. S., at 377 (plurality opinion) (refusing "the invitation to rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional associations"). For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat—at the behest of private organizations speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Even if I were to accept the legitimacy of the Court's decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results. See, *e. g.*, R. Groves, Survey

Errors and Survey Costs (1989); 1 C. Turner & E. Martin, Surveying Subjective Phenomena (1984).

The Federal Judicial Center's Reference Manual on Scientific Evidence 221–271 (1994) and its Manual for Complex Litigation § 21.493, pp. 101–103 (3d ed. 1995), offer helpful suggestions to judges called upon to assess the weight and admissibility of survey evidence on a factual issue before a court. Looking at the polling data (reproduced in the Appendix to this opinion) in light of these factors, one cannot help but observe how unlikely it is that the data could support a valid inference about the question presented by this case. For example, the questions reported to have been asked in the various polls do not appear designed to gauge whether the respondents might find the death penalty an acceptable punishment for mentally retarded offenders in rare cases. Most are categorical (*e. g.*, "Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"), and, as such, would not elicit whether the respondent might agree or disagree that all mentally retarded people by definition can never act with the level of culpability associated with the death penalty, regardless of the severity of their impairment or the individual circumstances of their crime. Second, none of the 27 polls cited disclose the targeted survey population or the sampling techniques used by those who conducted the research. Thus, even if one accepts that the survey instruments were adequately designed to address a relevant question, it is impossible to know whether the sample was representative enough or the methodology sufficiently sound to tell us anything about the opinions of the citizens of a particular State or the American public at large. Finally, the information provided to us does not indicate why a particular survey was conducted or, in a few cases, by whom, factors which also can bear on the objectivity of the results. In order to be credited here, such surveys should be offered as

evidence at trial, where their sponsors can be examined and cross-examined about these matters.

* * *

There are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America. Here, the Court goes beyond these well-established objective indicators of contemporary values. It finds "further support to [its] conclusion" that a national consensus has developed against imposing the death penalty on all mentally retarded defendants in international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable. *Ante*, at 317, n. 21. Believing this view to be seriously mistaken, I dissent.

APPENDIX TO OPINION OF REHNQUIST, C. J.

Poll and survey results reported in Brief for American Association on Mental Retardation et al. as *Amici Curiae* 3a–7a, and cited by the Court, *ante*, at 317, n. 21:

STATE	POLL	DATE	RESPONSE	QUESTION
AR	Arkansans' Opinion on the Death Penalty, Opinion Research Associates, Inc., Q. 13 (July 1992) John DiPippa, *Will Fairchild's Death Violate the Constitution, or Simply Our Morality?*, Arkansas Forum, Sept. 1993	1992	61% never appropriate 17% is appropriate 5% opposed to all executions 17% undecided	"Some people say that there is nothing wrong with executing a person who is mentally retarded. Others say that the death penalty should never be imposed on a person who is mentally retarded. Which of these positions comes closest to your own?"

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
AZ	Behavior Research Center, Survey 2000, Q. 3 (July 2000)	2000	71% oppose 12% favor 11% depends 6% ref/unsure	"For persons convicted of murder, do you favor or oppose use of the death penalty when the defendant is mentally retarded?"
CA	Field Research Corp., California Death Penalty Survey, Q. 22 (Dec. 1989) Frank Hill, *Death Penalty For The Retarded*, San Diego Union-Tribune, Mar. 28, 1993, at G3	1989	64.8% not all right 25.7% is all right 9.5% no opinion	"Some people feel there is nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel the death penalty should never be imposed on persons who are mentally retarded under any circumstance. The death penalty on a mentally retarded person is . . . ?"
CA	Field Research Corp., California Death Penalty Survey, Q. 62D (Feb. 1997) Paul Van Slambrouck, *Execution and a Convict's Mental State*, The Christian Science Monitor, Apr. 27, 1998, at 1	1997	74% disagree 17% agree 9% no opinion	"Mentally retarded defendants should be given the death penalty when they commit capital crimes."
CT	Quinnipac University	2001	77% no 12% yes	"Do you think that persons convicted of

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
	Polling Institute, Death Penalty Survey Info., Q. 35 (Apr. 23, 2001)		11% don't know	murder who are mentally retarded should or should not receive the death penalty?"
FL	Amnesty International Martin Dyckman, *Death Penalty's High Price*, St. Petersburg Times, Apr. 19, 1992, at 3D	1986	71% opposed	[not provided]
GA	Georgia State University Tracy Thompson, *Executions of Retarded Opposed*, Atlanta Journal, Jan. 6, 1987, at 1B	1987	66% opposed 17% favor 16% depends	[not provided]
LA	Marketing Research Inst., Loyola Death Penalty Survey, Q. 7 (Feb. 1993)	1993	77.7% no 9.2% yes 13% uncertain	"Would you vote for the death penalty if the convicted person is mentally retarded?"
LA	Louisiana Poll, Poll 104, Q. 9 (Apr. 2001)	2001	68% no 19% yes 11% no opinion 2% won't say	"Do you believe mentally retarded people, who are convicted of capital murder, should be executed?"
MD	Survey Research Center, University of Maryland (Nov. 1988)	1988	82% opposed 8% favor 10% other	"Would you favor or oppose the death penalty for a person convicted of murder if he or she is mentally retarded?"

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
MO	Missouri Mental Retardation and Death Penalty Survey, Q. 5 (Oct. 1993)	1993	61.3% not all right 23.7% is all right 15% don't know	"Some people feel there is nothing wrong with imposing the death penalty on *persons who are mentally retarded* depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Do you think it IS or IS NOT all right to impose the death penalty on a mentally retarded person?"
NC/SC	Charlotte Observer-WMTV News Poll (Sept. 2000) Diane Suchetka, *Carolinas Join Emotional Debate Over Executing Mentally Retarded*, Charlotte Observer, Sept. 13, 2000	2000	64% yes 21% no 14% not sure	"Should the Carolinas ban the execution of people with mental retardation?"
NM	Research & Polling Inc., Use of the Death Penalty Public Opinion Poll, Q. 2 (Dec. 1990)	1990	57.1% oppose 10.5% support 26.2% depends 6.1% don't know	62% support the death penalty. Asked of those that support it, "for which of the following do you support use of the

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
				death penalty . . . when the convicted person is mentally retarded?"
NY	Patrick Caddell Enterprises, NY Public Opinion Poll, The Death Penalty: An Executive Summary, Q. 27 (May 1989) Ronald Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 Loyola (LA) L. Rev. 59, 93 (1989)	1989	82% oppose 10% favor 9% don't know	"I'd like you to imagine you are a member of a jury. The jury has found the defendant guilty of murder beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. Would you favor or oppose sentencing the offender to the death penalty if . . . the convicted person were mentally retarded?"
OK	Survey of Oklahoma Attitudes Regarding Capital Punishment: Survey Conducted for Oklahoma Indigent Defense System, Q. C (July 1999)	1999	83.5% should not be executed 10.8% should be executed 5.7% depends	"Some people think that persons convicted of murder who are mentally retarded (or have a mental age of between 5 and 10 years) should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
				the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like everyone else?"
TX	Austin American Statesman, Nov. 15, 1988, at B3	1988	73% opposed	[not provided]
TX	Sam Houston State University, College of Criminal Justice, Texas Crime Poll On-line (1995) Domingo Ramirez, Jr., *Murder Trial May Hinge on Defendant's IQ*, The Fort Worth Star-Telegram, Oct. 6, 1997, at 1	1995	61% more likely to oppose	"For each of the following items that have been found to affect people's attitude about the death penalty, please state if you would be more likely to favor or more likely to oppose the death penalty, or wouldn't it matter . . . if the murderer is severely mentally retarded?"
TX	Scripps-Howard Texas Poll: Death Penalty (Mar. 2001) Dan Parker, *Most Texans Support Death Penalty*, Corpus Christi Caller-Times, Mar. 2, 2001, at A1	2001	66% no 17% yes 17% don't know/no answer	"Should the state use the death penalty when the inmate is considered mentally retarded?"

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
TX	Houston Chronicle (Feb. 2001) Stephen Brewer & Mike Tolson, *A Deadly Distinction: Part III, Debate Fervent in Mental Cases, Johnny Paul Penry Illustrates a Lingering Capital Conundrum*, The Houston Chronicle, Feb. 6, 2001, at A6	2001	59.9% no support 19.3% support 20.7% not sure/ no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"
US	Harris Poll, Unfinished Agenda on Race, Q. 32 (Sept. 1988) Saundra Torry, *High Court to Hear Case on Retarded Slayer*, The Washington Post, Jan. 11, 1989, at A6	1988	71% should not be executed 21% should be executed 4% depends 3% not sure/ refused	"Some people think that persons convicted of murder who have a mental age of less than 18 (or the 'retarded') should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like anyone else?"

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
US	Yankelovich Clancy Shulman, Time/CNN Poll, Q. 14 (July 7, 1989) Samuel R. Gross, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, Capital Punishment and the American Future (Feb. 2001)	1989	61% oppose 27% favor 12% not sure	"Do you favor or oppose the death penalty for mentally retarded individuals convicted of serious crimes, such as murder?"
US	The Tarrance Group, Death Penalty Poll, Q. 9 (Mar. 1993) Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 Cornell L. Rev. 1448, 1467 (1998)	1993	56% not all right 32% is all right 11% unsure	"Some people feel that there is nothing wrong with imposing the death penalty on persons who are mentally retarded, depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?"
US	Public Policy Research, Crime in America, Q. 72 (July 1995)	1995	67% likely to oppose 7% likely to favor 26% wouldn't matter	"For each item please tell me if you would be more likely to favor the death penalty, more likely to oppose the death

Appendix to opinion of REHNQUIST, C. J.

STATE	POLL	DATE	RESPONSE	QUESTION
				penalty or it wouldn't matter . . . if it is true that the murderer is severely mentally retarded?"
US	Princeton Research, Newsweek Poll, Q. 16 (Nov. 1995) Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 Cornell L. Rev. 1448, 1468 (1998)	1995	83% oppose 9% favor 8% don't know refused	"If the convicted person was . . . mentally retarded, would you favor or oppose the death penalty?"
US	Peter Hart Research Associates, Inc., Innocence Survey, Q. 12 (Dec. 1999)	1999	58% strongly/ somewhat favor 26% strongly/ somewhat oppose 12% mixed/ neutral 4% not sure	". . . [F]or each proposal I read, please tell me whether you strongly favor, somewhat favor, have mixed or neutral feelings, somewhat oppose, or strongly oppose that proposal . . . . [P]rohibit the death penalty for defendants who are mentally retarded."
US	Peter Hart Research Associates, Inc., Innocence Survey, Q. 9 (Dec. 1999)	1999	72% much/ somewhat less likely 19% no difference 9% not sure 47% much less likely	"Suppose you were on a jury and a defendant was convicted of murder. "Now it is time to determine the sentence. If you knew that the

STATE	POLL	DATE	RESPONSE	QUESTION
			25% somewhat less likely	defendant was mentally retarded or otherwise mentally impaired in a serious way, would you be much less likely to support the use of the death penalty in this specific case, somewhat less likely, or would it make no difference to you?"
US	Houston Chronicle (Feb. 2001) Stephen Brewer & Mike Tolson, *A Deadly Distinction: Part III, Debate Fervent in Mental Cases, Johnny Paul Penry Illustrates a Lingering Capital Conundrum*, The Houston Chronicle, Feb. 6, 2001, at A6	2001	63.8% no support 16.4% support 19.8% not sure/ no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"

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

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render

an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.

I

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw $200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

The jury convicted Atkins of capital murder. At resentencing (the Virginia Supreme Court affirmed his conviction but remanded for resentencing because the trial court had used an improper verdict form, 257 Va. 160, 179, 510 S. E. 2d 445, 457 (1999)), the jury heard extensive evidence of petitioner's alleged mental retardation. A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learner," App. 444, who showed a "lack of success in pretty much every domain of his life," *id.*, at 442, and that he had an "impaired" capacity to appreciate the criminality of his conduct and to conform his conduct to the law, *id.*, at 453. Petitioner's family members offered additional evidence in support of his mental retardation claim (*e. g.*, that petitioner is a "follower," *id.*, at 421). The Commonwealth contested the evidence of retardation and presented testimony of a psychologist who found "absolutely no evidence other than the IQ score . . . indicating that [peti-

tioner] was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." *Id.*, at 476.

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming. *Id.*, at 491–522. The victims of these offenses provided graphic depictions of petitioner's violent tendencies: He hit one over the head with a beer bottle, *id.*, at 406; he slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach, *id.*, at 411–413. The jury sentenced petitioner to death. The Supreme Court of Virginia affirmed petitioner's sentence. 260 Va. 375, 534 S. E. 2d 312 (2000).

II

As the foregoing history demonstrates, petitioner's mental retardation was a *central issue* at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. "In upsetting this particularized judgment on the basis of a constitutional absolute," the Court concludes that no one who is even slightly mentally retarded can have sufficient "moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." *Thompson* v. *Oklahoma*, 487 U. S. 815, 863–864 (1988) (SCALIA, J., dissenting).

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986), and modes of punishment that are inconsistent with

modern "'standards of decency,'" as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures," *Penry* v. *Lynaugh,* 492 U. S. 302, 330–331 (1989).

The Court makes no pretense that execution of the mildly mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as "idiots," enjoyed any special status under the law at that time. They, like lunatics, suffered a "deficiency in will" rendering them unable to tell right from wrong. 4 W. Blackstone, Commentaries on the Laws of England 24 (1769) (hereinafter Blackstone); see also *Penry,* 492 U. S., at 331–332 ("[T]he term 'idiot' was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil"); *id.,* at 333 (citing sources indicating that idiots generally had an IQ of 25 or below, which would place them within the "profound" or "severe" range of mental retardation under modern standards); 2 A. Fitz-Herbert, *Natura Brevium* 233B (9th ed. 1794) (originally published 1534) (An idiot is "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss"). Due to their incompetence, idiots were "excuse[d] from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 4 Blackstone 25; see also *Penry*, *supra*, at 331. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "go[ing] loose, to the terror of the king's subjects." 4 Blackstone 25; see also S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 12–14 (3d ed. 1985); 1 Blackstone 292–296; 1 M. Hale, Pleas of the Crown 33 (1st Am. ed. 1847). Mentally retarded offenders with less severe impairments—those who were not "idiots"—suffered criminal prosecution

and punishment, including capital punishment. See, *e. g.*, I. Ray, Medical Jurisprudence of Insanity 65, 87–92 (W. Overholser ed. 1962) (recounting the 1834 trial and execution in Concord, New Hampshire, of an apparent "imbecile"—imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind"); A. Highmore, Law of Idiocy and Lunacy 200 (1807) ("The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions . . .").

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) (Warren, C. J.). Before today, our opinions consistently emphasized that Eighth Amendment judgments regarding the existence of social "standards" "should be informed by objective factors to the maximum possible extent" and "should not be, or appear to be, merely the subjective views of individual Justices." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); see also *Stanford* v. *Kentucky*, 492 U. S. 361, 369 (1989); *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987); *Enmund* v. *Florida*, 458 U. S. 782, 788 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford*, *supra*, at 370; because it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives," *Thompson*, *supra*, at 865 (SCALIA, J., dissenting).

The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded, *ante*, at 316, from the fact that 18 States—less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded. Even that 47% figure is a distorted one. If one is to say, as the Court does today, that *all* executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against *all* such executions. Not 18 States, but only 7—18% of death penalty jurisdictions—have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation;[1] those already on death row, or consigned there before the statute's effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches. Two of these States permit execution of the mentally retarded in other situations as well: Kansas apparently permits execution of all

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[1] See Ariz. Rev. Stat. Ann. § 13–703.02(I) (Supp. 2001); Ark. Code Ann. § 5–4–618(d)(1) (1997); *Reams* v. *State*, 322 Ark. 336, 340, 909 S. W. 2d 324, 326–327 (1995); Fla. Stat. § 921.137(8) (Supp. 2002); Ga. Code Ann. § 17–7–131(j) (1997); Ind. Code § 35–36–9–6 (1998); *Rondon* v. *State*, 711 N. E. 2d 506, 512 (Ind. 1999); Kan. Stat. Ann. §§ 21–4623(d), 21–4631(c) (1995); Ky. Rev. Stat. Ann. § 532.140(3) (1999); Md. Ann. Code, Art. 27, § 412(g) (1996); *Booth* v. *State*, 327 Md. 142, 166–167, 608 A. 2d 162, 174 (1992); Mo. Rev. Stat. § 565.030(7) (Supp. 2001); N. Y. Crim. Proc. Law § 400.27.12(c) (McKinney Supp. 2002); 1995 N. Y. Laws, ch. 1, § 38; Tenn. Code Ann. § 39–13–203(b) (1997); *Van Tran* v. *State*, 66 S. W. 3d 790, 798–799 (Tenn. 2001).

except the *severely* mentally retarded;[2] New York permits execution of the mentally retarded who commit murder in a correctional facility. N. Y. Crim. Proc. Law § 400.27.12(d) (McKinney 2001); N. Y. Penal Law § 125.27 (McKinney 2002).

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone—*18*—should be enough to convince any reasonable person that no "national consensus" exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds. In *Coker*, *supra*, at 595–596, we proscribed the death penalty for rape of an adult woman after finding that only one jurisdiction, Georgia, authorized such a punishment. In *Enmund*, *supra*, at 789, we invalidated the death penalty for mere participation in a robbery in which an accomplice took a life, a punishment not permitted in 28 of the death penalty States (78%). In *Ford*, 477 U. S., at 408, we supported the common-law prohibition of execution of the insane with the observation that "[t]his ancestral legacy has not outlived its time," since not a single State authorizes such punishment. In *Solem* v. *Helm*, 463 U. S. 277, 300 (1983), we invalidated a life sentence without parole under a recidivist statute by which the criminal "was treated more severely than he would have been in any other State." What the Court calls evidence of "consensus" in the present case (a fudged 47%) more closely resembles evidence that we found *inadequate*

[2] The Kansas statute defines "mentally retarded" as "having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. § 21–4623(e) (2001). This definition of retardation, petitioner concedes, is analogous to the Model Penal Code's definition of a "mental disease or defect" excusing responsibility for criminal conduct, see ALI, Model Penal Code § 4.01 (1985), which would not include mild mental retardation. Reply Brief for Petitioner 3, n. 4.

to establish consensus in earlier cases. *Tison* v. *Arizona*, 481 U. S. 137, 154, 158 (1987), upheld a state law authorizing capital punishment for major participation in a felony with reckless indifference to life where only 11 of the 37 death penalty States (30%) prohibited such punishment. *Stanford*, 492 U. S., at 372, upheld a state law permitting execution of defendants who committed a capital crime at age 16 where only 15 of the 36 death penalty States (42%) prohibited death for such offenders.

Moreover, a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old;[3] five were enacted last year;[4] over half were enacted within the past eight years.[5] Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is "myopic to base sweeping constitutional principles upon the narrow experience of [a few] years." *Coker*, 433 U. S., at 614 (Burger, C. J., dissenting); see also *Thompson*, 487 U. S., at 854–855 (O'CONNOR, J., concurring in judgment).

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." *Ante*, at 315 (emphasis added). But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound*

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[3] Ga. Code Ann. § 17–7–131(j).

[4] Ariz. Rev. Stat. Ann. § 13–703.02; Conn. Gen. Stat. § 53a–46a(h); Fla. Stat. § 921.137; Mo. Rev. Stat. §§ 565.030(4)–(7); N. C. Gen. Stat. § 15A–2005.

[5] In addition to the statutes cited n. 4, *supra*, see S. D. Codified Laws § 23A–27A–26.1 (enacted 2000); Neb. Rev. Stat. §§ 28–105.01(2)–(5) (1998); N. Y. Crim. Proc. Law § 400.27(12) (1995); Ind. Code § 35–36–9–6 (1994); Kan. Stat. Ann. § 21–4623 (1994).

to be in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's "*consistency*-of-the-direction-of-change" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years." In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as JUSTICE O'CONNOR eloquently explained in *Thompson:*

> "In 1846, Michigan became the first State to abolish the death penalty . . . . In succeeding decades, other American States continued the trend towards abolition . . . . Later, and particularly after World War II, there ensued a steady and dramatic decline in executions . . . . In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. . . .
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> "In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." 487 U. S., at 854–855.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none.

The Court's thrashing about for evidence of "consensus" includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. *Ante*, at 316. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by how much*. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted *for* it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States. U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 21 (121st ed. 2001).) This is quite absurd. What we have looked for in the past to "evolve" the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.

Even less compelling (if possible) is the Court's argument, *ante*, at 316, that evidence of "national consensus" is to be found in the infrequency with which retarded persons are executed in States that do not bar their execution. To begin with, what the Court takes as true is in fact quite doubtful. It is not at all clear that execution of the mentally retarded is "uncommon," *ibid.*, as even the sources cited by the Court suggest, see *ante*, at 316, n. 20 (citing D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb. 1997) (updated by Death Penalty Information Center, available at http://www.advocacyone.org/deathpenalty.html (as visited

June 12, 2002) (showing that 12 States executed 35 allegedly mentally retarded offenders during the period 1984–2000)). See also Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000, p. A1 (reporting that 10% of death row inmates are retarded). *If*, however, execution of the mentally retarded *is* "uncommon"; and if it is not a sufficient explanation of this that the retarded constitute a tiny fraction of society (1% to 3%), Brief for American Psychological Association et al. as *Amici Curiae* 7; then surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing, *Penry*, 492 U. S., at 328. For that reason, even if there were uniform national sentiment in *favor* of executing the retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." To adapt to the present case what the Court itself said in *Stanford*, 492 U. S., at 374: "[I]t is not only possible, but overwhelmingly probable, that the very considerations which induce [today's majority] to believe that death should *never* be imposed on [mentally retarded] offenders . . . cause prosecutors and juries to believe that it should *rarely* be imposed."

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. *Ante*, at 316–317, n. 21. I agree with THE CHIEF JUSTICE, *ante*, at 325–328 (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant.[6] Equally irrelevant are the practices of the

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[6] And in some cases positively counterindicative. The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. See *ante*, at 316, n. 21 (citing Brief for United States Catholic Conference et al. as *Amici Curiae* 2). The attitudes of that body regarding crime and punish-

"world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Thompson*, 487 U. S., at 868–869, n. 4 (SCALIA, J., dissenting).

III

Beyond the empty talk of a "national consensus," the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. "'[T]he Constitution,'" the Court says, "contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Ante*, at 312 (quoting *Coker*, 433 U. S., at 597) (emphasis added). (The unexpressed reason for this unexpressed "contemplation" of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. "'[I]n the end,'" *Thompson*, *supra*, at 823, n. 8 (plurality opinion (quoting *Coker*, *supra*, at 597 (plurality opinion))), it is the *feelings* and *intuition* of a majority of the Justices that count—"the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and

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ment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism.

unrepresentative segment of our society that sits on this Court." *Thompson, supra,* at 873 (SCALIA, J., dissenting).

The genuinely operative portion of the opinion, then, is the Court's statement of the reasons why it agrees with the contrived consensus it has found, that the "diminished capacities" of the mentally retarded render the death penalty excessive. *Ante,* at 317–321. The Court's analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the "diminished capacities" of the retarded. The first assumption is wrong, as I explained at length in *Harmelin* v. *Michigan,* 501 U. S. 957, 966–990 (1991) (opinion of SCALIA, J.). The Eighth Amendment is addressed to always-and-everywhere "cruel" punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Id.,* at 990. The second assumption—inability of judges or juries to take proper account of mental retardation—is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters:

> "[I]t is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes . . . ." 1 Hale, Pleas of the Crown, at 30.

Proceeding from these faulty assumptions, the Court gives two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the "dimin-

ished capacities" of the mentally retarded raise a "serious question" whether their execution contributes to the "social purposes" of the death penalty, viz., retribution and deterrence. *Ante*, at 318–319. (The Court conveniently ignores a third "social purpose" of the death penalty—"incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future," *Gregg* v. *Georgia*, 428 U. S. 153, 183, n. 28 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). But never mind; its discussion of even the other two does not bear analysis.) Retribution is not advanced, the argument goes, because the mentally retarded are *no more culpable* than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty, see *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion). *Ante*, at 319. Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

Assuming, however, that there is a direct connection between diminished intelligence and the inability to refrain from murder, what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime—which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today

imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none. Once the Court admits (as it does) that mental retardation does not render the offender morally *blameless*, *ante*, at 318, there is no basis for saying that the death penalty is *never* appropriate retribution, no matter *how* heinous the crime. As long as a mentally retarded offender knows "the difference between right and wrong," *ibid.*, only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

As for the other social purpose of the death penalty that the Court discusses, deterrence: That is not advanced, the Court tells us, because the mentally retarded are "less likely" than their nonretarded counterparts to "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information." *Ante*, at 320. Of course this leads to the same conclusion discussed earlier—that the mentally retarded (because they are less deterred) are more likely to kill—which neither I nor the society at large believes. In any event, even the Court does not say that *all* mentally retarded individuals cannot "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. Virginia's death penalty, for example, does not fail of its deterrent effect simply because *some* criminals are unaware that Virginia *has* the death penalty. In other words, the supposed fact that *some*

retarded criminals cannot fully appreciate the death penalty has nothing to do with the deterrence rationale, but is simply an echo of the arguments denying a retribution rationale, discussed and rejected above. I am not sure that a murderer is somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be "less likely" to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor. *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–117 (1982).

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses. *Ante*, at 320–321. "Special risk" is pretty flabby language (even flabbier than "less likely")—and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt), it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim that execution of the mentally retarded is cruel and unusual. We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.

* * *

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those

requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the death penalty for "ordinary" murder, *Godfrey*, 446 U. S., at 433, for rape of an adult woman, *Coker*, 433 U. S., at 592, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*, 458 U. S., at 801; prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson*, 487 U. S., at 838 (plurality opinion); prohibition of the death penalty as the mandatory punishment for any crime, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), *Sumner* v. *Shuman*, 483 U. S. 66, 77–78 (1987); a requirement that the sentencer not be given unguided discretion, *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion), *Eddings* v. *Oklahoma*, *supra*, at 110; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford*, 477 U. S., at 410–411 (plurality opinion). There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, *ante*, at 308, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), *Jones* v. *United States*, 463 U. S. 354, 370, and n. 20 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency

of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded. See, *e. g.*, *Moore* v. *Texas*, 535 U. S. 1044 (2002) (SCALIA, J., dissenting from grant of applications for stay of execution).

Perhaps these practical difficulties will not be experienced by the minority of capital-punishment States that have very recently changed mental retardation from a mitigating factor (to be accepted or rejected by the sentencer) to an absolute immunity. Time will tell—and the brief time those States have had the new disposition in place (an average of 6.8 years) is surely not enough. But if the practical difficulties do not appear, and if the other States share the Court's perceived moral consensus that *all* mental retardation renders the death penalty inappropriate for *all* crimes, then that majority will presumably follow suit. But there is no justification for this Court's pushing them into the experiment—and turning the experiment into a permanent practice—on constitutional pretext. Nothing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago:

> "[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. . . .
>
> "Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses . . . , and by the inspection and direction of the judge." 1 Pleas of the Crown, at 32–33.

I respectfully dissent.

Syllabus

RUSH PRUDENTIAL HMO, INC. *v.* MORAN ET AL.

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

No. 00–1021. Argued January 16, 2002—Decided June 20, 2002

Petitioner Rush Prudential HMO, Inc., a health maintenance organization (HMO) that contracts to provide medical services for employee welfare benefit plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), denied respondent Moran's request to have surgery by an unaffiliated specialist on the ground that the procedure was not medically necessary. Moran made a written demand for an independent medical review of her claim, as guaranteed by § 4–10 of Illinois's HMO Act, which further provides that "[i]n the event that the reviewing physician determines the covered service to be medically necessary," the HMO "shall provide" the service. Rush refused her demand, and Moran sued in state court to compel compliance with the Act. That court ordered the review, which found the treatment necessary, but Rush again denied the claim. While the suit was pending, Moran had the surgery and amended her complaint to seek reimbursement. Rush removed the case to federal court, arguing that the amended complaint stated a claim for ERISA benefits. The District Court treated Moran's claim as a suit under ERISA and denied it on the ground that ERISA preempted § 4–10. The Seventh Circuit reversed. It found Moran's reimbursement claim preempted by ERISA so as to place the case in federal court, but it concluded that the state Act was not preempted as a state law that "relate[s] to" an employee benefit plan, 29 U. S. C. § 1144(a), because it also "regulates insurance" under ERISA's saving clause, § 1144(b)(2)(A).

Held: ERISA does not preempt the Illinois HMO Act. Pp. 364–387.

(a) In deciding whether a law regulates insurance, this Court starts with a commonsense view of the matter, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 740, which requires a law to "be specifically directed toward" the insurance industry, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50. It then tests the results of the commonsense enquiry by employing the three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act. Pp. 365–375.

(1) The Illinois HMO Act is directed toward the insurance industry, and thus is an insurance regulation under a commonsense view. Although an HMO provides health care in addition to insurance, nothing

in the saving clause requires an either-or choice between health care and insurance. Congress recognized, the year before passing ERISA, that HMOs are risk-bearing organizations subject to state insurance regulation. That conception has not changed in the intervening years. States have been adopting their own HMO enabling Acts, and at least 40, including Illinois, regulate HMOs primarily through state insurance departments. Rush cannot submerge HMOs' insurance features beneath an exclusive characterization of HMOs as health care providers. And the argument of Rush and its *amici* that § 4–10 sweeps beyond the insurance industry, capturing organizations that provide no insurance and regulating noninsurance activities of HMOs that do, is based on unsound assumptions. Pp. 366–373.

(2) The McCarran-Ferguson factors confirm this conclusion. A state law does not have to satisfy all three factors to survive preemption, and § 4–10 clearly satisfies two. The independent review requirement satisfies the factor that a provision regulate "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129. Illinois adds an extra review layer when there is an internal disagreement about an HMO's denial of coverage, and the reviewer both applies a medical care standard and construes policy terms. Thus, the review affects a policy relationship by translating the relationship under the HMO agreement into concrete terms of specific obligation or freedom from duty. The factor that the law be aimed at a practice "limited to entities within the insurance industry," *ibid.*, is satisfied for many of the same reasons that the law passes the commonsense test: It regulates application of HMO contracts and provides for review of claim denials; once it is established that HMO contracts are contracts for insurance, it is clear that § 4–10 does not apply to entities outside the insurance industry. Pp. 373–375.

(b) This Court rejects Rush's contention that, even though ERISA's saving clause ostensibly forecloses preemption, congressional intent to the contrary is so clear that it overrides the statutory provision. Pp. 375–386.

(1) The Court has recognized an overpowering federal policy of exclusivity in ERISA's civil enforcement provisions located at 29 U. S. C. § 1132(a); and it has anticipated that in a conflict between congressional polices of exclusively federal remedies and the States' regulation of insurance, the state regulation would lose out if it allows remedies that Congress rejected in ERISA, *Pilot Life*, 481 U. S., at 54. Rush argues that § 4–10 is preempted for creating the kind of alternative remedy that this Court disparaged in *Pilot Life*, one that subverts congressional intent, clearly expressed through ERISA's structure and legislative history, that the federal remedy displace state causes of action. Rush

overstates *Pilot Life*'s rule. The enquiry into state processes alleged to "supplemen[t] or supplan[t]" ERISA remedies, *id.*, at 56, has, up to now, been more straightforward than it is here. *Pilot Life, Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, and *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, all involved an additional claim or remedy that ERISA did not authorize. In contrast, the review here may settle a benefit claim's fate, but the state statute does not enlarge the claim beyond the benefits available in any § 1132(a) action. And although the reviewer's determination would presumably replace the HMO's as to what is medically necessary, the ultimate relief available would still be what ERISA authorizes in a § 1132(a) suit for benefits. This case therefore resembles the claims-procedure rule that the Court sustained in *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358. Section 4–10's procedure does not fall within *Pilot Life*'s categorical preemption. Pp. 377–380.

(2) Nor does § 4–10's procedural imposition interfere unreasonably with Congress's intention to provide a uniform federal regime of "rights and obligations" under ERISA. Although this Court has recognized a limited exception from the saving clause for alternative causes of action and alternative remedies, further limits on insurance regulation preserved by ERISA are unlikely to deserve recognition. A State might provide for a type of review that would so resemble an adjudication as to fall within *Pilot Life*'s categorical bar, but that is not the case here. Section 4–10 is significantly different from common arbitration. The independent reviewer has no free-ranging power to construe contract terms, but instead confines review to the single phrase "medically necessary." That reviewer must be a physician with credentials similar to those of the primary care physician and is expected to exercise independent medical judgment, based on medical records submitted by the parties, in deciding what medical necessity requires. This process does not resemble either contract interpretation or evidentiary litigation before a neutral arbiter as much as it looks like the practice of obtaining a second opinion. In addition, § 4–10 does not clash with any deferential standard for reviewing benefit denials in judicial proceedings. ERISA itself says nothing about a standard. It simply requires plans to afford a beneficiary some mechanism for internal review of a benefit denial and provides a right to a subsequent judicial forum for a claim to recover benefits. Although certain "discretionary" plan interpretations may receive deference from a reviewing court, see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 115, nothing in ERISA requires that medical necessity decisions be "discretionary" in the first place. Pp. 381–386.

230 F. 3d 959, affirmed.

Syllabus

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post,* p. 388.

John G. Roberts, Jr., argued the cause for petitioner. With him on the briefs were *Clifford D. Stromberg, Craig A. Hoover, Jonathan S. Franklin, Catherine E. Stetson, James T. Ferrini, Michael R. Grimm, Sr.,* and *Melinda S. Kollross.*

Daniel P. Albers argued the cause for respondents. With him on the brief for respondent Moran were *Mark E. Rust* and *Stanley C. Fickle. James E. Ryan,* Attorney General, *Joel D. Bertocchi,* Solicitor General, and *John Philip Schmidt* and *Mary Ellen Margaret Welsh,* Assistant Attorneys General, filed a brief for respondent State of Illinois.

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

**Miguel A. Estrada* and *Andrew S. Tulumello* filed a brief for the American Association of Health Plans, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *John Cornyn,* Attorney General of Texas, *Howard G. Baldwin, Jr.,* First Assistant Attorney General, *Jeffrey S. Boyd,* Deputy Attorney General, *Julie Parsley,* Solicitor General, *Christopher Livingston,* Assistant Attorney General, and *David C. Mattax,* and by the Attorneys General for their respective jurisdictions as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Gregory D'Auria* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *Steve Carter* of Indiana, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *J. Joseph Curran, Jr.,* of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.,* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M.*

JUSTICE SOUTER delivered the opinion of the Court.

Section 4–10 of Illinois's Health Maintenance Organization Act, 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000), provides recipients of health coverage by such organizations with a right to independent medical review of certain denials of benefits. The issue in this case is whether the statute, as applied to health benefits provided by a health maintenance organization under contract with an employee welfare benefit plan, is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U. S. C. § 1001 *et seq.* We hold it is not.

I

Petitioner, Rush Prudential HMO, Inc., is a health maintenance organization (HMO) that contracts to provide medical services for employee welfare benefit plans covered by ERISA. Respondent Debra Moran is a beneficiary under one such plan, sponsored by her husband's employer. Rush's "Certificate of Group Coverage," issued to employees who participate in employer-sponsored plans, promises that Rush will provide them with "medically necessary" services. The terms of the certificate give Rush the "broadest possible discretion" to determine whether a medical service claimed by a

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Condon of South Carolina, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Randolph A. Beales* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *Hoke MacMillan* of Wyoming, and *Anabelle Rodriguez* of Puerto Rico; for AARP et al. by *Mary Ellen Signorille*, *Michael R. Schuster*, *Paula Brantner*, *Ronald Dean*, and *Judith L. Lichtman;* for the American Medical Association et al. by *Jack R. Bierig*, *Richard G. Taranto*, *Jon N. Ekdahl*, *Leonard A. Nelson*, and *Saul J. Morse;* for the National Association of Insurance Commissioners by *Jennifer R. Cook*, *Mary Elizabeth Senkewicz*, and *Marc I. Machiz;* and for Texas Watch et al. by *George Parker Young.*

Briefs of *amici curiae* were filed for the California Consumer Health Care Council et al. by *Sharon J. Arkin;* and for United Policyholders by *Arnold R. Levinson.*

beneficiary is covered under the certificate. The certificate specifies that a service is covered as "medically necessary" if Rush finds:

> "(a) [The service] is furnished or authorized by a Participating Doctor for the diagnosis or the treatment of a Sickness or Injury or for the maintenance of a person's good health.
>
> "(b) The prevailing opinion within the appropriate specialty of the United States medical profession is that [the service] is safe and effective for its intended use, and that its omission would adversely affect the person's medical condition.
>
> "(c) It is furnished by a provider with appropriate training, experience, staff and facilities to furnish that particular service or supply." Record, Pl. Exh. A, p. 21.

As the certificate explains, Rush contracts with physicians "to arrange for or provide services and supplies for medical care and treatment" of covered persons. Each covered person selects a primary care physician from those under contract to Rush, while Rush will pay for medical services by an unaffiliated physician only if the services have been "authorized" both by the primary care physician and Rush's medical director. See *id.*, at 11, 16.

In 1996, when Moran began to have pain and numbness in her right shoulder, Dr. Arthur LaMarre, her primary care physician, unsuccessfully administered "conservative" treatments such as physiotherapy. In October 1997, Dr. LaMarre recommended that Rush approve surgery by an unaffiliated specialist, Dr. Julia Terzis, who had developed an unconventional treatment for Moran's condition. Although Dr. LaMarre said that Moran would be "best served" by that procedure, Rush denied the request and, after Moran's internal appeals, affirmed the denial on the ground that the procedure was not "medically necessary." 230 F. 3d 959, 963 (CA7

2000). Rush instead proposed that Moran undergo standard surgery, performed by a physician affiliated with Rush.

In January 1998, Moran made a written demand for an independent medical review of her claim, as guaranteed by § 4–10 of Illinois's HMO Act, 215 Ill. Comp. Stat., ch. 125, § 4–10 *et seq.* (2000), which provides:

> "Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician holding the same class of license as the primary care physician, who is unaffiliated with the Health Maintenance Organization, jointly selected by the patient . . . , primary care physician and the Health Maintenance Organization in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by a primary care physician. In the event that the reviewing physician determines the covered service to be medically necessary, the Health Maintenance Organization shall provide the covered service."

The Act defines a "Health Maintenance Organization" as

> "any organization formed under the laws of this or another state to provide or arrange for one or more health care plans under a system which causes any part of the risk of health care delivery to be borne by the organization or its providers." Ch. 125, § 1–2.[1]

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[1] In the health care industry, the term "Health Maintenance Organization" has been defined as "[a] prepaid organized delivery system where the organization *and* the primary care physicians assume some financial risk for the care provided to its enrolled members. . . . In a *pure HMO*, members must obtain care from within the system if it is to be reimbursed." Weiner & de Lissovoy, Razing a Tower of Babel: A Taxonomy for Managed Care and Health Insurance Plans, 18 J. of Health Politics, Policy and Law 75, 96 (Spring 1993) (emphasis in original). The term "Managed Care Organization" is used more broadly to refer to any number of systems combining health care delivery with financing. *Id.*, at 97. The Illinois definition of HMO does not appear to be limited to the tradi-

When Rush failed to provide the independent review, Moran sued in an Illinois state court to compel compliance with the state Act. Rush removed the suit to Federal District Court, arguing that the cause of action was "completely preempted" under ERISA. 230 F. 3d, at 964.

While the suit was pending, Moran had surgery by Dr. Terzis at her own expense and submitted a $94,841.27 reimbursement claim to Rush. Rush treated the claim as a renewed request for benefits and began a new inquiry to determine coverage. The three doctors consulted by Rush said the surgery had been medically unnecessary.

Meanwhile, the federal court remanded the case back to state court on Moran's motion, concluding that because Moran's request for independent review under § 4–10 would not require interpretation of the terms of an ERISA plan, the claim was not "completely preempted" so as to permit removal under 28 U. S. C. § 1441.[2] 230 F. 3d, at 964. The state court enforced the state statute and ordered Rush to submit to review by an independent physician. The doctor selected was a reconstructive surgeon at Johns Hopkins Medical Center, Dr. A. Lee Dellon. Dr. Dellon decided that Dr. Terzis's treatment had been medically necessary, based on the definition of medical necessity in Rush's Certificate of

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tional usage of that term, but instead is likely to encompass a variety of different structures (although Illinois does distinguish HMOs from pure insurers by regulating "traditional" health insurance in a different portion of its insurance laws, 215 Ill. Comp. Stat., ch. 5 (2000)). Except where otherwise indicated, we use the term "HMO" because that is the term used by the State and the parties; what we intend is simply to describe the structures covered by the Illinois Act.

[2] In light of our holding today that § 4–10 is not preempted by ERISA, the propriety of this ruling is questionable; a suit to compel compliance with § 4–10 in the context of an ERISA plan would seem to be akin to a suit to compel compliance with the terms of a plan under 29 U. S. C. § 1132(a)(3). Alternatively, the proper course may have been to bring a suit to recover benefits due, alleging that the denial was improper in the absence of compliance with § 4–10. We need not resolve today which of these options is more consonant with ERISA.

Group Coverage, as well as his own medical judgment. Rush's medical director, however, refused to concede that the surgery had been medically necessary, and denied Moran's claim in January 1999.

Moran amended her complaint in state court to seek reimbursement for the surgery as "medically necessary" under Illinois's HMO Act, and Rush again removed to federal court, arguing that Moran's amended complaint stated a claim for ERISA benefits and was thus completely preempted by ERISA's civil enforcement provisions, 29 U. S. C. § 1132(a), as construed by this Court in *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58 (1987). The District Court treated Moran's claim as a suit under ERISA, and denied the claim on the ground that ERISA preempted Illinois's independent review statute.[3]

The Court of Appeals for the Seventh Circuit reversed. 230 F. 3d 959 (2000). Although it found Moran's state-law reimbursement claim completely preempted by ERISA so as to place the case in federal court, the Seventh Circuit did not agree that the substantive provisions of Illinois's HMO Act were so preempted. The court noted that although ERISA broadly preempts any state laws that "relate to" employee benefit plans, 29 U. S. C. § 1144(a), state laws that "regulat[e]

[3] No party has challenged Rush's status as defendant in this case, despite the fact that many lower courts have interpreted ERISA to permit suits under § 1132(a) only against ERISA plans, administrators, or fiduciaries. See, *e. g.*, *Everhart* v. *Allmerica Financial Life Ins. Co.*, 275 F. 3d 751, 754–756 (CA9 2001); *Garren* v. *John Hancock Mut. Life Ins. Co.*, 114 F. 3d 186, 187 (CA11 1997); *Jass* v. *Prudential Health Care Plan, Inc.*, 88 F. 3d 1482, 1490 (CA7 1996). Without commenting on the correctness of such holdings, we assume (although the information does not appear in the record) that Rush has failed to challenge its status as defendant because it is, in fact, the plan administrator. This conclusion is buttressed by the fact that the plan's sponsor has granted Rush discretion to interpret the terms of its coverage, and by the fact that one of Rush's challenges to the Illinois statute is based on what Rush perceives as the limits that statute places on fiduciary discretion. Whatever Rush's true status may be, however, it is immaterial to our holding.

insurance" are saved from preemption, § 1144(b)(2)(A). The court held that the Illinois HMO Act was such a law, the independent review requirement being little different from a state-mandated contractual term of the sort this Court had held to survive ERISA preemption. See 230 F. 3d, at 972 (citing *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 375–376 (1999)). The Seventh Circuit rejected the contention that Illinois's independent review requirement constituted a forbidden "alternative remedy" under this Court's holding in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41 (1987), and emphasized that § 4–10 does not authorize any particular form of relief in state courts; rather, with respect to any ERISA health plan, the judgment of the independent reviewer is only enforceable in an action brought under ERISA's civil enforcement scheme, 29 U. S. C. § 1132(a). 230 F. 3d, at 971.

Because the decision of the Court of Appeals conflicted with the Fifth Circuit's treatment of a similar provision of Texas law in *Corporate Health Ins., Inc.* v. *Texas Dept. of Ins.*, 215 F. 3d 526 (2000), we granted certiorari, 533 U. S. 948 (2001). We now affirm.

II

To "safeguar[d] . . . the establishment, operation, and administration" of employee benefit plans, ERISA sets "minimum standards . . . assuring the equitable character of such plans and their financial soundness," 29 U. S. C. § 1001(a), and contains an express preemption provision that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." § 1144(a). A saving clause then reclaims a substantial amount of ground with its provision that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." § 1144(b)(2)(A). The "unhelpful" drafting of these antiphonal clauses, *New York State Confer-*

ence of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U. S. 645, 656 (1995), occupies a substantial share of this Court's time, see, *e. g.*, *Egelhoff* v. *Egelhoff*, 532 U. S. 141 (2001); *UNUM Life Ins. Co. of America* v. *Ward*, *supra; California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316 (1997); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985). In trying to extrapolate congressional intent in a case like this, when congressional language seems simultaneously to preempt everything and hardly anything, we "have no choice" but to temper the assumption that "'the ordinary meaning . . . accurately expresses the legislative purpose,'" *id.*, at 740 (quoting *Park 'N Fly* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985)), with the qualification "'that the historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Travelers*, *supra*, at 655 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

It is beyond serious dispute that under existing precedent §4–10 of the Illinois HMO Act "relates to" employee benefit plans within the meaning of §1144(a). The state law bears "indirectly but substantially on all insured benefit plans," *Metropolitan Life*, 471 U. S., at 739, by requiring them to submit to an extra layer of review for certain benefit denials if they purchase medical coverage from any of the common types of health care organizations covered by the state law's definition of HMO. As a law that "relates to" ERISA plans under §1144(a), §4–10 is saved from preemption only if it also "regulates insurance" under §1144(b)(2)(A). Rush insists that the Act is not such a law.

A

In *Metropolitan Life*, we said that in deciding whether a law "regulates insurance" under ERISA's saving clause, we start with a "common-sense view of the matter," 471 U. S.,

at 740, under which "a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co.* v. *Dedeaux*, *supra*, at 50. We then test the results of the commonsense enquiry by employing the three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.*[4] Although this is not the place to plot the exact perimeter of the saving clause, it is generally fair to think of the combined "commonsense" and McCarran-Ferguson factors as parsing the "who" and the "what": when insurers are regulated with respect to their insurance practices, the state law survives ERISA. Cf. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 211 (1979) (explaining that the "business of insurance" is not coextensive with the "business of insurers").

1

The commonsense enquiry focuses on "primary elements of an insurance contract[, which] are the spreading and underwriting of a policyholder's risk." *Ibid.* The Illinois statute addresses these elements by defining "health maintenance organization" by reference to the risk that it bears. See 215 Ill. Comp. Stat., ch. 125, § 1–2(9) (2000) (an HMO "provide[s] or arrange[s] for . . . health care plans under a system which causes any part of the risk of health care delivery to be borne by the organization or its providers").

Rush contends that seeing an HMO as an insurer distorts the nature of an HMO, which is, after all, a health care provider, too. This, Rush argues, should determine its characterization, with the consequence that regulation of an HMO is not insurance regulation within the meaning of ERISA.

[4] The McCarran-Ferguson Act requires that the business of insurance be subject to state regulation, and, subject to certain exceptions, mandates that "[n]o Act of Congress shall be construed to invalidate . . . any law enacted by any State for the purpose of regulating the business of insurance . . . ." 15 U. S. C. § 1012(b).

The answer to Rush is, of course, that an HMO is both: it provides health care, and it does so as an insurer. Nothing in the saving clause requires an either-or choice between health care and insurance in deciding a preemption question, and as long as providing insurance fairly accounts for the application of state law, the saving clause may apply. There is no serious question about that here, for it would ignore the whole purpose of the HMO-style of organization to conceive of HMOs (even in the traditional sense, see n. 1, *supra*) without their insurance element.

"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." *Pegram* v. *Herdrich*, 530 U. S. 211, 218 (2000). "The HMO thus assumes the financial risk of providing the benefits 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 . . . ." *Id.*, at 218–219. The HMO design goes beyond the simple truism that all contracts are, in some sense, insurance against future fluctuations in price, R. Posner, Economic Analysis of Law 104 (4th ed. 1992), because HMOs actually underwrite and spread risk among their participants, see, *e. g.*, R. Shouldice, Introduction to Managed Care 450–462 (1991), a feature distinctive to insurance, see, *e. g.*, *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65, 73 (1959) (underwriting of risk is an "earmark of insurance as it has commonly been conceived of in popular understanding and usage"); *Royal Drug*, *supra*, at 214–215, n. 12 ("[U]nless there is some element of spreading risk more widely, there is no underwriting of risk").

So Congress has understood from the start, when the phrase "Health Maintenance Organization" was established and defined in the HMO Act of 1973. The Act was intended to encourage the development of HMOs as a new form of health care delivery system, see S. Rep. No. 93–129, pp. 7–9

(1973), and when Congress set the standards that the new health delivery organizations would have to meet to get certain federal benefits, the terms included requirements that the organizations bear and manage risk. See, *e. g.*, Health Maintenance Organization Act of 1973, § 1301(c), 87 Stat. 916, as amended, 42 U. S. C. § 300e(c); S. Rep. No. 93–129, at 14 (explaining that HMOs necessarily bear some of the risk of providing service, and requiring that a qualifying HMO "assum[e] direct financial responsibility, without benefit of reinsurance, for care . . . in excess of the first five thousand dollars per enrollee per year"). The Senate Committee Report explained that federally qualified HMOs would be required to provide "a basic package of benefits, consistent with existing health insurance patterns," *id.*, at 10, and the very text of the Act assumed that state insurance laws would apply to HMOs; it provided that to the extent state insurance capitalization and reserve requirements were too stringent to permit the formation of HMOs, "qualified" HMOs would be exempt from such limiting regulation. See § 1311, 42 U. S. C. § 300e–10. This congressional understanding that it was promoting a novel form of insurance was made explicit in the Senate Report's reference to the practices of "health insurers to charge premium rates based upon the actual claims experience of a particular group of subscribers," thus "raising costs and diminishing the availability of health insurance for those suffering from costly illnesses," S. Rep. No. 93–129, at 29–30. The federal Act responded to this insurance practice by requiring qualifying HMOs to adopt uniform capitation rates, see § 1301(b), 42 U. S. C. § 300e(b), and it was because of that mandate "pos[ing] substantial competitive problems to newly emerging HMOs," S. Rep. No. 93–129, at 30, that Congress authorized funding subsidies, see § 1304, 42 U. S. C. § 300e–4. The Senate explanation left no doubt that it viewed an HMO as an insurer; the subsidy was justified because "the same stringent requirements do not apply to other indemnity or service benefits insurance plans."

S. Rep. No. 93–129, at 30. In other words, one year before it passed ERISA, Congress itself defined HMOs in part by reference to risk, set minimum standards for managing the risk, showed awareness that States regulated HMOs as insurers, and compared HMOs to "indemnity or service benefits insurance plans."

This conception has not changed in the intervening years. Since passage of the federal Act, States have been adopting their own HMO enabling Acts, and today, at least 40 of them, including Illinois, regulate HMOs primarily through the States' insurance departments, see Aspen Health Law and Compliance Center, Managed Care Law Manual 31–32 (Supp. 6, Nov. 1997), although they may be treated differently from traditional insurers, owing to their additional role as health care providers,[5] see, *e. g.*, Alaska Ins. Code § 21.86.010 (2000) (health department reviews HMO before insurance commissioner grants a certificate of authority); Ohio Rev. Code Ann. § 1742.21 (West 1994) (health department may inspect HMO). Finally, this view shared by Congress and the States has passed into common understanding. HMOs (broadly defined) have "grown explosively in the past decade and [are] now the dominant form of health plan coverage for privately insured individuals." Gold & Hurley, The Role of Managed Care "Products" in Managed Care "Plans," in Contemporary Managed Care 47 (M. Gold ed. 1998). While the original form of the HMO was a single corporation employing its own physicians, the 1980's saw a variety of other types of structures develop even as traditional insurers altered their own

[5] We have, in a limited number of cases, found certain contracts not to be part of the "business of insurance" under McCarran-Ferguson, notwithstanding their classification as such for the purpose of state regulation. See, *e. g.*, *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65 (1959). Even then, however, we recognized that such classifications are relevant to the enquiry, because Congress, in leaving the "business of insurance" to the States, "was legislating concerning a concept which had taken on its coloration and meaning largely from state law, from state practice, from state usage." *Id.*, at 69.

plans by adopting HMO-like cost-control measures. See Weiner & de Lissovoy, Razing a Tower of Babel: A Taxonomy for Managed Care and Health Insurance Plans, 18 J. of Health Politics, Policy and Law 75, 83 (Spring 1993). The dominant feature is the combination of insurer and provider, see Gold & Hurley, *supra*, at 47, and "an observer may be hard pressed to uncover the differences among products that bill themselves as HMOs, [preferred provider organizations], or managed care overlays to health insurance," Managed Care Law Manual, *supra*, at 1. Thus, virtually all commentators on the American health care system describe HMOs as a combination of insurer and provider, and observe that in recent years, traditional "indemnity" insurance has fallen out of favor. See, *e. g.*, Weiner & de Lissovoy, *supra*, at 77 ("A common characteristic of the new managed care plans was the degree to which the roles of insurer and provider became integrated"); Gold, Understanding the Roots: Health Maintenance Organizations in Historical Context, in Contemporary Managed Care, *supra*, at 7, 8, 13; Managed Care Law Manual, *supra*, at 1; R. Rosenblatt, S. Law, & S. Rosenbaum, Law and the American Health Care System 552 (1997); Shouldice, Introduction to Managed Care, at 13, 20. Rush cannot checkmate common sense by trying to submerge HMOs' insurance features beneath an exclusive characterization of HMOs as providers of health care.

2

On a second tack, Rush and its *amici* dispute that § 4–10 is aimed specifically at the insurance industry. They say the law sweeps too broadly with definitions capturing organizations that provide no insurance, and by regulating noninsurance activities of HMOs that do. Rush points out that Illinois law defines HMOs to include organizations that cause the risk of health care delivery to be borne by the organization itself, or by "its providers." 215 Ill. Comp. Stat., ch. 125, § 1–2(9) (2000). In Rush's view, the reference to "its

providers" suggests that an organization may be an HMO under state law (and subject to § 4–10) even if it does not bear risk itself, either because it has "devolve[d]" the risk of health care delivery onto others, or because it has contracted only to provide "administrative" or other services for self-funded plans. Brief for Petitioner 38.

These arguments, however, are built on unsound assumptions. Rush's first contention assumes that an HMO is no longer an insurer when it arranges to limit its exposure, as when an HMO arranges for capitated contracts to compensate its affiliated physicians with a set fee for each HMO patient regardless of the treatment provided. Under such an arrangement, Rush claims, the risk is not borne by the HMO at all. In a similar vein, Rush points out that HMOs may contract with third-party insurers to protect themselves against large claims.

The problem with Rush's argument is simply that a reinsurance contract does not take the primary insurer out of the insurance business, cf. *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764 (1993) (applying McCarran-Ferguson to a dispute involving primary insurers and reinsurers); *id.*, at 772–773 ("[P]rimary insurers . . . usually purchase insurance to cover a portion of the risk they assume from the consumer"), and capitation contracts do not relieve the HMO of its obligations to the beneficiary. The HMO is still bound to provide medical care to its members, and this is so regardless of the ability of physicians or third-party insurers to honor their contracts with the HMO.

Nor do we see anything standing in the way of applying the saving clause if we assume that the general state definition of HMO would include a contractor that provides only administrative services for a self-funded plan.[6] Rush points

[6] ERISA's "deemer" clause provides an exception to its saving clause that prohibits States from regulating self-funded plans as insurers. See 29 U. S. C. § 1144(b)(2)(B); *FMC Corp.* v. *Holliday*, 498 U. S. 52, 61 (1990). Therefore, Illinois's Act would not be "saved" as an insurance law to the

out that the general definition of HMO under Illinois law includes not only organizations that "provide" health care plans, but those that "arrange for" them to be provided, so long as "any part of the risk of health care delivery" rests upon "the organization or its providers." 215 Ill. Comp. Stat., ch. 125, § 1–2(9) (2000). See Brief for Petitioner 38. Rush hypothesizes a sort of medical matchmaker, bringing together ERISA plans and medical care providers; even if the latter bear all the risks, the matchmaker would be an HMO under the Illinois definition. Rush would conclude from this that § 4–10 covers noninsurers, and so is not directed specifically to the insurance industry. Ergo, ERISA's saving clause would not apply.

It is far from clear, though, that the terms of § 4–10 would even theoretically apply to the matchmaker, for the requirement that the HMO "provide" the covered service if the independent reviewer finds it medically necessary seems to assume that the HMO in question is a provider, not the mere arranger mentioned in the general definition of an HMO. Even on the most generous reading of Rush's argument, however, it boils down to the bare possibility (not the likelihood) of some overbreadth in the application of § 4–10 beyond orthodox HMOs, and there is no reason to think Congress would have meant such minimal application to noninsurers to remove a state law entirely from the category of insurance regulation saved from preemption.

In sum, prior to ERISA's passage, Congress demonstrated an awareness of HMOs as risk-bearing organizations subject to state insurance regulation, the state Act defines HMOs by reference to risk bearing, HMOs have taken over much business formerly performed by traditional indemnity insurers, and they are almost universally regulated as insurers under state law. That HMOs are not traditional "indem-

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extent it applied to self-funded plans. This fact, however, does not bear on Rush's challenge to the law as one that is targeted toward non-risk-bearing organizations.

nity" insurers is no matter; "we would not undertake to freeze the concepts of 'insurance' . . . into the mold they fitted when these Federal Acts were passed." *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S., at 71. Thus, the Illinois HMO Act is a law "directed toward" the insurance industry, and an "insurance regulation" under a "commonsense" view.

B

The McCarran-Ferguson factors confirm our conclusion. A law regulating insurance for McCarran-Ferguson purposes targets practices or provisions that "ha[ve] the effect of transferring or spreading a policyholder's risk; . . . [that are] an integral part of the policy relationship between the insurer and the insured; and [are] limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982). Because the factors are guideposts, a state law is not required to satisfy all three McCarran-Ferguson criteria to survive preemption, see *UNUM Life Ins. Co.* v. *Ward*, 526 U. S., at 373, and so we follow our precedent and leave open whether the review mandated here may be described as going to a practice that "spread[s] a policyholder's risk." For in any event, the second and third factors are clearly satisfied by § 4–10.

It is obvious enough that the independent review requirement regulates "an integral part of the policy relationship between the insurer and the insured." Illinois adds an extra layer of review when there is internal disagreement about an HMO's denial of coverage. The reviewer applies both a standard of medical care (medical necessity) and characteristically, as in this case, construes policy terms. Cf. *Pegram* v. *Herdrich*, 530 U. S., at 228–229. The review affects the "policy relationship" between HMO and covered persons by translating the relationship under the HMO agreement into concrete terms of specific obligation or freedom from duty. Hence our repeated statements that the interpretation of insurance contracts is at the "core" of the business of

insurance. *E. g., SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969).

Rush says otherwise, citing *Union Labor Life Ins. Co.* v. *Pireno*, *supra*, and insisting that that case holds external review of coverage decisions to be outside the "policy relationship." But Rush misreads *Pireno*. We held there that an insurer's use of a "peer review" committee to gauge the necessity of particular treatments was not a practice integral to the policy relationship for the purposes of McCarran-Ferguson. 458 U. S., at 131–132. We emphasized, however, that the insurer's resort to peer review was simply the insurer's unilateral choice to seek advice if and when it cared to do so. The policy said nothing on the matter. The insurer's contract for advice from a third party was no concern of the insured, who was not bound by the peer review committee's recommendation any more, for that matter, than the insurer was. Thus it was not too much of an exaggeration to conclude that the practice was "a matter of indifference to the policyholder," *id.*, at 132. Section 4–10, by contrast, is different on all counts, providing as it does a legal right to the insured, enforceable against the HMO, to obtain an authoritative determination of the HMO's medical obligations.

The final factor, that the law be aimed at a "practice . . . limited to entities within the insurance industry," *id.*, at 129, is satisfied for many of the same reasons that the law passes the commonsense test. The law regulates application of HMO contracts and provides for review of claim denials; once it is established that HMO contracts are, in fact, contracts for insurance (and not merely contracts for medical care), it is clear that § 4–10 does not apply to entities outside the insurance industry (although it does not, of course, apply to all entities within it).

Even if we accepted Rush's contention, rejected already, that the law regulates HMOs even when they act as pure administrators, we would still find the third factor satisfied.

That factor requires the targets of the law to be limited to entities within the insurance industry, and even a matchmaking HMO would fall within the insurance industry. But the implausibility of Rush's hypothesis that the pure administrator would be bound by § 4–10 obviates any need to say more under this third factor. Cf. *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 39 (1996) (holding that a federal statute permitting banks to act as agents of insurance companies, although not insurers themselves, was a statute regulating the "business of insurance" for McCarran-Ferguson purposes).

III

Given that § 4–10 regulates insurance, ERISA's mandate that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance," 29 U. S. C. § 1144(b)(2)(A), ostensibly forecloses preemption. See *Metropolitan Life*, 471 U. S., at 746 ("If a state law 'regulates insurance,' . . . it is not preempted"). Rush, however, does not give up. It argues for preemption anyway, emphasizing that the question is ultimately one of congressional intent, which sometimes is so clear that it overrides a statutory provision designed to save state law from being preempted. See *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 227 (1998) *(AT&T)* (clause in Communications Act of 1934 purporting to save "the remedies now existing at common law or by statute," 47 U. S. C. § 414 (1994 ed.), defeated by overriding policy of the filed-rate doctrine); *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 507 (1913) (saving clause will not sanction state laws that would nullify policy expressed in federal statute; "the act cannot be said to destroy itself" (internal quotation marks omitted)).

In ERISA law, we have recognized one example of this sort of overpowering federal policy in the civil enforcement provisions, 29 U. S. C. § 1132(a), authorizing civil actions for

six specific types of relief.[7] In *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134 (1985), we said those provisions amounted to an "interlocking, interrelated, and interdependent remedial scheme," *id.*, at 146, which *Pilot Life* described as "represent[ing] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans," 481 U. S., at 54. So, we have held, the civil enforcement provisions are of such extraordinarily preemptive power that they override even the "well-pleaded complaint" rule for establishing the conditions under which a cause of action may be removed to a federal forum. *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S., at 63–64.

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[7] Title 29 U. S. C. § 1132(a) provides in relevant part:

"A civil action may be brought—

"(1) by a participant or beneficiary—

"(A) for the relief provided for in subsection (c) of this section [concerning requests to the administrator for information], or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [breach of fiduciary duty];

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title [information to be furnished to participants];

"(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

"(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (*l*) of this section."

A

Although we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the "reservation of the business of insurance to the States," *Metropolitan Life*, 471 U. S., at 744, n. 21, we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants "to obtain remedies . . . that Congress rejected in ERISA," *Pilot Life*, *supra*, at 54.

In *Pilot Life*, an ERISA plan participant who had been denied benefits sued in a state court on state tort and contract claims. He sought not merely damages for breach of contract, but also damages for emotional distress and punitive damages, both of which we had held unavailable under relevant ERISA provisions. *Russell*, *supra*, at 148. We not only rejected the notion that these common law contract claims "regulat[ed] insurance," *Pilot Life*, 481 U. S., at 50–51, but went on to say that, regardless, Congress intended a "federal common law of rights and obligations" to develop under ERISA, *id.*, at 56, without embellishment by independent state remedies. As in *AT&T*, we said the saving clause had to stop short of subverting congressional intent, clearly expressed "through the structure and legislative history[,] that the federal remedy . . . displace state causes of action." 481 U. S., at 57.[8]

Rush says that the day has come to turn dictum into holding by declaring that the state insurance regulation, § 4–10, is preempted for creating just the kind of "alternative remedy" we disparaged in *Pilot Life*. As Rush sees it, the inde-

[8] Rush and its *amici* interpret *Pilot Life* to have gone a step further to hold that any law that presents such a conflict with federal goals is simply not a law that "regulates insurance," however else the "insurance" test comes out. We believe the point is largely academic. As will be discussed further, even under Rush's approach, a court must still determine whether the state law at issue does, in fact, create such a conflict. Thus, we believe that it is more logical to proceed as we have done here.

pendent review procedure is a form of binding arbitration that allows an ERISA beneficiary to submit claims to a new decisionmaker to examine Rush's determination *de novo*, supplanting judicial review under the "arbitrary and capricious" standard ordinarily applied when discretionary plan interpretations are challenged. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 110–112 (1989). Rush says that the beneficiary's option falls within *Pilot Life*'s notion of a remedy that "supplement[s] or supplant[s]" the remedies available under ERISA. 481 U. S., at 56.

We think, however, that Rush overstates the rule expressed in *Pilot Life*. The enquiry into state processes alleged to "supplemen[t] or supplan[t]" the federal scheme by allowing beneficiaries "to obtain remedies under state law that Congress rejected in ERISA," *id.*, at 54, has, up to now, been far more straightforward than it is here. The first case touching on the point did not involve preemption at all; it arose from an ERISA beneficiary's reliance on ERISA's own enforcement scheme to claim a private right of action for types of damages beyond those expressly provided. *Russell*, 473 U. S., at 145. We concluded that Congress had not intended causes of action under ERISA itself beyond those specified in § 1132(a). *Id.*, at 148. Two years later we determined in *Metropolitan Life Ins. Co.* v. *Taylor*, *supra*, that Congress had so completely preempted the field of benefits law that an ostensibly state cause of action for benefits was necessarily a "creature of federal law" removable to federal court. *Id.*, at 64 (internal quotation marks omitted). *Russell* and *Taylor* naturally led to the holding in *Pilot Life* that ERISA would not tolerate a diversity action seeking monetary damages for breach generally and for consequential emotional distress, neither of which Congress had authorized in § 1132(a). These monetary awards were claimed as remedies to be provided at the ultimate step of plan enforcement, and even if they could have been characterized as products of "insurance regulation," they would have signifi-

cantly expanded the potential scope of ultimate liability imposed upon employers by the ERISA scheme.

Since *Pilot Life*, we have found only one other state law to "conflict" with § 1132(a) in providing a prohibited alternative remedy. In *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133 (1990), we had no trouble finding that Texas's tort of wrongful discharge, turning on an employer's motivation to avoid paying pension benefits, conflicted with ERISA enforcement; while state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under § 1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal). Thus, *Ingersoll-Rand* fit within the category of state laws *Pilot Life* had held to be incompatible with ERISA's enforcement scheme; the law provided a form of ultimate relief in a judicial forum that added to the judicial remedies provided by ERISA. Any such provision patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred. See *Pilot Life*, *supra*, at 56 (" 'The uniformity of decision . . . will help administrators . . . predict the legality of proposed actions without the necessity of reference to varying state laws' " (quoting H. R. Rep. No. 93–533, p. 12 (1973))); 481 U. S., at 56 ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under [§ 1132(a)] could be supplemented or supplanted by varying state laws").

But this case addresses a state regulatory scheme that provides no new cause of action under state law and authorizes no new form of ultimate relief. While independent review under § 4–10 may well settle the fate of a benefit claim under a particular contract, the state statute does not en-

large the claim beyond the benefits available in any action brought under § 1132(a). And although the reviewer's determination would presumably replace that of the HMO as to what is "medically necessary" under this contract,[9] the relief ultimately available would still be what ERISA authorizes in a suit for benefits under § 1132(a).[10] This case therefore does not involve the sort of additional claim or remedy exemplified in *Pilot Life*, *Russell*, and *Ingersoll-Rand*, but instead bears a resemblance to the claims-procedure rule that we sustained in *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358 (1999), holding that a state law barring enforcement of a policy's time limitation on submitting claims did not conflict with § 1132(a), even though the state "rule of decision," *id.*, at 377, could mean the difference between success and failure for a beneficiary. The procedure provided by § 4–10 does not fall within *Pilot Life*'s categorical preemption.

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[9] The parties do not dispute that § 4–10, as a matter of state law, purports to make the independent reviewer's judgment dispositive as to what is "medically necessary." We accept this interpretation of the meaning of the statute for the purposes of our opinion.

[10] This is not to say that the court would have no role beyond ordering compliance with the reviewer's determination. The court would have the responsibility, for example, to fashion appropriate relief, or to determine whether other aspects of the plan (beyond the "medical necessity" of a particular treatment) affect the relative rights of the parties. Rush, for example, has chosen to guarantee medically necessary services to plan participants. For that reason, to the extent § 4–10 may render the independent reviewer the final word on what is necessary, see n. 9, *supra*, Rush is obligated to provide the service. But insurance contracts do not have to contain such guarantees, and not all do. Some, for instance, guarantee medically necessary care, but then modify that obligation by excluding experimental procedures from coverage. See, *e. g.*, *Tillery* v. *Hoffman Enclosures, Inc.*, 280 F. 3d 1192 (CA8 2002). Obviously, § 4–10 does not have anything to say about whether a proposed procedure is experimental. There is also the possibility, though we do not decide the issue today, that a reviewer's judgment could be challenged as inaccurate or biased, just as the decision of a plan fiduciary might be so challenged.

B

Rush still argues for going beyond *Pilot Life*, making the preemption issue here one of degree, whether the state procedural imposition interferes unreasonably with Congress's intention to provide a uniform federal regime of "rights and obligations" under ERISA. However, "[s]uch disuniformities . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life*, 471 U. S., at 747.[11] Although we have recognized a limited exception from the saving clause for alternative causes of action and alternative remedies in the sense described above, we have never indicated that there might be additional justifications for qualifying the clause's application. Rush's arguments today convince us that further limits on insurance regulation preserved by ERISA are unlikely to deserve recognition.

To be sure, a State might provide for a type of "review" that would so resemble an adjudication as to fall within *Pilot Life*'s categorical bar. Rush, and the dissent, *post*, at 394 (opinion of THOMAS, J.), contend that § 4–10 fills that bill by imposing an alternative scheme of arbitral adjudication at

[11] Thus, we do not believe that the mere fact that state independent review laws are likely to entail different procedures will impose burdens on plan administration that would threaten the object of 29 U. S. C. § 1132(a); it is the HMO contracting with a plan, and not the plan itself, that will be subject to these regulations, and every HMO will have to establish procedures for conforming with the local laws, regardless of what this Court may think ERISA forbids. This means that there will be no special burden of compliance upon an ERISA plan beyond what the HMO has already provided for. And although the added compliance cost to the HMO may ultimately be passed on to the ERISA plan, we have said that such "indirect economic effect[s]," *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 659 (1995), are not enough to preempt state regulation even outside of the insurance context. We recognize, of course, that a State might enact an independent review requirement with procedures so elaborate, and burdens so onerous, that they might undermine § 1132(a). No such system is before us.

odds with the manifest congressional purpose to confine adjudication of disputes to the courts. It does not turn out to be this simple, however, and a closer look at the state law reveals a scheme significantly different from common arbitration as a way of construing and applying contract terms.

In the classic sense, arbitration occurs when "parties in dispute choose a judge to render a final and binding decision on the merits of the controversy and on the basis of proofs presented by the parties." 1 I. MacNeil, R. Speidel, & T. Stipanowich, Federal Arbitration Law § 2.1.1 (1995) (internal quotation marks omitted); see also Uniform Arbitration Act § 5, 7 U. L. A. 173 (1997) (discussing submission evidence and empowering arbitrator to "hear and determine the controversy upon the evidence produced"); Commercial Dispute Resolution Procedures of the American Arbitration Association ¶¶ R33–R35 (Sept. 2000) (discussing the taking of evidence). Arbitrators typically hold hearings at which parties may submit evidence and conduct cross-examinations, *e. g.*, Uniform Arbitration Act § 5, and are often invested with many powers over the dispute and the parties, including the power to subpoena witnesses and administer oaths, *e. g.*, Federal Arbitration Act, 9 U. S. C. § 7; 28 U. S. C. § 653; Uniform Arbitration Act § 7, 7 U. L. A., at 199; Cal. Civ. Proc. Code Ann. §§ 1282.6, 1282.8 (West 1982).

Section 4–10 does resemble an arbitration provision, then, to the extent that the independent reviewer considers disputes about the meaning of the HMO contract [12] and receives "evidence" in the form of medical records, statements from

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[12] Nothing in the Act states that the reviewer should refer to the definitions of medical necessity contained in the contract, but the reviewer did, in this case, refer to that definition. Thus, we will assume that some degree of contract interpretation is required under the Act. Were no interpretation required, there would be a real question as to whether § 4–10 is properly characterized as a species of mandated-benefit law of the type we approved in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985).

physicians, and the like. But this is as far as the resemblance to arbitration goes, for the other features of review under § 4–10 give the proceeding a different character, one not at all at odds with the policy behind § 1132(a). The Act does not give the independent reviewer a free-ranging power to construe contract terms, but instead, confines review to a single term: the phrase "medical necessity," used to define the services covered under the contract. This limitation, in turn, implicates a feature of HMO benefit determinations that we described in *Pegram* v. *Herdrich*, 530 U. S. 211 (2000). We explained that when an HMO guarantees medically necessary care, determinations of coverage "cannot be untangled from physicians' judgments about reasonable medical treatment." *Id.*, at 229. This is just how the Illinois Act operates; the independent examiner must be a physician with credentials similar to those of the primary care physician, 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000), and is expected to exercise independent medical judgment in deciding what medical necessity requires. Accordingly, the reviewer in this case did not hold the kind of conventional evidentiary hearing common in arbitration, but simply received medical records submitted by the parties, and ultimately came to a professional judgment of his own. Tr. of Oral Arg. 30–32.

Once this process is set in motion, it does not resemble either contract interpretation or evidentiary litigation before a neutral arbiter, as much as it looks like a practice (having nothing to do with arbitration) of obtaining another medical opinion. The reference to an independent reviewer is similar to the submission to a second physician, which many health insurers are required by law to provide before denying coverage.[13]

The practice of obtaining a second opinion, however, is far removed from any notion of an enforcement scheme, and

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[13] See, *e. g.*, Cal. Ins. Code Ann. § 10123.68 (West Supp. 2002); Ind. Code § 27–13–37–5 (1999); N. J. Stat. Ann. § 17B:26–2.3 (1996); Okla. Admin. Code § 365:10–5–4 (1996); R. I. Gen. Laws § 27–39–2 (1998).

once § 4–10 is seen as something akin to a mandate for second-opinion practice in order to ensure sound medical judgments, the preemption argument that arbitration under § 4–10 supplants judicial enforcement runs out of steam.

Next, Rush argues that § 4–10 clashes with a substantive rule intended to be preserved by the system of uniform enforcement, stressing a feature of judicial review highly prized by benefit plans: a deferential standard for reviewing benefit denials. Whereas *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S., at 115, recognized that an ERISA plan could be designed to grant "discretion" to a plan fiduciary, deserving deference from a court reviewing a discretionary judgment, § 4–10 provides that when a plan purchases medical services and insurance from an HMO, benefit denials are subject to apparently *de novo* review. If a plan should continue to balk at providing a service the reviewer has found medically necessary, the reviewer's determination could carry great weight in a subsequent suit for benefits under § 1132(a),[14] depriving the plan of the judicial deference a fiduciary's medical judgment might have obtained if judicial review of the plan's decision had been immediate.[15]

Again, however, the significance of § 4–10 is not wholly captured by Rush's argument, which requires some perspec-

[14] See n. 10, *supra*.

[15] An issue implicated by this case but requiring no resolution is the degree to which a plan provision for unfettered discretion in benefit determinations guarantees truly deferential review. In *Firestone Tire* itself, we noted that review for abuse of discretion would home in on any conflict of interest on the plan fiduciary's part, if a conflict was plausibly raised. That last observation was underscored only two Terms ago in *Pegram* v. *Herdrich*, 530 U. S. 211 (2000), when we again noted the potential for conflict when an HMO makes decisions about appropriate treatment, see *id.*, at 219–220. It is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest. Moreover, as we explained in *Pegram*, "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." *Id.*, at 232. Our decision today does not require us to resolve these questions.

tive for evaluation. First, in determining whether state procedural requirements deprive plan administrators of any right to a uniform standard of review, it is worth recalling that ERISA itself provides nothing about the standard. It simply requires plans to afford a beneficiary some mechanism for internal review of a benefit denial, 29 U. S. C. § 1133(2), and provides a right to a subsequent judicial forum for a claim to recover benefits, § 1132(a)(1)(B). Whatever the standards for reviewing benefit denials may be, they cannot conflict with anything in the text of the statute, which we have read to require a uniform judicial regime of categories of relief and standards of primary conduct, not a uniformly lenient regime of reviewing benefit determinations. See *Pilot Life*, 481 U. S., at 56.[16]

Not only is there no ERISA provision directly providing a lenient standard for judicial review of benefit denials, but there is no requirement necessarily entailing such an effect even indirectly. When this Court dealt with the review standards on which the statute was silent, we held that a general or default rule of *de novo* review could be replaced

[16] Rush presents the alternative argument that § 4–10 is preempted as conflicting with ERISA's requirement that a benefit denial be reviewed by a named fiduciary, 29 U. S. C. § 1133(2). Rush contends that § 4–10 interferes with fiduciary discretion by forcing the provision of benefits over a fiduciary's objection. Happily, we need not decide today whether § 1133(2) carries the same preemptive force of § 1132(a) such that it overrides even the express saving clause for insurance regulation, because we see no conflict. Section 1133 merely requires that plans provide internal appeals of benefit denials; § 4–10 plays no role in this process, instead providing for extra review once the internal process is complete. Nor is there any conflict in the removal of fiduciary "discretion"; as described below, ERISA does not require that such decisions be discretionary, and insurance regulation is not preempted merely because it conflicts with substantive plan terms. See *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 376 (1999) ("Under [Petitioner's] interpretation . . . insurers could displace any state regulation simply by inserting a contrary term in plan documents. This interpretation would virtually rea[d] the saving clause out of ERISA" (internal quotation marks and citations omitted)).

by deferential review if the ERISA plan itself provided that the plan's benefit determinations were matters of high or unfettered discretion, see *Firestone Tire*, *supra*, at 115. Nothing in ERISA, however, requires that these kinds of decisions be so "discretionary" in the first place; whether they are is simply a matter of plan design or the drafting of an HMO contract. In this respect, then, § 4–10 prohibits designing an insurance contract so as to accord unfettered discretion to the insurer to interpret the contract's terms. As such, it does not implicate ERISA's enforcement scheme at all, and is no different from the types of substantive state regulation of insurance contracts we have in the past permitted to survive preemption, such as mandated-benefit statutes and statutes prohibiting the denial of claims solely on the ground of untimeliness.[17] See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985); *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358 (1999).

* * *

In sum, § 4–10 imposes no new obligation or remedy like the causes of action considered in *Russell*, *Pilot Life*, and *Ingersoll-Rand*. Even in its formal guise, the State Act bears a closer resemblance to second-opinion requirements than to arbitration schemes. Deferential review in the HMO context is not a settled given; § 4–10 operates before the stage of judicial review; the independent reviewer's *de novo* examination of the benefit claim mirrors the general or

[17] We do not mean to imply that States are free to create other forms of binding arbitration to provide *de novo* review of any terms of insurance contracts; as discussed above, our decision rests in part on our recognition that the disuniformity Congress hoped to avoid is not implicated by decisions that are so heavily imbued with expert medical judgments. Rather, we hold that the feature of § 4–10 that provides a different standard of review with respect to mixed eligibility decisions from what would be available in court is not enough to create a conflict that undermines congressional policy in favor of uniformity of remedies.

default rule we have ourselves recognized; and its effect is no greater than that of mandated-benefit regulation.

In deciding what to make of these facts and conclusions, it helps to go back to where we started and recall the ways States regulate insurance in looking out for the welfare of their citizens. Illinois has chosen to regulate insurance as one way to regulate the practice of medicine, which we have previously held to be permissible under ERISA, see *Metropolitan Life,* 471 U. S., at 741. While the statute designed to do this undeniably eliminates whatever may have remained of a plan sponsor's option to minimize scrutiny of benefit denials, this effect of eliminating an insurer's autonomy to guarantee terms congenial to its own interests is the stuff of garden variety insurance regulation through the imposition of standard policy terms. See *id.,* at 742 ("[S]tate laws regulating the substantive terms of insurance contracts were commonplace well before the mid-70's"). It is therefore hard to imagine a reservation of state power to regulate insurance that would not be meant to cover restrictions of the insurer's advantage in this kind of way. And any lingering doubt about the reasonableness of § 4–10 in affecting the application of § 1132(a) may be put to rest by recalling that regulating insurance tied to what is medically necessary is probably inseparable from enforcing the quintessentially state-law standards of reasonable medical care. See *Pegram* v. *Herdrich,* 530 U. S., at 236. "[I]n the field of health care, a subject of traditional state regulation, there is no ERISA preemption without clear manifestation of congressional purpose." *Id.,* at 237. To the extent that benefit litigation in some federal courts may have to account for the effects of § 4–10, it would be an exaggeration to hold that the objectives of § 1132(a) are undermined. The saving clause is entitled to prevail here, and we affirm the judgment.

It is so ordered.

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

This Court has repeatedly recognized that ERISA's civil enforcement provision, § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1132, provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA, and therefore that state laws that create additional remedies are pre-empted. See, *e. g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 52 (1987); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 146–147 (1985). Such exclusivity of remedies is necessary to further Congress' interest in establishing a uniform federal law of employee benefits so that employers are encouraged to provide benefits to their employees: "To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." *FMC Corp.* v. *Holliday*, 498 U. S. 52, 60 (1990).

Of course, the "expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." *Pilot Life*, *supra*, at 56. Therefore, as the Court concedes, see *ante*, at 377, even a state law that "regulates insurance" may be pre-empted if it supplements the remedies provided by ERISA, despite ERISA's saving clause, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A). See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984) (noting that state laws that stand as an obstacle to the accomplishment of the full purposes and objectives of Congress are pre-empted).[1] Today, however,

[1] I would assume without deciding that 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000) is a law that "regulates insurance." We can begin and end the pre-emption analysis by asking if § 4–10 conflicts with the provisions

the Court takes the unprecedented step of allowing respondent Debra Moran to short circuit ERISA's remedial scheme by allowing her claim for benefits to be determined in the first instance through an arbitral-like procedure provided under Illinois law, and by a decisionmaker other than a court. See 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000). This decision not only conflicts with our precedents, it also eviscerates the uniformity of ERISA remedies Congress deemed integral to the "careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life*, *supra*, at 54. I would reverse the Court of Appeals' judgment and remand for a determination whether Moran was entitled to reimbursement absent the independent review conducted under § 4–10.

I

From the facts of this case one can readily understand why Moran sought recourse under § 4–10. Moran is covered by a medical benefits plan sponsored by her husband's employer and governed by ERISA. Petitioner Rush Prudential HMO, Inc., is the employer's health maintenance organization (HMO) provider for the plan. Petitioner's Member Certificate of Coverage (Certificate) details the scope of coverage under the plan and provides petitioner with "the broadest possible discretion" to interpret the terms of the plan and to determine participants' entitlement to benefits. 1 Record, Exh. A, p. 8. The Certificate specifically excludes from coverage services that are not "medically necessary." *Id.*, at 21. As the Court describes, *ante*, at 360–362, Moran underwent a nonstandard surgical procedure.[2] Prior to

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of ERISA or operates to frustrate its objects. See, *e. g.*, *Boggs* v. *Boggs*, 520 U. S. 833, 841 (1997).

[2] While the Court characterizes it as an "unconventional treatment," the Court of Appeals described this surgery more clinically as "rib resection, extensive scale-nectomy," and "microneurolysis of the lower roots of the brachial plexus under intraoperative microscopic magnification." 230

Moran's surgery, which was performed by an unaffiliated doctor, petitioner denied coverage for the procedure on at least three separate occasions, concluding that this surgery was not "medically necessary." For the same reason, petitioner denied Moran's request for postsurgery reimbursement in the amount of $94,841.27. Before finally determining that the specific treatment sought by Moran was not "medically necessary," petitioner consulted no fewer than six doctors, reviewed Moran's medical records, and consulted peer-reviewed medical literature.[3]

In the course of its review, petitioner informed Moran that "there is no prevailing opinion within the appropriate specialty of the United States medical profession that the procedure proposed [by Moran] is safe and effective for its intended use and that the omission of the procedure would adversely affect [her] medical condition." 1 Record, Exh. E, at 2. Petitioner did agree to cover the standard treatment for Moran's ailment, see n. 2, *supra;* n. 4, *infra,* concluding that peer-reviewed literature "demonstrates that [the standard surgery] is effective therapy in the treatment of [Moran's condition]." 1 Record, Exh. E, at 3.

Moran, however, was not satisfied with this option. After exhausting the plan's internal review mechanism, Moran

F. 3d 959, 963 (CA7 2000). The standard procedure for Moran's condition, as described by the Court of Appeals, involves (like the nonstandard surgery) rib resection with scale-nectomy, but it does not include "microneurolysis of the brachial plexus," which is the procedure Moran wanted and her primary care physician recommended. See *id.*, at 963–964. In any event, no one disputes that the procedure was not the standard surgical procedure for Moran's condition or that the Certificate covers even nonstandard surgery if it is "medically necessary."

[3] Petitioner thus appears to have complied with § 503 of ERISA, which requires every employee benefit plan to "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied," and to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U. S. C. § 1133.

chose to bypass the relief provided by ERISA. She invoked § 4–10 of the Illinois HMO Act, which requires HMOs to provide a mechanism for review by an independent physician when the patient's primary care physician and HMO disagree about the medical necessity of a treatment proposed by the primary care physician. See 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000). While Moran's primary care physician acknowledged that petitioner's affiliated surgeons had not recommended the unconventional surgery and that he was not "an expert in this or any other area of surgery," 1 Record, Exh. C, he nonetheless opined, without explanation, that Moran would be "best served" by having that surgery, *ibid.*

Dr. A. Lee Dellon, an unaffiliated physician who served as the independent medical reviewer, concluded that the surgery for which petitioner denied coverage "was appropriate," that it was "the same type of surgery" he would have done, and that Moran "had all of the indications and therefore the medical necessity to carry out" the nonstandard surgery. Appellant's Separate App. (CA7), pp. A42–A43.[4] Under § 4–10, Dr. Dellon's determination conclusively established Moran's right to benefits under Illinois law. See 215 Ill. Comp. Stat., ch. 125, § 4–10 ("In the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] *shall provide* the covered service" (emphasis added)). 230 F. 3d 959, 972–973 (CA7 2000).

Nevertheless, petitioner again denied benefits, steadfastly maintaining that the unconventional surgery was not medically necessary. While the Court of Appeals recharacterized Moran's claim for reimbursement under § 4–10 as a claim for benefits under ERISA § 502(a)(1)(B), it reversed the judg-

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[4] Even Dr. Dellon acknowledged, however, both that "[t]here is no particular research study" to determine whether failure to perform the nonstandard surgery would adversely affect Moran's medical condition and that the most common operation for Moran's condition in the United States was the standard surgery that petitioner had agreed to cover. Appellant's Separate App. (CA7), p. A43.

ment of the District Court based solely on Dr. Dellon's judgment that the surgery was "medically necessary."

II

Section 514(a)'s broad language provides that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan," except as provided in § 514(b). 29 U. S. C. § 1144(a). This language demonstrates "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.'" *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 656 (1995) (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 523 (1981)). It was intended to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law" so as to "minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government" and to prevent "the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 142 (1990). See also *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 148 (2001).

To be sure, this broad goal of uniformity is in some tension with the so-called "saving clause," which provides that ERISA does not "exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." § 514(b)(2)(A) of ERISA, 29 U. S. C. § 1144(b)(2)(A). As the Court has suggested on more than one occasion, the pre-emption and saving clauses are almost antithetically broad and "'are not a model of legislative drafting.'" *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 99 (1993) (quoting *Pilot Life*, 481 U. S., at 46). But because there is "no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis," the Court has con-

cluded that federal pre-emption occurs where state law governing insurance "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *Harris Trust*, *supra*, at 99 (quoting *Silkwood*, 464 U. S., at 248).

Consequently, the Court until today had consistently held that state laws that seek to supplant or add to the exclusive remedies in § 502(a) of ERISA, 29 U. S. C. § 1132(a), are pre-empted because they conflict with Congress' objective that rights under ERISA plans are to be enforced under a uniform national system. See, *e. g.*, *Ingersoll-Rand Co.*, *supra*, at 142–145; *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 64–66 (1987); *Pilot Life*, *supra*, at 52–57. The Court has explained that § 502(a) creates an "interlocking, interrelated, and interdependent remedial scheme," and that a beneficiary who claims that he was wrongfully denied benefits has "a panoply of remedial devices" at his disposal. *Russell*, 473 U. S., at 146. It is exactly this enforcement scheme that *Pilot Life* described as "represent[ing] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans," 481 U. S., at 54. Central to that balance is the development of "a federal common law of rights and obligations under ERISA-regulated plans." *Id.*, at 56.

In addressing the relationship between ERISA's remedies under § 502(a) and a state law regulating insurance, the Court has observed that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.*, at 54. Thus, while the preeminent federal interest in the uniform administration of employee benefit plans yields in some instances to varying state regulation of the business of insurance, the exclusivity and uniformity of

ERISA's enforcement scheme remains paramount. "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA." *Ingersoll-Rand Co.*, *supra*, at 144. In accordance with ordinary principles of conflict pre-emption, therefore, even a state law "regulating insurance" will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme. See, *e. g.*, *Pilot Life*, *supra*, at 54 (citing *Russell*, *supra*, at 146); *Harris Trust*, *supra*, at 99 (citing *Silkwood*, *supra*, at 248).

III

The question for the Court, therefore, is whether § 4–10 provides such a vehicle. Without question, Moran had a "panoply of remedial devices," *Russell*, *supra*, at 146, available under § 502 of ERISA when petitioner denied her claim for benefits.[5] Section 502(a)(1)(B) of ERISA provided the most obvious remedy: a civil suit to recover benefits due under the terms of the plan. 29 U. S. C. § 1132(a)(1)(B). But rather than bring such a suit, Moran sought to have her right to benefits determined outside of ERISA's remedial scheme through the arbitral-like mechanism available under § 4–10.

Section 4–10 cannot be characterized as anything other than an alternative state-law remedy or vehicle for seeking benefits. In the first place, § 4–10 comes into play only if the HMO and the claimant dispute the claimant's entitlement to benefits; the purpose of the review is to determine whether a claimant is entitled to benefits. Contrary to the majority's characterization of § 4–10 as nothing more than a state law

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[5] Commonly included in the panoply constituting part of this enforcement scheme are: suits under § 502(a)(1)(B) (authorizing an action to recover benefits, obtain a declaratory judgment that one is entitled to benefits, and to enjoin an improper refusal to pay benefits); suits under §§ 502(a)(2) and 409 (authorizing suit to seek removal of the fiduciary); and a claim for attorney's fees under § 502(g). See *Russell*, 473 U. S., at 146–147; *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 53 (1987).

regarding medical standards, *ante*, at 383–384, it is in fact a binding determination of whether benefits are due: "In the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] *shall provide* the covered service." 215 Ill. Comp. Stat., ch. 125, § 4–10 (2000) (emphasis added). Section 4–10 is thus most precisely characterized as an arbitration-like mechanism to settle benefits disputes. See Brief for United States as *Amicus Curiae* 23 (conceding as much).

There is no question that arbitration constitutes an alternative remedy to litigation. See, *e. g.*, *Air Line Pilots* v. *Miller*, 523 U. S. 866, 876, 880 (1998) (referring to "arbitral remedy" and "arbitration remedy"); *DelCostello* v. *Teamsters*, 462 U. S. 151, 163 (1983) (referring to "arbitration remedies"); *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 377–378 (1979) (noting that arbitration and litigation are "alternative remedies"); 3 D. Dobbs, Law of Remedies § 12.23 (2d ed. 1993) (explaining that arbitration "is itself a remedy"). Consequently, although a contractual agreement to arbitrate—which does not constitute a "State law" relating to "any employee benefit plan"—is outside § 514(a) of ERISA's pre-emptive scope, States may not circumvent ERISA pre-emption by mandating an alternative arbitral-like remedy as a plan term enforceable through an ERISA action.

To be sure, the majority is correct that § 4–10 does not mirror all procedural and evidentiary aspects of "common arbitration." *Ante*, at 381–383. But as a binding decision on the merits of the controversy the § 4–10 review resembles nothing so closely as arbitration. See generally 1 I. MacNeil, R. Spediel, & T. Stipanowich, Federal Arbitration Law § 2.1.1 (1995). That the decision of the § 4–10 medical reviewer is ultimately enforceable through a suit under § 502(a) of ERISA further supports the proposition that it tracks the arbitral remedy. Like the decision of any arbitrator, it is enforceable through a subsequent judicial action, but judicial

review of an arbitration award is very limited, as was the Court of Appeals' review in this case. See, *e. g.*, *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 36–37 (1987) (quoting *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567–568 (1960)). Although the Court of Appeals recharacterized Moran's claim for reimbursement under § 4–10 as a claim for benefits under § 502(a)(1)(B) of ERISA, the Court of Appeals did not interpret the plan terms or purport to analyze whether the plan fiduciary had engaged in the "full and fair review" of Moran's claim for benefits that § 503(2) of ERISA, 29 U. S. C. § 1133(2), requires. Rather, it rubberstamped the independent medical reviewer's judgment that Moran's surgery was "medically necessary," granting summary judgment to Moran on her claim for benefits solely on that basis. Thus, as Judge Posner aptly noted in his dissent from the denial of rehearing en banc below, § 4–10 "establishes a system of appellate review of benefits decisions that is distinct from the provision in ERISA for suits in federal court to enforce entitlements conferred by ERISA plans." 230 F. 3d, at 973.

IV

The Court of Appeals attempted to evade the pre-emptive force of ERISA's exclusive remedial scheme primarily by characterizing the alternative enforcement mechanism created by § 4–10 as a "contract term" under state law.[6] *Id.*, at 972. The Court saves § 4–10 from pre-emption in a somewhat different manner, distinguishing it from an alternative enforcement mechanism because it does not "enlarge the

[6] The Court of Appeals concluded that § 4–10 is saved from pre-emption because it is a law that "regulates insurance," and that it does not conflict with the exclusive enforcement mechanism of § 502 because § 4–10's independent review mechanism is a state-mandated contractual term of the sort that survived ERISA pre-emption in *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 375–376 (1999). In the Court of Appeals' view, the independent review provision, like any other mandatory contract term, can be enforced through an action brought under § 502(a) of ERISA, 29 U. S. C. § 1132(a), pursuant to state law. 230 F. 3d, at 972.

claim beyond the benefits available in any action brought under § 1132(a)," and characterizing it as "something akin to a mandate for second-opinion practice in order to ensure sound medical judgments." *Ante,* at 379–380, 384. Neither approach is sound.

The Court of Appeals' approach assumes that a State may impose an alternative enforcement mechanism through mandated contract terms even though it could not otherwise impose such an enforcement mechanism on a health plan governed by ERISA. No party cites any authority for that novel proposition, and I am aware of none. Cf. *Fort Halifax Packing Co.* v. *Coyne,* 482 U. S. 1, 16–17 (1987) (noting that a State cannot avoid ERISA pre-emption on the ground that its regulation only mandates a benefit plan; such an approach would "permit States to circumvent ERISA's pre-emption provision, by allowing them to require directly what they are forbidden to regulate"). To hold otherwise would be to eviscerate ERISA's comprehensive and exclusive remedial scheme because a claim to benefits under an employee benefits plan could be determined under each State's particular remedial devices so long as they were made contract terms. Such formalist tricks cannot be sufficient to bypass ERISA's exclusive remedies; we should not interpret ERISA in such a way as to destroy it.

With respect to the Court's position, Congress' intention that § 502(a) be the exclusive remedy for rights guaranteed under ERISA has informed this Court's weighing of the pre-emption and saving clauses. While the Court has previously focused on ERISA's *overall* enforcement mechanism and remedial scheme, see *infra,* at 393–394, the Court today ignores the "interlocking, interrelated, and interdependent" nature of that remedial scheme and announces that the relevant inquiry is whether a state regulatory scheme "provides [a] new cause of action" or authorizes a "new form of ultimate relief." *Ante,* at 379. These newly created principles have no roots in the precedents of this Court. That § 4–10 *also*

effectively provides for a second opinion to better ensure sound medical practice is simply irrelevant to the question whether it, in fact, provides a binding mechanism for a participant or beneficiary to pursue a claim for benefits because it is on this latter basis that § 4–10 is pre-empted.

The Court's attempt to diminish § 4–10's effect by characterizing it as one where "the reviewer's determination would *presumably* replace that of the HMO," *ante*, at 380 (emphasis added), is puzzling given that the statute makes such a determination conclusive and the Court of Appeals treated it as a binding adjudication. For these same reasons, it is troubling that the Court views the review under § 4–10 as nothing more than a practice "of obtaining a second [medical] opinion." *Ante*, at 383. The independent reviewer may, like most arbitrators, possess special expertise or knowledge in the area subject to arbitration. But while a second medical opinion is nothing more than that—an opinion—a determination under § 4–10 is a conclusive determination with respect to the award of benefits. And the Court's reference to *Pegram* v. *Herdrich*, 530 U. S. 211 (2000), as support for its Alice in Wonderland-like claim that the § 4–10 proceeding is "far removed from any notion of an enforcement scheme," *ante*, at 383, is equally perplexing, given that the treatment is long over and the issue presented is purely an eligibility decision with respect to reimbursement.[7]

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[7] I also disagree with the Court's suggestion that, following *Pegram* v. *Herdrich*, 530 U. S. 211 (2000), HMOs are exempted from ERISA whenever a coverage or reimbursement decision relies in any respect on medical judgment. *Ante*, at 383, 386, n. 17. *Pegram* decided the limited question whether relief was available under § 1109 for claims of fiduciary breach against HMOs based on its physicians' medical decisions. Quite sensibly, in my view, that question was answered in the negative because otherwise, "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." 530 U. S., at 235.

As we held in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), a State may, of course, require that employee health plans provide certain substantive benefits. See *id.*, at 746 (holding that a state law mandating mental health benefits was not within ERISA's pre-emptive reach). Indeed, were a State to require that insurance companies provide all "medically necessary care" or even that it must provide a second opinion before denying benefits, I have little doubt that such *substantive* requirements would withstand ERISA's pre-emptive force. But recourse to those benefits, like all others, could be sought only through an action under § 502 and not, as is the case here, through an arbitration-like remedial device. Section 4–10 does not, in any event, purport to extend a new substantive benefit. Rather, it merely sets up a procedure to conclusively determine whether the HMO's decision to deny benefits was correct when the parties disagree, a task that lies within the exclusive province of the courts through an action under § 502(a).

By contrast, a state law regulating insurance that merely affects whether a plan participant or beneficiary may *pursue* the remedies available under ERISA's remedial scheme, such as California's notice-prejudice rule, is not pre-empted because it has nothing to do with § 502(a)'s exclusive enforcement scheme. In *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358 (1999), the Court evaluated California's so-called notice-prejudice rule, which provides that an insurer cannot avoid liability in cases where a claim is not filed in a timely fashion absent proof that the insurer was actually prejudiced because of the delay. In holding that it was not pre-empted, the Court did not suggest that this rule provided a substantive plan term. The Court expressly declined to address the Solicitor General's argument that the saving clause saves even state law "conferring causes of action or affecting remedies that regulate insurance." See *id.*, at 376–377, n. 7 (internal quotation marks omitted). While

a law may "effectively creat[e] a mandatory contract term," *id.*, at 374 (internal quotation marks omitted), and even provide the rule of decision with respect to whether a claim is *out of time*, and thus whether benefits will ultimately be received, such laws do not create an *alternative enforcement mechanism* with respect to recovery of plan benefits. They merely allow the participant to proceed via ERISA's enforcement scheme. To my mind, neither *Metropolitan Life* nor *UNUM* addresses, let alone purports to answer, the question before us today.

* * *

Section 4–10 constitutes an arbitral-like state remedy through which plan members may seek to resolve conclusively a disputed right to benefits. Some 40 other States have similar laws, though these vary as to applicability, procedures, standards, deadlines, and consequences of independent review. See Brief for Respondent State of Illinois 12, n. 4 (citing state independent review statutes); see also Kaiser Family Foundation, K. Politz, J. Crowley, K. Lucia, & E. Bangit, Assessing State External Review Programs and the Effects of Pending Federal Patients' Rights Legislation (May 2002) (comparing state program features). Allowing disparate state laws that provide inconsistent external review requirements to govern a participant's or beneficiary's claim to benefits under an employee benefit plan is wholly destructive of Congress' expressly stated goal of uniformity in this area. Moreover, it is inimical to a scheme for furthering and protecting the "careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans," given that the development of a federal common law under ERISA-regulated plans has consistently been deemed central to that balance.[8] *Pilot Life*, 481 U. S., at 54, 56. While

[8] The Court suggests that a state law's impact on cost is not relevant after *New York State Conference of Blue Cross & Blue Shield Plans*

it is true that disuniformity is the inevitable result of the congressional decision to save local insurance regulation, this does not answer the altogether different question before the Court today, which is whether a state law "regulating insurance" nonetheless provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme. See, *e. g.*, *id.*, at 54 (citing *Russell*, 473 U. S., at 146); *Harris Trust*, 510 U. S., at 99 (citing *Silkwood*, 464 U. S., at 248). If it does, the exclusivity and uniformity of ERISA's enforcement scheme must remain paramount and the state law is pre-empted in accordance with ordinary principles of conflict pre-emption.[9]

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v. *Travelers Ins. Co.*, 514 U. S. 645, 662 (1995), which holds that a state law providing for surcharges on hospital rates did not, based solely on their indirect economic effect, "bear the requisite 'connection with' ERISA plans to trigger pre-emption." But *Travelers* addressed only the question whether a state law "relates to" an ERISA plan so as to fall within § 514(a)'s broad pre-emptive scope in the first place and is not relevant to the inquiry here. The Court holds that "[i]t is beyond serious dispute," *ante*, at 365, that § 4–10 does "relate to" an ERISA plan; § 4–10's economic effects are necessarily relevant to the extent that they upset the object of § 1132(a). See *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 142 (1990) ("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries").

[9] The Court isolates the "plan" from the HMO and then concludes that the independent review provision does not "threaten the object of 29 U. S. C. § 1132" because it does not affect the plan, but only the HMO. *Ante*, at 381, n. 11. To my knowledge such a distinction is novel. Cf. *Pegram*, 530 U. S., at 223 (recognizing that the agreement between an HMO and an employer may provide elements of a plan by setting out the rules under which care is provided). Its application is particularly novel here, where the Court appears to view the HMO as the plan administrator, leaving one to wonder how the myriad state independent review procedures can help but have an impact on plan administration. *Ante*, at 363, n. 3.

For the reasons noted by the Court, independent review provisions may sound very appealing. Efforts to expand the variety of remedies available to aggrieved beneficiaries beyond those set forth in ERISA are obviously designed to increase the chances that patients will be able to receive treatments they desire, and most of us are naturally sympathetic to those suffering from illness who seek further options. Nevertheless, the Court would do well to remember that no employer is required to provide any health benefit plan under ERISA and that the entire advent of managed care, and the genesis of HMOs, stemmed from spiraling health costs. To the extent that independent review provisions such as § 4–10 make it more likely that HMOs will have to subsidize beneficiaries' treatments of choice, they undermine the ability of HMOs to control costs, which, in turn, undermines the ability of employers to provide health care coverage for employees.

As a consequence, independent review provisions could create a disincentive to the formation of employee health benefit plans, a problem that Congress addressed by making ERISA's remedial scheme exclusive and uniform. While it may well be the case that the advantages of allowing States to implement independent review requirements as a supplement to the remedies currently provided under ERISA outweigh this drawback, this is a judgment that, pursuant to ERISA, must be made by Congress. I respectfully dissent.

Syllabus

CHRISTOPHER, FORMER SECRETARY OF STATE, ET AL. *v.* HARBURY

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

No. 01–394. Argued March 18, 2002—Decided June 20, 2002

Respondent-plaintiff Harbury alleges that Government officials intentionally deceived her in concealing information that her husband, a Guatemalan dissident, had been detained, tortured, and executed by Guatemalan army officers paid by the Central Intelligence Agency (CIA), and that this deception denied her access to the courts by leaving her without information, or reason to seek information, with which she could have brought a lawsuit that might have saved her husband's life. In the District Court, Harbury raised against the CIA, State Department, National Security Council, and officials of each, common- and international law tort claims, and claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, on behalf of her husband's estate, and on her own behalf for violation of, *inter alia*, her constitutional right of access to courts. The District Court dismissed the *Bivens* claims. With respect to the access-to-courts counts, the court held that Harbury had not stated a valid cause of action because (1) having filed no prior suit, she could only guess how the alleged coverup might have prejudiced her rights to bring a separate action, and (2) the defendants would be entitled to qualified immunity. Harbury appealed the dismissal of her *Bivens* claims, but the District of Columbia Circuit reversed only the dismissal of her *Bivens* claim against petitioners for denial of access to courts.

Held: Harbury has not stated a claim for denial of judicial access. Pp. 412–422.

(a) Access-to-courts claims fall into two categories: claims that systemic official action frustrates a plaintiff in preparing and filing suits at the present time, where the suits could be pursued once the frustrating condition has been removed; and claims of specific cases that cannot be tried, no matter what official action may be in the future. Regardless of whether the claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the point of recognizing an access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. Thus, the access-to-courts right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. It follows that the

underlying claim is an element that must be described in the complaint as though it were being independently pursued; and that, when the access claim (like this one) looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought. The underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give the defendant fair notice. The facts of this case underscore the need for care in stating a tenable predicate cause of action. The alleged acts were apparently taken in the conduct of foreign relations by the National Government, and any judicial enquiry will raise concerns for the separation of powers in trenching on matters committed to the other branches. Since the need to resolve such constitutional issues should be avoided where possible, the trial court should be in a position as soon as possible to know whether a constitutional ruling may be obviated because the denied access allegations fail to state a claim. Pp. 412–418.

(b) Harbury's complaint did not come even close to stating a constitutional denial-of-access claim upon which relief could be granted. It did not identify the underlying cause of action that the alleged disruption had compromised, leaving the District Court and the defendants to guess as to the unstated action supposedly lost and at the remedy being sought independently of relief that might be available on the complaint's other counts. Harbury's position did not improve when the Court of Appeals gave her counsel an opportunity at oral argument to supply the missing allegations. He stated that she would have brought an action for intentional infliction of emotional distress as one wrong for which she could have sought the injunctive relief that might have saved her husband's life. But that does not satisfy the requirement that a backward-looking denial-of-access claim provide a remedy that could not be obtained on an existing claim, for the complaint's counts naming the CIA defendants, including the Guatemalan officer who allegedly tortured and killed her husband, are among the tort claims that survived the motion to dismiss in the District Court. Harbury can seek damages and possibly some sort of injunctive relief for the consequences of the infliction of emotional distress alleged in those counts, although she cannot obtain the order that might have saved her husband's life. But neither can she obtain such an order in her access claim, which therefore cannot recompense her for the unique loss she claims as a consequence of her inability to bring an intentional-infliction action earlier. Pp. 418–422.

233 F. 3d 596, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 422.

Richard A. Cordray argued the cause for petitioners. With him on the briefs was *Harry Litman.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Patricia A. Millett*, *Barbara L. Herwig*, and *Robert M. Loeb.*

Jennifer K. Harbury, respondent, argued the cause and filed a brief *pro se.**

JUSTICE SOUTER delivered the opinion of the Court.

Respondent-plaintiff in this case alleges that Government officials intentionally deceived her in concealing information that her husband, a foreign dissident, was being detained and tortured in his own country by military officers of his government, who were paid by the Central Intelligence Agency (CIA). One count of the complaint, brought after the husband's death, charges that the official deception denied respondent access to the courts by leaving her without information, or reason to seek information, with which she could have brought a lawsuit that might have saved her husband's life. The issue is whether this count states an actionable claim. We hold that it does not, for two reasons. As stated in the complaint, it fails to identify an underlying cause of action for relief that the plaintiff would have raised had it not been for the deception alleged. And even after a

*Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey R. White* and *Laura C. Tharney;* for the Brennan Center for Justice by *Jodie L. Kelley;* and for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al. by *Robert E. Borton*, *Scott D. Wiener*, *Robert Rubin*, *Steven R. Shapiro*, and *Lucas Guttentag.*

subsequent, informal amendment accepted by the Court of Appeals, respondent fails to seek any relief presently available for denial of access to courts that would be unavailable otherwise.

I

Respondent Jennifer Harbury, a United States citizen, is the widow of Efrain Bamaca-Velasquez, a Guatemalan rebel leader who vanished in his own country in March 1992. Since we are reviewing a ruling on motion to dismiss, we accept Harbury's factual allegations and take them in the light most favorable to her. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993). Bamaca was captured by Guatemalan army forces, including officers trained (in the United States), paid, and used as informants by the CIA. App. 27–28 (Respondent's Second Amended Complaint ¶¶ 35–42, 46–47). He was detained and tortured for more than a year to obtain information of interest to the CIA, for which it paid. *Id.*, at 28 (¶¶ 43, 46–47). Bamaca was summarily executed on orders of the same Guatemalan officers affiliated with the CIA, *id.*, at 28–29 (¶¶ 48–49), sometime before September 1993, *id.*, at 31 (¶ 66), 34 (¶ 84).[1]

The CIA knew as early as March 18, 1992, that the Guatemalan army had captured Bamaca alive and shared this information with the White House and State Department. *Id.*, at 27 (¶ 35). Officials there, however, "intentionally misled" Harbury, by "deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture." *Id.*, at 31 (¶ 67).

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[1] Harbury says in a footnote in her brief before this Court that "[n]ew evidence exists suggesting that Mr. Bamaca in fact survived well into 1994 if not longer," Brief for Respondent 23, n. 3, but the factual allegations in her complaint unequivocally state that the Government knew that Bamaca had been killed by September 1993.

Harbury makes three specific allegations of such Government deception, all involving State Department officials, while Bamaca was still alive. First, she says she contacted several unnamed State Department officials in March 1993 to express concerns about her husband, who, according to an eyewitness, was still alive. *Id.*, at 29 (¶¶ 50, 55). They "promised to look into the matter and to assist her," *ibid.*, but they neither gave her nor made public any information about Bamaca, though CIA reports from as early as May 1993 confirmed he was still alive. *Id.*, at 30 (¶¶ 56–59). Second, in August 1993, Marilyn McAfee, then Ambassador to Guatemala, advised Harbury to submit a written report to the effect that remains found in a grave purported to be her husband's were not in fact his, as Harbury promptly did. *Id.*, at 30–31 (¶¶ 60–63). Although McAfee promised that she would "investigate the matter immediately[,] report her findings," and keep Harbury "properly informed regarding her husband's situation," *ibid.* (¶ 62), she gave Harbury no information, *id.*, at 31 (¶ 64). Third, in September 1993 (the same month that the Government learned Bamaca was dead, *ibid.* (¶ 66)), Harbury engaged in a week-long hunger strike in Guatemala City to focus public attention on her husband's plight, but the State Department told her nothing, *id.*, at 31–32 (¶¶ 64–68).

According to Harbury's allegations, the Government's deceptions and omissions continued and intensified after Bamaca was killed. From October 1993 until March 1995, officials of the State Department and National Security Council (NSC) repeatedly met and communicated with Harbury, *id.*, at 32 (¶¶ 70–71), 34 (¶¶ 80, 83), 35 (¶ 86), conveying the impression that they knew nothing for sure but were seeking "concrete information" about her husband and would keep her informed, *id.*, at 33 (¶ 75). At one point, in November 1994, National Security Adviser Anthony Lake told Harbury that the Government had "'scraped the bottom of the barrel'" to no avail in seeking information about her husband,

id., at 34 (¶ 83). All along, however, the Government officials knew that Bamaca had been killed by the Guatemalan army, *ibid.* (¶ 84), but engaged in misleading statements and omissions because they did not want their complicity in Bamaca's torture and death revealed, *id.*, at 36 (¶ 92). Harbury learned that her husband was dead only in March 1995 when a congressman publicly announced that Bamaca had been killed on the orders of a Guatemalan army colonel who was also a paid agent of the CIA, *ibid.* (¶ 91).

II

A year later, in March 1996, Harbury filed suit in the District Court for the District of Columbia against the CIA, the State Department, the NSC, and members of each in their official and individual capacities. The complaint, as amended, listed 28 causes of action under federal, state, and international law. App. 38–62. Although only the access-to-courts counts directly concern us here, it is important to know Harbury's other claims, in order to determine whether she has stated a tenable claim for denial of judicial access.

A

Harbury's complaint sought relief in four categories other than access to courts. First, on behalf of Bamaca's estate, she raised claims against the CIA defendants under the Due Process Clause of the Fifth Amendment for his imprisonment, torture, and execution, seeking declaratory and injunctive relief,[2] and money damages against the officials in their individual capacities on the theory of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). App. 38–42 (counts 1–5). Next, on her own behalf, Harbury sued all the Government defendants for declaratory and injunctive relief

[2] The injunctive relief Harbury sought in these (and other) counts was disclosure of information "concerning her husband's death and the location of his body" and an order to prevent "[d]efendants from taking such actions in the future." App. 63.

and money damages under *Bivens* for violating her "right to familial integrity" under the First, Fifth, and Ninth Amendments by imprisoning, torturing, and executing her husband. *Id.*, at 42–48 (counts 6–13). Third, she alleged common law torts invoking the Federal Tort Claims Act, 28 U. S. C. §§ 2401(b) and 2675, App. 54, (1) on behalf of herself and her husband's estate against the CIA defendants for intentional infliction of emotional distress by causing and conspiring to cause Bamaca's imprisonment, torture, and execution, *id.*, at 55 (counts 18–19); (2) on behalf of her husband's estate against the CIA defendants for negligent supervision resulting in his false imprisonment, assault and battery, and wrongful death, *id.*, at 56–58 (counts 20–22); and (3) on her own behalf against the State Department and NSC defendants for intentional and negligent misrepresentation, constructive fraud, interference with the right to possess a spouse's dead body, *id.*, at 58–62 (counts 24–27), and intentional infliction of emotional distress by making "intentionally deceptive statements and omissions . . . about her husband, including concealing whether or not he was alive" *id.*, at 58 (count 23). Fourth, Harbury brought a tort claim said to arise under international law against the CIA defendants on behalf of herself and her husband's estate. *Id.*, at 62 (count 28).

In addition to these counts for direct harm, Harbury relied on the First and Fifth Amendments in raising four claims that the deceptive statements and omissions of the State Department and NSC defendants had unconstitutionally impeded her access to courts, *id.*, at 49–51 (counts 14–15), as well as her rights to speak freely and to petition the Government, *id.*, at 51–54 (counts 16–17). The basic theory as to access to courts was that if the officials had shared what they knew or simply said "no comment" rather than affirmatively misleading Harbury into thinking they were doing something, she might have been able "to take appropriate actions

to save her husband's life." *Id.*, at 37 (¶ 98).[3] Harbury alleged that she "was foreclosed from effectively seeking adequate legal redress." *Ibid.*

B

For failure to state a claim, the District Court dismissed all counts for declaratory and injunctive relief (counts 1–3, 6–9, 14, 16). It also dismissed all the *Bivens* counts: those on behalf of Bamaca's estate for his torture and execution said to have violated his Fifth Amendment due process rights (counts 4–5), and those brought on Harbury's own behalf based on the claimed violation of her constitutional rights of familial association (counts 10–13), access to courts (count 15), and free speech and access to Government (count 17). But the District Court denied the defendants' motion to dismiss the tort claims at common law (counts 18–27) and international law (count 28).

With respect to the access-to-courts claims (including Harbury's *Bivens* claim on this theory), the District Court acknowledged that five Courts of Appeals "have held that conspiracies to destroy or cover-up evidence of a crime that render a plaintiff's judicial remedies inadequate or ineffective violat[e] the right of access," App. to Pet. for Cert. 43a, but held that Harbury had not stated a valid cause of action for two reasons. First, the court held that Harbury's claim "would have to be dismissed" (without prejudice) because, having filed no prior suit, she had "nothing more than a guess" as to how the alleged coverup might "have prejudiced her rights to bring a separate action." *Id.*, at 46a. Second, the District Court reasoned that the defendants in any event would be entitled to qualified immunity in their individual capacities because, unlike officials in coverup cases who destroyed, manufactured, or hid evidence, the de-

[3] Harbury did not allege that the State Department and NSC defendants had an affirmative duty to disclose or to provide information about her husband in response to her informal requests.

fendants here did not act contrary to "clearly established constitutional norms that a reasonable official would understand" in being less than "forthcoming in discussing the intelligence that they received about Bamaca." *Id.*, at 48a–49a.

C

Harbury did not pursue her claims for declaratory or injunctive relief, and appealed only the dismissal of the *Bivens* causes of action. *Harbury* v. *Deutch*, 233 F. 3d 596, 600–601 (CADC 2000). The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the *Bivens* claims of violations of Bamaca's due process rights, 233 F. 3d, at 604, Harbury's rights of familial association, *id.*, at 606–607, and her free speech and petition rights.[4] It reversed the dismissal, however, of Harbury's *Bivens* claim against the State Department and NSC defendants for denial of access to courts. *Id.*, at 607–611.

The Court of Appeals agreed with the District Court that a plaintiff who merely alleges without factual basis in the conduct of a prior lawsuit that " 'key witnesses . . . may now be dead or missing, . . . crucial evidence may have been destroyed, and . . . memories may have faded' " generally falls short of raising a claim for denial of access to courts. *Id.*, at 609 (quoting the District Court). The court held, however, that Harbury's allegations stated a valid access claim insofar as she alleged that the Government's conduct had "effectively prevented her from seeking emergency injunctive relief in time to save her husband's life." *Ibid.* The District of Columbia Circuit went on to conclude that "[b]ecause his death completely foreclosed this avenue of relief, nothing would be gained by requiring Harbury to postpone this aspect of her access to courts cause of action until she

[4] The Court of Appeals did not explicitly say that this *Bivens* claim (count 17) was dismissed, but, in reversing the District Court, it spoke only of a single claim of "access to courts." 233 F. 3d, at 611 ("[W]e reverse the district court's dismissal of Harbury's access to courts claim").

finishes prosecuting her tort claims." *Ibid.* Nor did the court hold that qualified immunity would bar suit because, in its words, "we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit." *Id.*, at 611.[5]

D

Three categories of claims were left in the case after the Court of Appeals's decision: the various common law tort claims including intentional infliction of emotional distress, the international law claim against the CIA defendants (neither of which the District Court had dismissed), and Harbury's *Bivens* claims against the State Department and NSC defendants for preventing access to courts (which the Court of Appeals reinstated). The defendant officials petitioned for review of the court's holding as to the claim of denial of access to courts, but Harbury did not cross-petition on the other *Bivens* claims, leaving the *Bivens* access claim[6] the sole matter before us. We granted certiorari, 534 U. S. 1064 (2001), because of the importance of this issue to the Government in its conduct of the Nation's foreign affairs, and now reverse.

III

A

This Court's prior cases on denial of access to courts have not extended over the entire range of claims that have been brought under that general rubric elsewhere, but if we con-

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[5] The District of Columbia Circuit denied rehearing, *Harbury* v. *Deutch*, 244 F. 3d 956, 957 (2001) *(per curiam)*, and rehearing en banc, 244 F. 3d 960, 961 (2001), with two judges dissenting from denial of rehearing en banc.

[6] The petitioners did not challenge below the existence of a cause of action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and we express no opinion on the matter in deciding this case.

sider examples in the Courts of Appeals[7] as well as our own, two categories emerge. In the first are claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time. Thus, in the prison-litigation cases, the relief sought may be a law library for a prisoner's use in preparing a case, *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977); *Lewis* v. *Casey*, 518 U. S. 343, 346–348 (1996), or a reader for an illiterate prisoner, *id.*, at 347–348, or simply a lawyer, *ibid.* In denial-of-access cases challenging filing fees that poor plaintiffs cannot afford to pay, the object is an order requiring waiver of a fee to open the courthouse door for desired litigation, such as direct appeals or federal habeas petitions in criminal cases,[8] or civil suits asserting family-law rights, *e. g., Boddie* v. *Connecticut*, 401 U. S. 371, 372 (1971) (divorce filing fee); *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 106–107 (1996) (record fee in parental-rights termination action). In cases of this sort, the essence of the access claim is that official action is presently denying an opportunity to litigate for a class of potential plaintiffs. The opportunity has not been lost for all time, however, but only in the short term; the object of the denial-of-access suit, and the justification for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed.

The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now

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[7] See, *e. g., Delew* v. *Wagner*, 143 F. 3d 1219, 1222–1223 (CA9 1998); *Swekel* v. *River Rouge*, 119 F. 3d 1259, 1263–1264 (CA6 1997); *Vasquez* v. *Hernandez*, 60 F. 3d 325, 329 (CA7 1995); *Foster* v. *Lake Jackson*, 28 F. 3d 425, 429–431 (CA5 1994); *Williams* v. *Boston*, 784 F. 2d 430, 435 (CA1 1986); *Bell* v. *Milwaukee*, 746 F. 2d 1205, 1260–1266 (CA7 1984); *Ryland* v. *Shapiro*, 708 F. 2d 967, 974–975 (CA5 1983).

[8] *E. g., Smith* v. *Bennett*, 365 U. S. 708, 713–714 (1961) (filing fee for habeas petitions); *Burns* v. *Ohio*, 360 U. S. 252, 255–258 (1959) (fee for direct appeal in a criminal case); *Mayer* v. *Chicago*, 404 U. S. 189, 195–196 (1971) (same, as to petty crime); *Griffin* v. *Illinois*, 351 U. S. 12, 16–20 (1956) (transcript fee for appellate review in a criminal case).

be tried (or tried with all material evidence), no matter what official action may be in the future.[9] The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e. g.*, *Foster* v. *Lake Jackson*, 28 F. 3d 425, 429 (CA5 1994); *Bell* v. *Milwaukee*, 746 F. 2d 1205, 1261 (CA7 1984) ("[T]he cover-up and resistance of the investigating police officers rendered hollow [the plaintiff's] right to seek redress"), the loss of an opportunity to sue, *e. g.*, *Swekel* v. *River Rouge*, 119 F. 3d 1259, 1261 (CA6 1997) (police coverup extended throughout "time to file suit . . . under . . . statute of limitations"), or the loss of an opportunity to seek some particular order of relief, as Harbury alleges here. These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly,[10] or could not have commenced, or could have produced a remedy subsequently unobtainable.[11] The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.

While the circumstances thus vary, the ultimate justification for recognizing each kind of claim is the same. Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some ef-

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[9] All such cases have been decided in the Courts of Appeals, see n. 7, *supra;* we assume, without deciding, the correctness of the decisions.

[10] Some Courts of Appeals have held that an actual attempt to sue is a prerequisite to any such claim. See *Delew*, *supra*, at 1222–1223; *Swekel*, *supra*, at 1263–1264. See also App. to Pet. for Cert. 46a (District Court adopting this requirement). But cf. *Swekel*, *supra*, at 1264, n. 2 ("We recognize that in some instances it would be completely futile for a plaintiff to attempt to access the state court system. The Plaintiff, however, has not presented evidence that this is such a case").

[11] Bifurcation into forward-looking and backward-looking access claims is a simplification, and not the only possible categorization, but it helps to focus the issues here.

fective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts,[12] our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. We indicated as much in our most recent case on denial of access, *Lewis* v. *Casey*, *supra*, where we noted that even in forward-looking prisoner class actions to remove roadblocks to future litigation, the named plaintiff must identify a "nonfrivolous," "arguable" underlying claim, *id.*, at 353, and n. 3, and we have been given no reason to treat backward-looking access claims any differently in this respect. It follows that the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation. It follows, too, that when the access claim (like this one) looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought. There is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element.

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[12] Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148 (1907); *Blake* v. *McClung*, 172 U. S. 239, 249 (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513 (1972), the Fifth Amendment Due Process Clause, *Murray* v. *Giarratano*, 492 U. S. 1, 11, n. 6 (1989) (plurality opinion); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 335 (1985), and the Fourteenth Amendment Equal Protection, *Pennsylvania* v. *Finley*, 481 U. S. 551, 557 (1987), and Due Process Clauses, *Wolff* v. *McDonnell*, 418 U. S. 539, 576 (1974); *Boddie* v. *Connecticut*, 401 U. S. 371, 380–381 (1971).

Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant. See generally *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 513–515 (2002). Although we have no reason here to try to describe pleading standards for the entire spectrum of access claims, this is the place to address a particular risk inherent in backward-looking claims. Characteristically, the action underlying this sort of access claim will not be tried independently,[13] a fact that enhances the natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.

Hence the need for care in requiring that the predicate claim be described well enough to apply the "nonfrivolous" test and to show that the "arguable" nature of the underlying claim is more than hope.[14] And because these backward-looking cases are brought to get relief unobtainable in other suits, the remedy sought must itself be identified to hedge against the risk that an access claim be tried all the way through, only to find that the court can award no remedy that the plaintiff could not have been awarded on a presently existing claim.

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[13] It may be the case that an underlying action has already been tried to an inadequate result due to missing or fabricated evidence in an official cover-up, see, *e. g.*, *Foster*, 28 F. 3d, at 427; *Bell*, 746 F. 2d, at 1223, or the claim may still be timely and subject to trial, but for a different remedy than the one sought under the access claim, or against different defendants.

[14] The District of Columbia Circuit rejected the holding of some Circuits, see n. 10, *supra*, that a filed suit on the underlying claim is a prerequisite for a backward-looking access claim, 233 F. 3d 596, 608–610 (2000), because it would foreclose access claims in the most heinous cases where a cover-up was so pervasive that any timely attempt to litigate would have seemed futile. In essence, the Court of Appeals rejected a rule requiring an attempt to litigate, even if frivolous, as a condition of bringing a nonfrivolous backward-looking access claim.

The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants (the State Department and NSC defendants sued for denial of access and the CIA defendants who would have been timely sued on the underlying claim but for the denial) was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. See *Department of Navy* v. *Egan*, 484 U. S. 518, 529 (1988) ("'[F]oreign policy [is] the province and responsibility of the Executive'"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial"). Since the need to resolve such constitutional issues ought to be avoided where possible, cf. *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 134–135 (2002); *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring), the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.

In sum, the right of a defendant in a backward-looking access suit to obtain early dismissal of a hopelessly incomplete claim for relief coincides in this case with the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly. For the sake of each, the complaint should state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a),[15] just as if it were being independently pursued, and a like plain statement should describe any rem-

[15] "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

edy available under the access claim and presently unique to it.

B

Under these standards, Harbury's complaint did not come even close to stating a constitutional claim for denial of access upon which relief could be granted. While we cannot read the complaint without appreciating Harbury's anguish, neither can we read it without appreciating the position of the District Judge who described Harbury's various requests for relief as "nearly unintelligible." App. to Pet. for Cert. 32a. Although the counts stating the *Bivens* claim for denial of judicial access seemed to confirm that Harbury intended to state a backward-looking claim, the complaint failed to identify the underlying cause of action that the alleged deception had compromised, going no further than the protean allegation that the State Department and NSC defendants' "false and deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress." App. 50 (¶ 175). The District Court and the defendants were left to guess at the unstated cause of action supposed to have been lost, and at the remedy being sought independently of relief that might be available on the 24 other counts set out in the complaint.

Nothing happened in the Court of Appeals to improve Harbury's position. That court, too, was frustrated by the failure to identify the predicate claim and the need for relief otherwise unattainable,[16] but it gave Harbury's counsel an opportunity at oral argument to supply the missing allega-

[16] The court repeatedly pressed counsel to identify the underlying claim. See Lodging for United States as *Amicus Curiae* Supporting Petitioners 7, 19, 44, 47 (respectively, "Now what would that [predicate] lawsuit have looked like? . . . Can you explain what that lawsuit would look like? . . . [A]ccess to do what[?] . . . And what would that lawsuit have looked like?" (Tr. of Proceedings in *Harbury* v. *Deutch*, No. 99–5307 (Sept. 8, 2000))).

tions. Counsel responded that Harbury would have brought an action for intentional infliction of emotional distress[17] as one wrong for which she could have sought the injunctive relief that might have saved her husband's life:

> "[I]f defendants had disclosed the information they possessed about Bamaca, Harbury could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress. Even if the NSC and State Department officials had simply said they could not discuss Bamaca's situation, counsel explained, Harbury would have filed her FOIA requests immediately, thus perhaps obtaining the information necessary to seek an injunction in time to save her husband's life. Instead, believing defendants' reassurances, Harbury waited for the State Department and NSC officials to complete their 'investigation.'" 233 F. 3d, at 609.

The Court of Appeals adopted this theory in saying that the "adequate legal redress" alleged for purposes of Harbury's access claims meant emergency injunctive relief in a now futile lawsuit for intentional infliction of emotional distress,

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[17] Whether the Court of Appeals should have extended that opportunity is not an issue before us. We see counsel's answer as amounting to an amendment of pleadings that still fails to cure the inadequacy of the denial-of-access claim. In providing the clarification, Harbury's counsel appears to have been referring to the intentional-infliction counts against the CIA defendants alleged elsewhere in her complaint, App. 55 (counts 18–19). See *infra*, at 422. Whatever latitude is allowed by federal notice pleading, no one says Harbury should be allowed to construe "adequate legal redress" to mean causes of action that were not even mentioned in her complaint. As for Harbury's position here, suffice it to say that a brief to this Court, see Brief for Respondent at 22–33 (listing causes of action that Harbury could have brought in 1993), is not the place to supplement pleadings in response to a motion in the trial court to dismiss for failure to state a claim.

and it accepted this amendment as a sufficient statement of an underlying cause of action.[18] *Ibid.*

We think, however, that treating the amendment as an adequate statement was error. For even on the assumption that Harbury could surmount all difficulties raised by treating the underlying claim as one for intentional infliction of emotional distress,[19] she could not satisfy the requirement

[18] Harbury does not argue, based on her counsel's argument before the Court of Appeals, that the allegation that official deception delayed a Freedom of Information Act filing, which, presumably, might have involved a lawsuit down the road if the defendants obstructed compulsory disclosure, can independently serve as an underlying cause of action for purposes of her access claim.

[19] Because the access claim as "amended" by Harbury's counsel at argument still fails to indicate any remedy that would be available in addition to potential relief on presently existing tort claims, see *infra*, at 422, it is unnecessary to resolve any of the claim's other difficulties in satisfying the need for nonfrivolous and arguable underlying causes of action. For example, Harbury alleges no acts of concealment by NSC officials prior to her husband's death; it would appear that the *Bivens* access claim should have been dismissed as to them on this ground alone. Nor does Harbury allege a plausible causal link between an injunction that might have been issued by a United States court and the behavior of the Guatemalan military alleged to have killed Harbury's husband. It is also uncertain whether the underlying cause of action could be pursued consistently with respect for separation of powers. And, of course, all of this assumes the unlikely case that the Government would not certify the defendants' action as exercises of their official capacity, or that if the Government did, an action could be maintained under the Federal Tort Claims Act. See 28 U. S. C. § 2680(h) (excluding certain intentional torts including assault, battery, false imprisonment, and misrepresentation); § 2680(k) (excluding claims arising in a foreign country); cf. *United States* v. *Shearer*, 473 U. S. 52, 57 (1985) (no claim for negligent supervision of an employee resulting in wrongful death in the military context). But see *U. S. Information Agency* v. *Krc*, 989 F. 2d 1211, 1216 (CADC 1993) ("injunctive relief is available" under the Federal Tort Claims Act for an intentional-tort claim when the statute bars a damages remedy), cert. denied, 510 U. S. 1109 (1994).

Indeed, even if Harbury's underlying claim could navigate these concerns, it is not at all apparent that any or all of Harbury's many factual allegations would make out a claim for intentional infliction of emotional distress. As a general matter, "[w]here [extreme and outrageous] conduct

that a backward-looking denial-of-access claim provide a remedy that could not be obtained on an existing claim. We have no choice but to assume that what Harbury intends to claim as intentional infliction of emotional distress is set out in the counts of her complaint naming the "CIA defendants," including the Guatemalan officer who allegedly tortured and killed her husband, App. 55 (counts 18–19).[20] These are among the tort counts that survived the motion to dismiss under the portion of the District Court's order not before us. If an intentional-infliction claim can be maintained at all, Harbury can seek damages and even conceivably some sort of injunctive relief for the demonstrated consequences of the infliction alleged.[21] It is true that she cannot obtain in any present tort action the order she would have sought before her husband's death, the order that might have saved her husband's life. But neither can she obtain any such order on her access claim, which therefore cannot recompense Har-

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is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." Restatement (Second) of Torts § 46(2)(a) (1965). It is unclear that Harbury's allegations meet either the intent or the presence requirements. While there is room to argue for an exception to presence in some situations, cf. *Jenco* v. *Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33 (DC 2001) (allowing publication to substitute for presence), far from there being any allegation that the CIA defendants intended her husband's situation to become known to the public, the entire thrust of Harbury's pleadings is that every defendant tried to conceal it.

[20] See n. 17, *supra*. There is also an emotional-distress count against the State Department and NSC defendants, but based on their alleged deception, see App. 58 (count 23), that is, simply in duplication of the acts alleged to constitute denial of access, not on the acts underlying the predicate claim.

[21] While Harbury, if otherwise successful, might obtain injunctive relief requiring the CIA to reveal the location of her husband's remains (if known), she could not get any injunction against continued deception on the part of the State Department. But this is irrelevant, since Harbury has given no indication that she contemplates any future litigation to which continued deception would be relevant; she has not, in other words, pleaded any surviving, forward-looking access claim.

bury for the unique loss she claims as a consequence of her inability to bring an intentional-infliction action earlier. She has not explained, and it is not otherwise apparent, that she can get any relief on the access claim that she cannot obtain on her other tort claims, *i. e.*, those that remain pending in the District Court.[22] And it is just because the access claim cannot address any injury she has suffered in a way the presently surviving intentional-infliction claims cannot[23] that Harbury is not entitled to maintain the access claim as a substitute, backward-looking action.

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

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

In *Lewis* v. *Casey*, 518 U. S. 343 (1996), after a review of the constitutional text, this Court's precedent, and tradition, I could find no basis "for the conclusion that the constitutional right of access imposes affirmative obligations on the States to finance and support prisoner litigation." *Id.*, at 384–385 (concurring opinion). Likewise, I find no basis in the Constitution for a "right of access to courts" that effectively imposes an affirmative duty on Government officials either to disclose matters concerning national security or to provide information in response to informal requests. Notwithstanding the Court of Appeals' attempt to characterize

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[22] This might not be the case where, for example, the underlying claim had been tried or settled for an inadequate amount given official deception, see *Foster*, 28 F. 3d, at 427; *Bell*, 746 F. 2d, at 1223, and thus likely barred by res judicata, or where the statute of limitations had run, see *Swekel*, 119 F. 3d, at 1261.

[23] If Harbury's existing tort claims should be dismissed for the reasons identified in n. 19, *supra*, or other reasons unrelated to the alleged deception by the State Department officials, she would still be unable to identify a predicate cause of action necessary to state a backward-looking access claim.

the right of access differently, see *Harbury* v. *Deutch*, 233 F. 3d 596, 611 (CADC 2000) (characterizing the right as "when public officials affirmatively mislead citizens in order to prevent them from filing suit"), I would decide this case solely on the ground that no such right is implicated here. For that reason, I concur in the judgment.

Syllabus

CITY OF COLUMBUS ET AL. *v.* OURS GARAGE AND WRECKER SERVICE, INC., ET AL.

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

No. 01–419. Argued April 23, 2002—Decided June 20, 2002

Federal law preempts prescriptions by "a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," 49 U. S. C. § 14501(c)(1). Exceptions to this general rule provide that the preemption directive "shall not restrict the safety regulatory authority of a State with respect to motor vehicles," § 14501(c)(2)(A); "does not apply to the transportation of household goods," § 14501(c)(2)(B); and "does not apply to the authority of a State or a political subdivision of a State" to regulate "the price of for-hire motor vehicle transportation by a tow truck . . . performed without the prior consent . . . of the [towed vehicle's] owner or operator," § 14501(c)(2)(C). Petitioner Columbus, Ohio (City), extensively regulates the operation of tow trucks seeking to pick up vehicles within city limits. Plaintiff-respondents, a tow-truck operator and a trade association of such operators, brought this suit to enjoin enforcement of the City's tow-truck regulations on the ground that they were preempted by § 14501(c)(1). The Federal District Court granted the plaintiffs summary judgment. The Sixth Circuit affirmed based on its earlier decision in *Petrey* v. *Toledo*, in which it held that city tow-truck regulations similar to those of Columbus were preempted. Observing that § 14501(c)(1)'s preemption rule explicitly applies to "a State [or] political subdivision of a State," while the exception for safety regulations, § 14501(c)(2)(A), refers only to the "authority of a State," the *Petrey* court determined that the contrast in statutory language indicated that Congress meant to limit the safety exception to States alone. This reading, the court further reasoned, was consistent with Congress' deregulatory purpose of encouraging market forces by eliminating a myriad of complicated and potentially conflicting state regulations. Yet another level of regulation at the local level, the court inferred, would be disfavored.

Held: Section 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks. Pp. 432–442.

Syllabus

(a) Had § 14501(c) contained no reference at all to "political subdivision[s] of a State," § 14501(c)(2)(A)'s exception for exercises of the "safety regulatory authority of a State" undoubtedly would have embraced both state and local regulation under *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597. It was there held that the exclusion of political subdivisions cannot be inferred from a federal law's express authorization to the "States" to take action, for such subdivisions are components of the very entity the statute empowers, and are created as convenient agencies to exercise such of the State's powers as it chooses to entrust to them, *id.*, at 607–608. This case is a closer call than *Mortier* because, in contrast to § 14501(c)(2)(A)'s singularly bare reference to "[s]tate" authority, almost every other provision of § 14501 links States and their political subdivisions. Nevertheless, that does not mean that Congress intended to limit the exception to States alone, as respondents contend. Respondents rely on *Russello* v. *United States*, 464 U. S. 16, 23, in which the Court observed that, where particular language is included in one section of a federal statute but omitted from another, Congress is generally presumed to have acted intentionally and purposely. Reading § 14501(c)'s exceptions in combination and context, however, leads the Court to conclude that § 14501 does not provide the requisite "clear and manifest indication that Congress sought to supplant local authority." *Mortier*, 501 U. S., at 611. Section 14501(c)(2)(C) refers to the "authority of a State or a political subdivision of a State to enact or enforce" regulations in particular areas, wording which parallels that of § 14501(c)(1). Accord, § 14501(c)(3). This parallel structure does not imply, however, that § 14501(c)(2)(A)'s concise statement must be read to use the term "State" restrictively. In contrast to §§ 14501(c)(2)(C) and (c)(3), neither the safety exception, § 14501(c)(2)(A), nor the exception for the transportation of household goods, § 14501(c)(2)(B), refers to the "authority . . . to enact or enforce a law, regulation, or other provision." The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection. Furthermore, the Court notes, § 14501(c)(1) preempts the power of both States and localities to "enact or enforce" rules related to the "price, route, or service of any motor carrier . . . with respect to the transportation of property"; reading the term "State" in § 14501(c)(2)(A) to exclude localities would prevent those units not only from enacting such rules but also from enforcing them, even when such rules were enacted by the state legislature. Finally, resort to the *Russello* presumption here would yield a decision at odds with our federal system's traditional comprehension of the regulatory authority of a State. Local governmental units are cre-

ated to exercise such of the State's powers as the State may entrust to them in its absolute discretion. *Mortier*, 501 U. S., at 607–608. In contrast to programs in which Congress restricts that discretion through its spending power, § 14501(c)(2)(A) evinces a clear purpose to ensure that the preemption of States' economic authority over motor carriers of property "not restrict" the preexisting and traditional state police power over safety, "a field which the States have traditionally occupied." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485. Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.* Because a State's "safety regulatory authority" includes the choice to delegate power to localities, forcing a State to refrain from doing so would effectively "restrict" that very authority. Absent a basis more reliable than statutory language insufficient to demonstrate a "clear and manifest purpose" to the contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units over safety on municipal streets and roads. Pp. 432–440.

(b) Contrary to the Sixth Circuit's reading, declarations of deregulatory purpose in the statute and legislative history do not justify interpreting through a deregulatory prism aspects of the state regulatory process that Congress determined should *not* be preempted. Giving § 14501(c)(2)(A)'s safety exception the narrowest possible construction is resistible here, for that provision does not necessarily conflict with Congress' deregulatory purposes. The area Congress sought to deregulate was state *economic* regulation; the exemption in question is for state *safety* regulation. Local regulation of tow-truck prices, routes, or services that is not genuinely responsive to safety concerns garners no exemption from preemption. The construction of § 14501 that respondents advocate, moreover, does not guarantee uniform regulation. On their reading as on petitioners', for example, a State could, without affront to the statute, pass discrete, nonuniform safety regulations applicable to each of its several constituent municipalities. Furthermore, § 31141—which authorizes the Secretary of Transportation to void any state safety law or regulation upon finding that it has no safety benefit or would cause an unreasonable burden on interstate commerce—affords a means to prevent § 14501(c)(2)(A)'s safety exception from overwhelming Congress' deregulatory purpose. Pp. 440–442.

(c) The Court expresses no opinion on whether Columbus' particular regulations, in whole or in part, qualify as exercises of "safety regula-

Syllabus

tory authority" or otherwise fall within § 14501(c)(2)(A)'s compass. This question, which was not reached by the Sixth Circuit, remains open on remand. P. 442.

257 F. 3d 506, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 442.

Jeffrey S. Sutton argued the cause for petitioners. With him on the briefs were *Traci L. Lovitt*, *Ronald E. Laymon*, and *Susan E. Ashbrook*.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Dana Martin*, *Kirk K. Van Tine*, *Paul M. Geier*, and *Dale C. Andrews*.

Richard A. Cordray argued the cause for respondents. With him on the briefs was *David A. Ferris*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Kansas et al. by *Carla J. Stovall*, Attorney General of Kansas, and *Stephen R. McAllister*, State Solicitor, joined by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Steve Carter* of Indiana, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *Eliot Spitzer* of New York, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the City of Dallas by *Christopher D. Bowers;* for Miami-Dade County by *Leonard Leigh Elias;* for the City and County of San Francisco et al. by *Rose-Ellen Heinz*, *Moses W. Johnson IV*, *Michael F. Dean*, *Charles M. Hinton, Jr.*, *Brad Neighbor*, *Scott H. Howard*, *Henry W. Underhill, Jr.*, *Michael G. Colantuono*, *William B. Conners*, *Michael A. Cardozo*, *Leonard J. Koerner*, *George Rios*, *Valerie J. Armento*, *Debra E. Corbett*, and *Robert E. Murphy;* for the City of Toledo et al. by *Barry*

JUSTICE GINSBURG delivered the opinion of the Court.

Federal preemption prescriptions relating to motor carriers, contained in 49 U. S. C. § 14501(c) (1994 ed., Supp. V), specifically save to States "safety regulatory authority . . . with respect to motor vehicles," § 14501(c)(2)(A). This case presents the question whether the state power preserved in § 14501(c)(2)(A) may be delegated to municipalities, permitting them to exercise safety regulatory authority over local tow-truck operations.

The federal legislation preempts provisions by "a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." § 14501(c)(1). As an exception to this general rule, Congress provided that the preemption directive "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." § 14501(c)(2)(A). Section 14501(c)(1)'s statement of the general rule explicitly includes "State[s]" and their "political subdivision[s]." The exception for safety regulation, however, specifies only "State[s]" and does not mention "political subdivision[s]." § 14501(c)(2)(A).

We hold that § 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks. A locality, as § 14501(c) recognizes, is a "political *subdivision*" of the State. Ordinarily, a political subdivision may exercise whatever portion

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M. Byron, *John E. Gotherman*, and *James G. Burkhardt;* and for Coalition for Local Sovereignty by *Kenneth B. Clark*.

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations, Inc., et al. by *Evan M. Tager*, *Beth L. Law*, and *Robert Digges, Jr.;* for the California Dump Truck Owners Association by *Edward J. Hegarty;* for the Cargo Airline Association by *Paul T. Friedman*, *Ruth N. Borenstein*, *Drew S. Days III*, and *Beth S. Brinkmann;* for the Towing and Recovery Association of America by *Erik S. Jaffe* and *Michael P. McGovern;* and for VRC LLC et al. by *James C. Mosser*.

of state power the State, under its own constitution and laws, chooses to delegate to the subdivision. Absent a clear statement to the contrary, Congress' reference to the "regulatory authority of a State" should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.

I

The Interstate Commerce Act, as amended by the Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1606, and the ICC Termination Act of 1995, 109 Stat. 899, generally preempts state and local regulation "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property"; enumerated matters, however, are not covered by the preemption provision. The Act prescribes:

> "(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.
>
> "(2) MATTERS NOT COVERED.—Paragraph (1)—
>
> "(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> "(B) does not apply to the transportation of household goods; and
>
> "(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck,

> if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.
>
> "(3) STATE STANDARD TRANSPORTATION PRACTICES.—
>
> "(A) CONTINUATION.—[Section 14501(c)(1)] shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—*[inter alia]* uniform cargo liability rules . . . if such law, regulation, or provision meets [various enumerated] requirements." 49 U. S. C. § 14501(c).

Tow trucks, all parties to this case agree, are "motor carrier[s] of property" falling within § 14501(c)'s compass. This reading is corroborated by § 14501(c)(2)(C), which relates to nonconsensual tows, *e. g.*, of illegally parked or abandoned vehicles. That provision plainly indicates that tow trucks qualify as "motor carrier[s] of property"; it exempts from federal preemption state and local regulation of "the price of for-hire motor vehicle transportation by a tow truck" when the towing "is performed without the prior consent . . . of the [towed vehicle's] owner or operator."

Petitioner, the City of Columbus, Ohio (City), extensively regulates the operation of any tow truck that seeks to pick up vehicles within city limits. Columbus' regulations require tow-truck operators to obtain city licenses, submit to city inspections, meet city standards for insurance and recordkeeping, and conform their vehicles to the City's detailed equipment requirements. See Columbus, Ohio, City Code §§ 549.02–549.06 (1991); App. to Pet. for Cert. 37a–52a.

Plaintiff-respondent Ours Garage and Wrecker Service, Inc., joined by a trade association of tow-truck operators, the Towing and Recovery Association of Ohio (TRAO), brought suit in Federal District Court against the City of Columbus

and two city officials to enjoin enforcement of the City's tow-truck regulations. The complaint alleged that Columbus' regulations were preempted by § 14501(c)(1). On cross-motions for summary judgment, the District Court ruled for the plaintiffs; the court declared the City's tow-truck regulations preempted and enjoined their enforcement. Columbus and its officials appealed to the United States Court of Appeals for the Sixth Circuit.

During the pendency of Columbus' appeal, the Sixth Circuit decided *Petrey* v. *Toledo*, 246 F. 3d 548 (2001). *Petrey* held that city of Toledo tow-truck regulations, resembling those of Columbus, were preempted by § 14501(c).[1] The court observed first that § 14501(c)(1)'s preemption rule explicitly applies to "a State [or] political subdivision of a State," while the exception for safety regulations, § 14501(c)(2)(A), refers only to the "authority of a State." The contrast in statutory language indicated to the court that Congress meant to limit the safety exception to States alone. *Id.*, at 563. This reading, the court further reasoned, was consistent with Congress' deregulatory purpose. "Congress intended to encourage market forces . . . through the elimination of a myriad of complicated and potentially conflicting state regulations," the court observed; "yet another level of regulation at the local level," the court inferred, "would be disfavored." *Ibid.*

Eleven weeks after rendering its judgment in *Petrey*, the Sixth Circuit decided this case. Holding *Petrey* dispositive, the appeals court affirmed the District Court's injunction against enforcement of Columbus' tow-truck regulations. 257 F. 3d 506, 507–508 (2001).

The Courts of Appeals have divided on the question whether § 14501(c)(2)(A)'s safety regulation exception to pre-

[1] The court excepted regulations governing the city's own purchase of towing services, which it held fell within the "municipal proprietor" exception applicable to federal preemption rules. See *Petrey*, 246 F. 3d, at 558–559.

emption encompasses municipal regulations. Compare *Petrey*, 246 F. 3d 548; *Stucky* v. *San Antonio*, 260 F. 3d 424 (CA5 2001); *Tocher* v. *Santa Ana*, 219 F. 3d 1040, 1051 (CA9 2000); and *R. Mayer of Atlanta, Inc.* v. *Atlanta*, 158 F. 3d 538 (CA11 1998) (all holding that local safety and insurance regulations are preempted), with *Ace Auto Body & Towing, Ltd.* v. *New York*, 171 F. 3d 765 (CA2 1999) (holding that local safety and insurance regulations are not preempted). We granted certiorari to resolve the conflict, see 534 U. S. 1073 (2002), and now reverse the Sixth Circuit's judgment.

II

We begin our consideration of the question presented with an observation that is beyond genuine debate. Had 49 U. S. C. § 14501(c) contained no reference at all to "political subdivision[s] of a State," the preemption provision's exception for exercises of the "safety regulatory authority of a State," § 14501(c)(2)(A), undoubtedly would have embraced both state and local regulation. Accord, *post*, at 445 (SCALIA, J., dissenting). The Court's decision in *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597 (1991), would have been definitive. There the Court considered a provision of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing a "State [to] regulate the sale or use of any federally registered pesticide or device in the State," 7 U. S. C. § 136v(a); the provision was "silent with reference to local governments." 501 U. S., at 607. "Mere silence," we held, "cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *Ibid.* (internal quotation marks omitted).

As Justice White stated for the Court in *Mortier*, "[w]hen considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.*, at 605 (quoting *Rice* v.

Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947)). Furthermore, Justice White explained:

> "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion. The exclusion of political subdivisions cannot be inferred from the express authorization to the States because political subdivisions are components of the very entity the statute empowers." 501 U. S., at 607–608 (internal quotation marks, citations, and alterations omitted).

This case is a closer call than *Mortier*. Here, the general preemption provision, § 14501(c)(1)—from which § 14501(c)(2)(A) excepts "the safety regulatory authority of a State"—explicitly preempts regulation both by "a State" and by a "political subdivision of a State." The exception for state safety regulation is the first in a series of four statutory exceptions to the preemption rule. The third exception in the series, covering regulation of prices for nonconsensual tow-truck services, matches the general preemption provision; it explicitly applies to the "authority of a State or a political subdivision of a State." § 14501(c)(2)(C). States and their political subdivisions are likewise linked in almost every other provision of § 14501. See §§ 14501(a), 14501(b)(1), 14501(c)(3)(A), 14501(c)(3)(B), 14501(c)(3)(C).

Respondents Ours Garage and TRAO, in line with several Courts of Appeals, home in on the statute's repeated references to both States and their political subdivisions; in contrast, they urge, the singularly bare reference to "[s]tate" authority in § 14501(c)(2)(A)'s exception for safety regulation must mean that Congress intended to limit the exception to States alone. See Brief for Respondents 15–16, 26–29. Respondents rely particularly on *Russello* v. *United States*, 464 U. S. 16 (1983). In that case, we observed: "Where Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.*, at 23 (internal quotation marks omitted) (cited in *Petrey*, 246 F. 3d, at 561; *Stucky*, 260 F. 3d, at 441; and *Tocher*, 219 F. 3d, at 1051). The dissent asserts the same argument vigorously. In its words: "The only conceivable reason" for the separate enumeration of States and their political subdivisions in § 14501(c)(1) is to "*establish* . . . two *separate categories* of state power—state power exercised through political subdivisions and state power exercised by the State directly—that are later treated differently in the exceptions to the rule." *Post*, at 445.

We acknowledge that § 14501(c)'s "disparate inclusion [and] exclusion" of the words "political subdivisions" support an argument of some force, one that could not have been made in *Mortier*. Nevertheless, reading § 14501(c)'s set of exceptions in combination, and with a view to the basic tenets of our federal system pivotal in *Mortier*, we conclude that the statute does not provide the requisite "clear and manifest indication that Congress sought to supplant local authority." 501 U. S., at 611.

Respondents Ours Garage and TRAO, as just noted, contrast the first statutory exception to § 14501(c)'s preemption rule, *i. e.*, the exception preserving "the safety regulatory authority of a State," § 14501(c)(2)(A), with the third exception, preserving the "authority of a State or a political subdivision to enact or enforce a law, regulation, or other provision relating to the price" charged for nonconsensual towing, § 14501(c)(2)(C). See Brief for Respondents 15–16. The nonconsensual towing exception tracks the language and structure of the general preemption rule, omitting only the reference to a "political authority of 2 or more States." Similarly styled, the fourth exception, for carrier-requested regulations in areas such as "uniform cargo liability" and antitrust immunity, § 14501(c)(3), completely parallels the word-

ing of § 14501(c)(1): It provides that preemption "shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision" in those areas.

The safety exception of § 14501(c)(2)(A), however, does not borrow language from § 14501(c)(1). It simply states that preemption "shall not restrict the safety regulatory authority of a State." Notably, the second statutory exception, on which respondents train no attention, is stated with similar economy. That exception mentions neither States nor political subdivisions; it simply says that the general preemption rule, § 14501(c)(1), "does not apply to the transportation of household goods," § 14501(c)(2)(B). Yet it is abundantly clear that, notwithstanding this difference in verbal formulation, § 14501(c)(2)(B), like its neighbor § 14501(c)(2)(C), permits both state and local regulation. Accord, *post*, at 446 (SCALIA, J., dissenting).

The inclusion of the phrase "the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision" no doubt synchronizes the nonconsensual towing provision with § 14501(c)(1)'s main rule. The parallel structure of §§ 14501(c)(1) and 14501(c)(2)(C) does not imply, however, that § 14501(c)(2)(A)'s concise statement must be read to use the term "State" restrictively. Respondents' inference from the absence of "political subdivision of a State" in § 14501(c)(2)(A) would be more persuasive if the omission were the sole difference in the expression of the general rule and the safety exception. In contrast to §§ 14501(c)(2)(C) and (c)(3), however, neither the safety exception nor the household-goods exception refers to the "authority . . . to enact or enforce a law, regulation, or other provision."[2] The *Russello* presump-

[2] The dissent insists that § 14501(c)(2)(B) is irrelevant because its phrasing "ha[s] nothing to do with the issue of separating state and local authority." *Post*, at 446 (emphasis deleted). We ultimately draw the same conclusion, of course, regarding the phrasing of the safety exception in

tion—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection.

Respondents' restrictive reading of the term "State," we note, introduces an interpretive conundrum of another kind. Section 14501(c)(1) preempts the power of both States and localities to "*enact or enforce* a law, regulation, or other provision." (Emphasis added.) Those conjoined words travel together. If, as Ours Garage and TRAO argue, the safety exception of § 14501(c)(2)(A) reaches only States, then localities are preempted not only from enacting, but equally from *enforcing*, safety regulations governing motor carriers of property—even if those regulations are enacted by the state legislature. It is unlikely that Congress would preserve States' power to enact safety rules and, at the same time, bar the ordinary method by which States enforce such rules—through their local instrumentalities.[3]

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§ 14501(c)(2)(A). The dissent, although it urges that "we should take seriously the references to States and subdivisions of States where they appear," *post*, at 447, rests upon the fact that subdivisions of States do *not* appear in the safety exception—as they also do not in the household-goods exception of § 14501(c)(2)(B). That § 14501(c)(2) comprises three exceptions, each differently stated, seems to us indeed relevant to the interpretive weight that may be attached to the variation among them.

[3] Faced with this argument, the dissent is converted, however temporarily, to the view that "federal interference with the 'historic powers of the States' must be evinced by a 'plain statement.'" *Post*, at 450, n. 4 (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 461 (1991)). The dissent finds no plain statement in § 14501(c)(1)'s prohibition on local enforcement because it can be read to mean only that "a political subdivision may not enact new laws or enforce *its previously enacted laws*" relating to motor carriage of property. *Post*, at 450, n. 4. This is by no means the most natural reading of the preemption provision. The suggestion of the dissent is that, as applied to localities, § 14501(c)(1) preempts only local enforcement of *locally enacted* laws. See *ibid.* This interpretation raises the startling possibility that, although § 14501(c)(1) prohibits both States and localities

Finally, we reiterate, reading the term "State" as used in § 14501 to exclude political subdivisions would yield a decision at odds with our federal system's traditional comprehension of "the safety regulatory authority of a State," § 14501(c)(2)(A). To repeat the essential observation made in *Mortier:* "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." 501 U. S., at 607–608 (internal quotation marks and alterations omitted). Whether and how to use that discretion is a question central to state self-government. See, *e. g.*, *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978) (States enjoy "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them").

In Ohio, as in other States, the delegation of governing authority from State to local unit has long occupied the attention of the State's lawmakers. See D. Wilcox, Municipal Government in Michigan and Ohio: A Study in the Relations of City and Commonwealth 52–54, 63 (1896) (citing Ohio Const., Art. XIII (1851)). The Ohio Constitution currently grants municipalities within the State general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." Art. XVIII, § 3. Ohio's Legislature has enacted several statutes empowering cities to regulate motor vehicles and highways. See, *e. g.*, Ohio Rev. Code Ann. § 715.22 (Anderson 2000) (municipality may regulate motor vehicles and highways); § 723.01 ("Municipal corporations shall have special power to regulate the use of the streets."). Particularly relevant here, Ohio has exempted tow trucks from the State's regulation of motor carriers,

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from "enact[ing]" new laws, it permits localities (but not States) to enforce previously enacted *state* laws relating to motor carriage of property.

§ 4921.02(A)(8), thus leaving tow-truck regulation largely to the cities, *Cincinnati* v. *Reed*, 27 Ohio App. 3d 115, 500 N. E. 2d 333 (1985).

It is the expressed intent of § 14501(c)(2)(A) that the preemption rule of § 14501(c)(1) "not restrict" the *existing* "safety regulatory authority of a State." Compare § 14501(c)(2)(A) with §§ 14501(c)(2)(B) and (C) (preemption "does not apply" to state or local power to regulate in particular areas), and § 14501(c)(3) (preemption rule "shall not affect" multistate, state, or local authority to regulate particular areas at the behest of carriers). Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) (internal quotation marks and citation omitted). Section 14501(c)(2)(A) seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid.* (internal quotation marks and citation omitted). A saving provision of that order is hardly comparable to exercises of congressional *spending* authority that, as a condition for receipt of funds, explicitly restrict the prerogative of States to entrust governance of a matter to localities. Such programs typically make uniform statewide regulation a condition of funding, or, conversely, provide funds to localities on the condition that they be spent at that level in accordance with federal prescriptions and without state interference. See, *e. g.*, 23 U. S. C. § 153 (grants to support traffic safety conditioned on a motorcycle helmet law that applies "throughout the State"); § 158 (highway grants withheld unless "State has in effect a law" setting the drinking age at 21); 42 U. S. C. § 1396a(a)(1) (Medicaid grants available only if a State ensures that its plan for medical assistance is "in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them"); *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S.

256, 270 (1985) (State may not restrict local use of funds that the United States makes available to localities to spend at their discretion).[4]

This case, by contrast, deals not with States' voluntary agreements to relinquish authority vis-à-vis their political subdivisions in exchange for federal funds, but with preemption stemming from Congress' power to regulate commerce, in a field where States have traditionally allowed localities to address local concerns. Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), "not restrict" the preexisting and traditional state police power over safety. That power typically includes the choice to delegate the State's "safety regulatory authority" to localities. Forcing a State to refrain from doing so would effectively "restrict" that very authority. Absent a basis more reliable than statutory language insufficient to demonstrate a "clear and manifest purpose" to the

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[4] Nor, the dissent's suggestion notwithstanding, see *post*, at 448, is § 14501 similar to the Clean Air Act, which mandates that States undertake an environmental planning process that of necessity cannot respect local political boundaries. See 42 U. S. C. §§ 7407(c), 7410(a)(1) (1994 ed.) (States must develop implementation plans for air quality in each of its "air quality control region[s]," whose borders are defined by the Administrator of the Environmental Protection Agency based not upon local jurisdictional lines but upon criteria she "deems necessary or appropriate for the attainment . . . of [national] ambient air quality standards"); cf. 33 U. S. C. § 1313(d)(1)(A) (under the Clean Water Act, each State must develop pollution abatement plans based upon a "priority ranking" of *all* "waters within its boundaries for which . . . effluent limitations . . . are not stringent enough to implement [applicable] water quality standard[s]"). Even so, States *may* delegate implementation authority under the Clean Air Act to their political subdivisions, subject to the requirement that the State bear ultimate oversight responsibility. See § 7410(a)(2)(E)(iii) (State must provide "necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any [state] plan provision, the State has responsibility for ensuring adequate implementation of such plan provision").

contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units over safety on municipal streets and roads.

III

The Court of Appeals supported its reading of § 14501(c)(2)(A) to disallow delegation from State to city in part by reference to the statute's deregulatory purpose. See *Petrey*, 246 F. 3d, at 563; accord, *Stucky*, 260 F. 3d, at 444–446; *Tocher*, 219 F. 3d, at 1048, 1051; *R. Mayer*, 158 F. 3d, at 546. We now turn to that justification.

The Conference Report on the Federal Aviation Administration Authorization Act of 1994 observed that "[s]tate economic regulation of motor carrier operations . . . is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H. R. Conf. Rep. No. 103–677, p. 87 (1994). Carrying more weight, in the Act itself Congress reported its finding that "the regulation of intrastate transportation of property by the States" unreasonably burdened free trade, interstate commerce, and American consumers. Pub. L. 103–305, § 601(a)(1), 108 Stat. 1605. Congress therefore concluded that "certain aspects of the State regulatory process should be preempted." § 601(a)(2). These declarations of deregulatory purpose, however, do not justify interpreting through a deregulatory prism "aspects of the State regulatory process" that Congress determined should *not* be preempted.

A congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception. Such a construction is surely resistible here, for § 14501(c)(1)'s preemption rule and § 14501(c)(2)(A)'s safety exception to it do not necessarily conflict. The problem to which the congressional conferees attended was "[s]tate *economic* regulation";

the exemption in question is for state *safety* regulation. Corroboratively, the measure's legislative history shows that the deregulatory aim of the legislation had been endorsed by a key interest group—the American Trucking Association—subject to "some conditions that would allow regulatory protection to continue for non-economic factors, such as . . . insurance [and] safety." H. R. Conf. Rep. No. 103–677, at 88. The conferees believed that the legislation "address[ed] these conditions." *Ibid.;* see also *Ace Auto Body,* 171 F. 3d, at 776.

The construction of § 14501 that respondents Ours Garage and TRAO advocate, moreover, does not guarantee uniform regulation. On respondents' reading as on petitioners', a State could, without affront to the statute, pass discrete, nonuniform safety regulations applicable to each of its several constituent municipalities. Ohio thus could adopt the Columbus regulations to govern in that city, the Toledo regulations to govern there, and so on down the line. See Tr. of Oral Arg. 37–38. Indeed, because § 14501(c)(2)(A) refers only to "political" subdivisions, nothing in the statute's text would impede a State from creating an administrative agency organized into local offices, each of which could craft local rules suitable to its assigned jurisdiction. There is no reason to suppose that Congress meant to stop the States from spreading their authority among municipalities unless they employ such artificial or inefficient schemes.

Furthermore, 49 U. S. C. § 31141 (1994 ed.) affords the Secretary of Transportation a means to prevent the safety exception from overwhelming the lawmakers' deregulatory purpose. That provision authorizes the Secretary to void any "State law or regulation on commercial motor vehicle safety" that, in the Secretary's judgment, "has no safety benefit . . . [or] would cause an unreasonable burden on interstate commerce." §§ 31141(a), (c)(4); see also § 31132(8) ("'State law' includes [for the purposes of § 31141] a law enacted by a political subdivision of a State"); § 31132(9) (parallel definition of "State regulation"). Under this authority,

the Secretary can invalidate local safety regulations upon finding that their content or multiplicity threatens to clog the avenues of commerce.

We reiterate that § 14501(c)(2)(A) shields from preemption only "safety regulatory authority" (and "authority of a State to regulate . . . with regard to minimum amounts of financial responsibility relating to insurance requirements"). Local regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule.

* * *

For the reasons stated, we hold that § 14501(c)(2)(A) spares from preemption local as well as state regulation. We express no opinion, however, on the question whether Columbus' particular regulations, in whole or in part, qualify as exercises of "safety regulatory authority" or otherwise fall within § 14501(c)(2)(A)'s compass. This question, which was not reached by the Court of Appeals,[5] remains open on remand.

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, dissenting.

The dispute in the present case arises from the fact that a reference to "State" power or authority can be meant to include *all* that power or authority, including the portion exercised by political subdivisions (as, for example, in the ordinary reference to "the State's police power"); but can also be

[5] Nor was it reached in *Petrey* v. *Toledo*, 246 F. 3d 548 (CA6 2001), which the Sixth Circuit stated "controls the disposition of this case," 257 F. 3d 506, 508 (2001). See *Petrey*, 246 F. 3d, at 563–564.

meant to include only that power or authority exercised at the state level (as, for example, in the phrase "State and local governmental authority"). The issue is whether, when 49 U. S. C. § 14501(c)(2)(A) (1994 ed., Supp. V) excepts from the preclusionary command of § 14501(c)(1) "the safety regulatory authority *of a State* with respect to motor vehicles," it means to except the safety regulatory authority of cities and counties as well. In my view it plainly does not.

I

There are four exceptions to the preclusionary rule of § 14501(c)(1), which read as follows:

> "(2) MATTERS NOT COVERED.—[The preemption rule]—
>
> "(A) shall not restrict the safety regulatory *authority of a State* with respect to motor vehicles, the *authority of a State* to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the *authority of a State* to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> "(B) does not apply to the transportation of household goods; and
>
> "(C) does not apply to the *authority of a State or a political subdivision of a State* to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.
>
> "(3) STATE STANDARD TRANSPORTATION PRACTICES.—
>
> "(A) CONTINUATION.—[The preemption rule] shall not affect any *authority of a State, political subdivision of a State, or political authority of 2 or more States* to

> enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—*[inter alia]* uniform cargo liability rules, . . . if such law, regulation, or provision meets the requirements of subparagraph (B)." §§ 14501(c)(2), (3) (emphases added).

It is impossible to read this text without being struck by the fact that the term "political subdivision of a State" is *added* to the term "State" in some of the exceptions, §§ 14501(c)(2)(C), (c)(3), but *not* in the exception at issue here, § 14501(c)(2)(A). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983). The only way to impart some purpose and intent here is to assume that the word "State" is used in its narrower sense, so that political subdivisions are not covered by the term. The Court admits that the rule applied in *Russello* "support[s] an argument of some force," *ante*, at 434, that the exception for the "safety regulatory authority of a State" does not include local safety regulation.

But while the *Russello* argument is strong, it alone does not fully describe the *clarity* with which § 14501(c)(2)(A) excludes political subdivisions. For the clarity begins not just with the various exceptions, but with the very preemption rule to which the exceptions are appended. That rule reads:

> "Except as provided [in §§ 14501(c)(2), (3)], a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U. S. C. § 14501(c)(1).

Since the lawmaking power of a political subdivision of a State is a subset of the lawmaking power of the State, *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 47 (1994); *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 607–608 (1991), the preemption rule would have precisely the same scope if it omitted the reference to "political subdivision of a State." It is a well-established principle of statutory construction (and of common sense) that when such a situation occurs, when "two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one." J. Sutherland, Statutes and Statutory Construction § 266, p. 349 (1891). The only conceivable reason for this specification of "political subdivision" apart from "State" is *to establish*, in the rule, the two *separate categories* of state power—state power exercised through political subdivisions and state power exercised by the State directly—that are later treated differently in the exceptions to the rule.

The situation is comparable to the following hypothetical using the term "football" (which may be used to include soccer, see Webster's New International Dictionary 983 (2d ed. 1950)): Assume a statute which says that "football and soccer shall not be played on the town green" (§ 14501(c)(1)), except that "football and soccer may be played on Saturdays" (§ 14501(c)(2)(C)), "football and soccer may be played on summer nights" (§ 14501(c)(3)(A)), and "football may be played on Mondays" (§ 14501(c)(2)(A)). In today's opinion, the Court says soccer may be played on Mondays. I think it clear that soccer is not to be regarded as a subset of football but as a separate category. And the same is true of "political subdivision" here.

II

The Court reaches the opposite conclusion merely because § 14501(c) exhibits uneven drafting. First, the Court notes that § 14501(c)(2)(A) does not "trac[k] the language and

structure of the general preemption rule." *Ante,* at 434. Whereas other exceptions to the rule refer to the authority of a State or other political entity "to enact or enforce a law, regulation, or other provision," § 14501(c)(2)(A) merely refers to the "safety regulatory authority of a State." Second, the Court notes that another exception to the preemption rule, § 14501(c)(2)(B), is "stated with similar economy." *Ante,* at 435. It addresses merely the *subject* of regulation (transportation of household goods) instead of both the subject and the *source* of regulation (a State, political subdivision, or political authority of two or more States). This has, the Court notes, the same effect as its neighbor, § 14501(c)(2)(C), of permitting both state and local regulation.[1] *Ibid.* These inconsistencies in the statute's drafting style, the Court contends, undermine the conclusion we would ordinarily draw from the absence of the term "'political subdivision'" in § 14501(c)(2)(A). *Ibid.*

The weakness of this argument should be self-evident. How can inconsistencies of style, *on points that have nothing to do with the issue of separating state and local authority,* cause the text's crystal-clear distinction between state and local authority to disappear? It would certainly reflect more orderly draftsmanship if the statute consistently used the formulation "to enact or enforce a law, regulation, or other provision," rather than replacing it in § 14501(c)(2)(A) with the equivalent phrase "regulatory authority of a State"; and if the statute referred to subject matter alone (à la § 14501(c)(2)(B)) either never at all, or else *whenever* the exception applied to all three categories of States, subdivisions of States, and political authorities of two or more States.

[1] Not only is this point (as the text proceeds to discuss) irrelevant in principle; it is misleading in its description of fact, suggesting that the two neighboring sections produce the same result with different language. It is true enough that § 14501(c)(2)(C), like § 14501(c)(2)(B), permits both state and local regulation. But § 14501(c)(2)(C), *unlike* § 14501(c)(2)(B), also permits regulation by a "political authority of 2 or more States."

But it is impossible to imagine how this imperfect draftsmanship in unrelated matters casts any doubt upon the precise meaning of the subject-matter-plus-source provisions where they appear. Unless the Court is appealing to some hitherto unknown canon of interpretation—perhaps (borrowed from the law of evidence) *negligens in uno, negligens in omnibus*—the diverse styles of § 14501(c)'s exceptions have nothing to do with whether we should take seriously the references to States and subdivisions of States where they appear.

What is truly anomalous here is not the fact that the terminology of § 14501(c) is diverse with regard to presently irrelevant matters, but the fact that the Court has today come up with a judicial interpretation of § 14501(c) that renders the term "political subdivision of a State," which appears throughout, *utterly superfluous* throughout. Although the Court claims that the "*Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection," *ante*, at 435–436, it cites no authority for that proposition—nor could it, because we have routinely applied the *Russello* presumption in cases where a statute employs different "verbal formulation[s]" in sections that include particular language and in sections that omit such language. See, *e. g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 452–454 (2002); *Duncan* v. *Walker*, 533 U. S. 167, 173–174 (2001); *Hohn* v. *United States*, 524 U. S. 236, 249–250 (1998); *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997).

III

Lacking support in the text of the statute, the Court invokes federalism concerns to justify its decision. "Absent a basis more reliable than statutory language insufficient to demonstrate a 'clear and manifest purpose' to the contrary," the Court reasons, "federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local

units over safety on municipal streets and roads." *Ante*, at 439–440. Well of course we think there is "clear and manifest purpose here"; but besides that, the Court's federalism concerns are overblown. To begin with, it should not be thought that the States' power to control the relationship between themselves and their political subdivisions—their "traditional prerogative . . . to delegate" (or to refuse to delegate) "their authority to their constituent parts," *ante*, at 429—has hitherto been regarded as sacrosanct. To the contrary. To take only a few examples,[2] the Federal Government routinely gives directly to municipalities substantial grants of funds that cannot be reached or directed by "the politicians upstate" (or "downstate"), see, *e. g.*, Office of Management and Budget, 2001 Catalog of Federal Domestic Assistance AEI–1 to AEI–29; *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 270 (1985); and many significant federal programs require laws or regulations that must be adopted by the state government and cannot be delegated to political subdivisions, see, *e. g.*, 42 U. S. C. § 1396a(a) (Medicaid); 23 U. S. C. §§ 153, 158 (Federal-Aid Highway System); 42 U. S. C. §§ 7407(a), 7410 (1994 ed.) (Clean Air Act).[3] This "interference" of the Fed-

[2] The Court thinks these examples are "hardly comparable" to § 14501(c) because many involve Spending Clause legislation. *Ante*, at 438. A sufficient answer is that one of them does not, see 42 U. S. C. § 7410 (1994 ed.) (Clean Air Act), and that other examples not involving Spending Clause legislation could be added, see, *e. g.*, 33 U. S. C. §§ 1313(d), 1362(3) (Clean Water Act). But in any event, a siphoning off of the States' "historic powers" to delegate has equally been achieved, whether it has come about through the coercion of deprivation of Spending Clause funds or through other means. The point is that it is not unusual for Congress to interfere in this matter.

[3] The Court thinks the Clean Air Act is a bad example merely because a State can rely on political subdivisions to *enforce* the State's implementation plan. *Ante*, at 439, n. 4; see 42 U. S. C. §§ 7407(a), 7410(a)(2)(E)(iii). So what? Only *States* may adopt implementation plans; this duty cannot be delegated to localities. Moreover, as I explain in

eral Government with the States' "traditional prerogative . . . to delegate their authority to their constituent parts" has long been a subject of considerable debate and controversy. See, *e. g.*, Hills, Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control, 97 Mich. L. Rev. 1201 (1999).

With such major impositions as these already on the books, treating § 14501(c)(1) as some extraordinary federal obstruction of state allocation of power is absurd. That provision preempts the authority of political subdivisions to regulate "a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder *with respect to the transportation of property.*" (Emphasis added.) The italicized language massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment "motor carriers of property." § 14501(c). States *and political subdivisions* remain free to enact and enforce general traffic safety laws, general restrictions on the weight of cars and trucks that may enter highways or pass over bridges, and other regulations that do not target motor carriers "with respect to the transportation of property." In addition, the exception contained in § 14501(c)(2)(A) allows a State—but not a political subdivision—to apply special safety rules (rules adopted under its "safety regulatory authority") to motor carriers of property.[4]

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n. 4, *infra*, the statute at issue here is no different. Under 49 U. S. C. §§ 14501(c)(1) and (c)(2)(A), a State may enact regulations pursuant to its "safety regulatory authority" and rely on localities to *enforce* those regulations.

[4] This interpretation of the statutory scheme "introduces an interpretive conundrum of another kind," the Court asserts, because § 14501(c)(1) declares that a political subdivision may not "*enact or enforce*" laws, regulations, or other provisions relating to motor carriers of property. *Ante*, at 436. In the Court's view, if the term "State" does not include "subdivision of a State," § 14501(c)(1) will prevent a State from relying on localities

This relatively modest burden on the "historic powers of the States" to delegate authority to political subdivisions, *Gregory* v. *Ashcroft*, 501 U. S. 452, 461 (1991) (internal quotation marks omitted), is unambiguously imposed by the statute. The Court repeatedly emphasizes the fact that § 14501(c)(2)(A) declares that § 14501(c)(1) shall " 'not restrict' the *existing* 'safety regulatory authority of a State,' " *ante*, at 438—which, it says, "includes the choice to delegate . . . to localities," *ante*, at 439. This entirely begs the question, which is *precisely* whether the statute's reference to the authority of a "State" includes authority possessed by a municipality on delegation from the State. As I have described, the text and structure of the statute leave no doubt that it does not—that "State" does not include "subdivision of a State." Even when we are dealing with the traditional powers of the States, "[e]vidence of pre-emptive purpose is sought in the *text and structure* of the statute at issue." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993) (emphasis added); see also *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

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to "enforce" rules adopted under its "safety regulations." *Ante*, at 435–436. But the conclusion that § 14501(c)(1) prevents a political subdivision from enforcing regulations *enacted by the State* can only be reached by ignoring (for this issue) the rule that the Court is so insistent upon elsewhere: that federal interference with the "historic powers of the States" must be evinced by a "plain statement," *Gregory* v. *Ashcroft*, 501 U. S. 452, 461 (1991). A natural reading of the phrase "a . . . political subdivision of a State . . . may not enact or enforce a law"—and a reading faithful to *Gregory*'s plain statement rule—is that a political subdivision may not enact new laws or enforce *its previously enacted laws.* The Court believes this reading "raises the startling possibility," *ante*, at 436, n. 3, that § 14501(c)(1) prevents States but not political subdivisions from enforcing *previously enacted state regulations* relating to motor carriage of property. I think not. A possibility so startling (and unlikely to occur) is well enough precluded by the rule that a statute should not be interpreted to produce absurd results. The municipalities' reserved power to enforce state law does not include the power to enforce state law that the State has no continuing power to enact or enforce.

* * *

I believe the text and structure of § 14501(c) show plainly that "the safety regulatory authority of a State" does not encompass the authority of a political subdivision. For this reason, I respectfully dissent.

Syllabus

UTAH ET AL. *v.* EVANS, SECRETARY OF COMMERCE, ET AL.

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

No. 01–714. Argued March 27, 2002—Decided June 20, 2002

The Census Bureau derives most census information from forms it mails to a nationwide list of addresses. If no one replies to a particular form or the information supplied is confusing, contradictory, or incomplete, the Bureau follows up with visits by its field personnel. Occasionally, despite the visits, the Bureau may still have conflicting indications about, *e. g.*, whether a listed address is a housing unit, office building, or vacant lot, whether a residence is vacant or occupied, or the number of persons in a unit. The Bureau may then use a methodology called "imputation," by which it infers that the address or unit about which it is uncertain has the same population characteristics as those of its geographically closest neighbor of the same type (*i. e.*, apartment or single-family dwelling) that did not return a form. In the year 2000 census, the Bureau used "hot-deck imputation" to increase the total population count by about 0.4%. But because this small percentage was spread unevenly across the country, it made a difference in the apportionment of congressional Representatives. In particular, imputation increased North Carolina's population by 0.4% while increasing Utah's by only 0.2%, so that North Carolina will receive one more Representative and Utah one less than if the Bureau had simply filled relevant informational gaps by counting the related number of individuals as zero. Utah brought this suit against appellees, the officials charged with conducting the census, claiming that the Bureau's use of "hot-deck imputation" violates 13 U. S. C. § 195, which prohibits use of "the statistical method known as 'sampling,'" and is inconsistent with the Constitution's statement that an "actual Enumeration shall be made," Art. I, § 2, cl. 3. Utah sought an injunction compelling appellees to change the official census results. North Carolina intervened. The District Court found for the Bureau.

Held:

1. The Court rejects North Carolina's argument that Utah lacks standing because this action is not a "Case" or "Controversy," Art. III, § 2, in that the federal courts do not have the power to "redress" the "injury" that appellees allegedly "caused" Utah, *e. g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561. Because there is no significant dif-

ference between Utah and the plaintiff in *Franklin* v. *Massachusetts*, 505 U. S. 788, in which the Court rejected a similar standing argument, North Carolina must convince the Court that it should reconsider *Franklin*. It has not done so. It argues that ordering appellees to recalculate the census numbers and recertify the official result cannot help Utah because North Carolina is "entitled" to the number of Representatives already certified to it under the statutes that require a decennial census, 13 U. S. C. § 141(a); mandate that the results be reported to the President, § 141(b); obligate the President to send Congress a statement showing the number of Representatives to which each State is "entitled" by the census data, 2 U. S. C. § 2a(a); and specify that the House must then send each State a certificate of the number of Representatives to which it is "entitled." The statutes also say that once all that is done, each State "shall be entitled" to the number of Representatives the "certificate" specifies. § 2a(b). Unlike North Carolina, the Court does not read these statutes as absolutely barring a certificate's revision in all cases. The statutes do not expressly address what is to occur in the case of a serious mistake—say, a clerical, mathematical, or calculation error in census data or in its transposition. Guided by *Franklin*, which found standing despite § 2a's presence, the Court reads the statute as permitting certificate revision in such cases of error, including cases of court-determined legal error leading to a court-required revision of the underlying census report. So read, the statute poses no legal bar to "redress." Nor does Pub. L. 105–119, Title II, § 209(b), 111 Stat. 2481, which entitles "[a]ny person aggrieved by the use of any [unlawful] statistical method" to bring "a civil action" for declaratory or injunctive "relief against the use of such method." Despite North Carolina's argument that this statute implicitly forbids a suit after the census' conclusion, the statute does not say that and does not explain why Congress would wish to deprive of its day in court a State that did not learn of a counting method's representational consequences until after the census' completion—and hence had little, if any, incentive to bring a precensus action. The Court reads limitations on its jurisdiction narrowly, see, *e. g.*, *Webster* v. *Doe*, 486 U. S. 592, 603, and will not read into a statute an unexpressed congressional intent to bar jurisdiction the Court has previously exercised, *e. g.*, *Franklin*, *supra*. Because neither statute poses an absolute legal barrier to relief, it is likely that Utah's victory here would bring about the ultimate relief it seeks. See *id.*, at 803. Thus, Utah has standing. Pp. 459–464.

2. The Bureau's use of "hot-deck imputation" does not violate 13 U. S. C. § 195, which "authorize[s] the use of the statistical method known as 'sampling,'" "[e]xcept for the determination of population for purposes of apportionment of Representatives." Bureau imputation in

the year 2000 census differs from sampling in several critical respects: (1) As to the *nature of the enterprise*, sampling seeks to extrapolate the features of a large population from a small one, but the Bureau's imputation process sought simply to fill in missing data as part of an effort to count individuals one by one. (2) As to *methodology*, sampling seeks to find a subset that will resemble a whole through the use of artificial, random selection processes, whereas the Bureau's methodology was not that typically used by statisticians, but that used to assure that an individual unit (not a "subset"), chosen nonrandomly, will resemble other individuals (not a "whole") selected by the fortuitous unavailability of data. (3) As to the *immediate objective*, sampling seeks to extrapolate the sample's relevant population characteristics to the whole population, while the Bureau seeks simply to determine the characteristics of missing individual data. These differences, whether of degree or of kind, are important enough to place imputation outside the scope of § 195's phrase "the statistical method known as 'sampling.'" That phrase—using the words "known as" and the quotation marks around "sampling"—suggests a term of art with a technical meaning. And the technical literature, which the Court has examined, see *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 201, contains definitions that focus upon the sorts of differences discussed above. Also, insofar as the parties rely on statisticians' expert opinion, that opinion uniformly favors the Government. Further, § 195's legislative history suggests that the "sampling" to which the statute refers is the practice that the Secretary called "sampling" in 1958 when Congress wrote that law, and that the statutory word does not apply to imputation, which Congress did not consider. Finally, Utah provides no satisfactory alternative account of the meaning of the phrase "the statistical method known as 'sampling.'" Its several arguments—that "sampling" occurs whenever information on a portion of the population is used to infer information about the whole population; that the Court found that two methods, allegedly virtually identical to imputation, constituted "sampling" in *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 324–326; that the Bureau, if authorized to engage in imputation, might engage in wide-scale substitution of imputation for person-by-person counting; and that two of the Bureau's imputation methods are inaccurate—are not convincing. Utah has failed to overcome the fact that the Bureau has long and consistently interpreted § 195 as permitting imputation, while Congress, aware of this interpretation, has enacted related legislation without changing the statute. Pp. 464–473.

3. The Bureau's use of "hot-deck imputation" does not violate the Census Clause, which requires the "actual Enumeration" of each State's pop-

ulation "within three Years after the first Meeting of the Congress . . . , in such Manner as they shall by Law direct." Utah argues that the words "actual Enumeration" require the Census Bureau to seek out each individual and prohibit it from relying on imputation, but the Constitution's text does not make the distinction that Utah seeks to draw. Rather, it uses a general word, "enumeration," that refers to a counting process without describing the count's methodological details. The textual word "actual" refers in context to the enumeration that would be used for apportioning the Third Congress, succinctly clarifying the fact that the constitutionally described basis for apportionment would not apply to the First and Second Congresses. The final part of the sentence says that the "actual Enumeration" shall take place "in such Manner as" Congress itself "shall by Law direct," thereby suggesting the breadth of congressional methodological authority, rather than its limitation. See, *e. g.*, *Wisconsin* v. *City of New York*, 517 U. S. 1, 19. This understanding of the text is supported by the history of the Constitutional Convention of 1787, which demonstrates that "actual Enumeration" does not limit census methodology as Utah proposes, but was intended to distinguish the census from the apportionment process for the First Congress, which was based on conjecture rather than a deliberately taken count. Further support is added by contemporaneous general usage, as exemplified by late-18th-century dictionaries defining "enumeration" simply as an act of numbering or counting over, without reference to counting methodology, and by contemporaneous legal documents, in which "enumeration" does not require contact between a census taker and each enumerated individual, but is used almost interchangeably with the phrase "cause the number of the inhabitants . . . to be taken." Indeed, the Bureau's imputation method is similar in principle to other efforts used since 1800 to determine the number of missing persons, including asking heads of households, neighbors, landlords, postal workers, or other proxies about the number of inhabitants in a particular place. Nor can Utah draw support from the Census Clause's basic purposes: to use population rather than wealth to determine representation, to tie taxes and representation together, to insist upon periodic recounts of the population, and to take from the States the power to determine the manner of conducting the census. Those matters of general principle do not directly help determine the issue of detailed methodology before the Court. Nonetheless, certain basic constitutional choices may prove relevant. The decisions, for example, to use population rather than wealth, to tie taxes and representation together, to insist upon periodic recounts, and to take from the States the power to determine methodology all suggest a strong constitutional interest in

Syllabus

accuracy. And an interest in accuracy here favors the Bureau, which uses imputation as a last resort after other methods have failed. The Court need not decide here the precise methodological limits foreseen by the Census Clause. It need say only that in this instance, where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely, those limits are not exceeded. Pp. 473–479.

182 F. Supp. 2d 1165, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SOUTER, and GINSBURG, JJ., joined, and in which O'CONNOR, J., joined as to Parts I and II. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 479. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined, *post*, p. 488. SCALIA, J., filed a dissenting opinion, *post*, p. 510.

Thomas R. Lee argued the cause for appellants. With him on the briefs were *Carter G. Phillips*, *Gene C. Schaerr*, *Michael S. Lee*, *Mark L. Shurtleff*, Attorney General of Utah, *Raymond A. Hintze*, Chief Civil Deputy Attorney General, and *J. Mark Ward*, Assistant Attorney General.

Walter Dellinger argued the cause for appellees North Carolina et al. With him on the brief were *Jonathan D. Hacker*, *Roy Cooper*, Attorney General of North Carolina, and *James Peeler Smith* and *Tiare B. Smiley*, Special Deputy Attorneys General.

Solicitor General Olson argued the cause for the federal appellees. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Malcolm L. Stewart*, *Mark B. Stern*, and *Jonathan H. Levy*.*

**Valle Simms Dutcher* and *L. Lynn Hogue* filed a brief for the Southeastern Legal Foundation, Inc., as *amicus curiae* urging reversal.

Nancy Northup and *Deborah Goldberg* filed a brief for the Brennan Center for Justice at NYU School of Law as *amicus curiae* urging affirmance.

JUSTICE BREYER delivered the opinion of the Court.

The question before us is whether the Census Bureau's use in the year 2000 census of a methodology called "hot-deck imputation" either (1) violates a statutory provision forbidding use of "the statistical method known as 'sampling' " or (2) is inconsistent with the Constitution's statement that an "actual Enumeration" be made. 13 U. S. C. § 195; U. S. Const., Art. I, § 2, cl. 3. We conclude that use of "hot-deck imputation" violates neither the statute nor the Constitution.

I

A

"Hot-deck imputation" refers to the way in which the Census Bureau, when conducting the year 2000 census, filled in certain gaps in its information and resolved certain conflicts in the data. The Bureau derives most census information through reference to what is, in effect, a nationwide list of addresses. It sends forms by mail to each of those addresses. If no one writes back or if the information supplied is confusing, contradictory, or incomplete, it follows up with several personal visits by Bureau employees (who may also obtain information on addresses not listed). Occasionally, despite the visits, the Bureau will find that it still lacks adequate information or that information provided by those in the field has somehow not been integrated into the master list. The Bureau may have conflicting indications, for example, about whether an address on the list (or a newly generated address) represents a housing unit, an office building, or a vacant lot; about whether a residential building is vacant or occupied; or about the number of persons an occupied unit contains. These conflicts and uncertainties may arise because no one wrote back, because agents in the field produced confused responses, or because those who processed the responses made mistakes. There may be too little time left for further personal visits. And the Bureau may then de-

cide "imputation" represents the most practical way to resolve remaining informational uncertainties.

The Bureau refers to different kinds of "imputation" depending upon the nature of the missing or confusing information. Where, for example, the missing or confused information concerns the existence of a housing unit, the Bureau speaks of "*status imputation.*" Where the missing or confused information concerns whether a unit is vacant or occupied, the Bureau speaks of "*occupancy imputation.*" And where the missing or confused information concerns the number of people living in a unit, the Bureau refers to "*household size imputation.*" In each case, however, the Bureau proceeds in a somewhat similar way: It imputes the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a "nearby sample or 'donor' " address or unit—*e. g.*, its "geographically closest neighbor of the same type (*i. e.*, apartment or single-family dwelling) that did not return a census questionnaire" by mail. Brief for Appellants 7–8, 11. Because the Bureau derives its information about the known address or unit from the current 2000 census rather than from prior censuses, it refers to its imputation as "hot-deck," rather than "cold-deck," imputation.

These three forms of imputation increased the final year 2000 count by about 1.2 million people, representing 0.4% of the total population. But because this small percentage was spread unevenly across the country, it makes a difference in the next apportionment of congressional Representatives. In particular, imputation increased North Carolina's population by 0.4% while increasing Utah's population by only 0.2%. And the parties agree that that difference means that North Carolina will receive one more Representative, and Utah will receive one less Representative, than if the Bureau had not used imputation but instead had simply filled relevant informational gaps by counting the related number of individuals as zero.

B

After analyzing the census figures, Utah brought this lawsuit against the Secretary of Commerce and the Acting Director of the Census Bureau, the officials to whom the statutes delegate authority to conduct the census. 28 U. S. C. § 2284. Utah claimed that the Bureau's use of "hot-deck imputation" violates the statutory prohibition against use of "the statistical method known as 'sampling,'" 13 U. S. C. § 195, and is inconsistent with the Constitution's statement that an "actual Enumeration" be made, Art. I, § 2, cl. 3. Utah sought an injunction compelling the census officials to change the official census results. North Carolina intervened. The District Court found in the Census Bureau's favor. 182 F. Supp. 2d 1165 (Utah 2001). Utah appealed. 28 U. S. C. § 1253. And we postponed consideration of jurisdiction pending hearing the case on the merits. 534 U. S. 1112 (2002).

II

North Carolina argues at the outset that the federal courts lack the constitutional power to hear this case. Article III, § 2, of the Constitution extends the "judicial Power" of the United States to actual "Cases" and "Controversies." A lawsuit does not fall within this grant of judicial authority unless, among other things, courts have the power to "redress" the "injury" that the defendant allegedly "caused" the plaintiff. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992); *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). And, in North Carolina's view, the courts cannot "redress" the injury that Utah claims to have suffered here. Hence Utah does not have the "standing" that the Constitution demands.

In *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992), this Court considered, and rejected, a similar claim. A private plaintiff had sued the Secretary of Commerce, challenging the legality of a 1990 census counting method as "arbitrary and capricious" and contrary to certain specific statutes.

Id., at 790–791. That plaintiff sought to require the Secretary to recalculate the numbers and recertify the official results. The plaintiff hoped that would ultimately lead to a reapportionment that would assign an additional Representative to his own State.

Eight Members of the Court found that the plaintiff had standing. Four Justices considered only whether the law permitted courts to review Census Bureau decisions under the Administrative Procedure Act. They concluded that it did. And they saw no further standing obstacle. *Id.*, at 807 (STEVENS, J., concurring in part and concurring in judgment).

Four other Justices went further. They found that the controversy between the plaintiff and the Secretary was concrete and adversary. They said:

> "The Secretary certainly has an interest in defending her policy determinations concerning the census; even though she cannot herself change the reapportionment, she has an interest in litigating its accuracy." *Id.*, at 803 (opinion of O'CONNOR, J.).

They also found that, as a practical matter, redress seemed likely. They said:

> "[A]s the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision . . . even though they would not be directly bound by such a determination." *Ibid.*

They saw no further potential obstacle to standing. *Ibid.*

We can find no significant difference between the plaintiff in *Franklin* and the plaintiff (Utah) here. Both brought their lawsuits after the census was complete. Both claimed that the Census Bureau followed legally improper counting methods. Both sought an injunction ordering the Secretary

of Commerce to recalculate the numbers and recertify the official result. Both reasonably believed that the Secretary's recertification, as a practical matter, would likely lead to a new, more favorable, apportionment of Representatives. Given these similarities, North Carolina must convince us that we should reconsider *Franklin*. It has not done so.

North Carolina does not deny that the courts can order the Secretary of Commerce to recalculate the numbers and to recertify the official census result. Rather it points out that Utah suffers, not simply from the lack of a proper census "report" (a document), but more importantly from the lack of the additional congressional Representative to which North Carolina believes itself entitled as a consequence of the filing of that document. Whatever we may have said in *Franklin*, North Carolina argues, court-ordered relief simply cannot reach beyond the "report" and, here, a proper "report" cannot help bring about that ultimate "redress."

The reason North Carolina believes that court-ordered relief, *i. e.*, the new document, cannot help is that, in its view, the statutes that set forth the census process make ultimate redress legally impossible. Those statutes specify that the Secretary of Commerce must "take a decennial census of population as of the first day of April" 2000, 13 U. S. C. § 141(a); he must report the results to the President by January 1, 2001, § 141(b); the President must transmit to Congress by January 12, 2001, a statement showing the "whole number of persons in each State . . . and the number of Representatives to which each State would be entitled," 2 U. S. C. § 2a(a); and, within 15 days of receiving that statement, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled," § 2a(b). The statutes also say that, once all that is done, each State "shall be entitled" to the number of Representatives that the "certificate" specifies "until the taking effect of a reapportionment under this section or subsequent statute." *Ibid.*

North Carolina points out that all of this was done by January 16, 2001. And North Carolina concludes that it is "entitled" to the number of Representatives that the "certificate" specifies (*i. e.*, one more than Utah would like)—come what may.

We disagree with North Carolina because we do not read these statutes so absolutely—as if they barred a certificate's revision in all cases no matter what. The statutes themselves do not expressly say what is to occur should the "report" or the "statement" upon which the Clerk's "certificate" rests turn out to contain, or to reflect, a serious mistake. The language is open to a more flexible reading that would permit correction of a certificate found to rest upon a serious error—say, a clerical, a mathematical, or a calculation error, in census data or in its transposition. And if that error is uncovered before new Representatives are actually selected, and its correction translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment, such mechanical revision makes good sense. In such cases, the "certificate" previously sent would have turned out not to have been a proper or valid certificate, it being understood that these statutes do not bar the substitution of a newer, more accurate version. Guided by *Franklin*, which found standing despite the presence of this statute, we read the statute as permitting "certificate" revision in such cases of error, and we include among them cases of court-determined legal error leading to a court-required revision of the underlying Secretarial "report." So read, the statute poses no legal bar to "redress."

North Carolina adds that another statute, enacted after *Franklin*, nonetheless bars our consideration of this case. That statute authorizes "[a]ny person aggrieved by the use of any [unlawful] statistical method" to bring "a civil action" for declaratory or injunctive "relief against the use of such method." Pub. L. 105–119, Title II, § 209(b), 111 Stat. 2481. North Carolina argues that this statute, by directly authoriz-

ing a lawsuit *prior to* conclusion of the census, implicitly forbids a lawsuit *after* its conclusion. And it supports this reading by pointing to a legislative finding that it would "be impracticable" to provide relief "after" that time. *Id.*, § 209(a)(8).

This statute, however, does not say that it bars postcensus lawsuits. It does not explain why Congress would have wished to deprive of its day in court a State that did not learn about a counting method's representational consequences until after the census is complete—and hence had little, if any, incentive to bring a precensus action. Nor (as we have just explained), if a lawsuit is brought soon enough after completion of the census and heard quickly enough, is relief necessarily "impracticable." We read limitations on our jurisdiction to review narrowly. See *Webster* v. *Doe*, 486 U. S. 592, 603 (1988); see also *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986). But see *National Railroad Passenger Corporation* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974) (special circumstances warrant reading statute as limiting the persons authorized to bring suit). We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised. *Franklin; Department of Commerce* v. *Montana*, 503 U. S. 442 (1992). And we shall not do so here.

Neither statute posing an absolute legal barrier to relief, we believe it likely that Utah's victory here would bring about the ultimate relief that Utah seeks. Victory would mean a declaration leading, or an injunction requiring, the Secretary to substitute a new "report" for the old one. Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post-2000 census congressional election. Under these circumstances, it would seem,

as in *Franklin*, "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision . . . ." 505 U. S., at 803 (opinion of O'CONNOR, J.).

Moreover, in terms of our "standing" precedent, the courts would have ordered a change in a legal status (that of the "report"), and the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered. We have found standing in similar circumstances. See, *e. g.*, *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 25 (1998) (standing to obtain court determination that the organization was a "political committee" where that determination would make agency more likely to require reporting, despite agency's power not to order reporting regardless); *Bennett* v. *Spear*, 520 U. S. 154, 169–171 (1997) (similar in respect to determination of the lawfulness of an agency's biological report); *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 264–265 (1991) (similar in respect to determination that transfer of airport control to local agency is unlawful). And related cases in which we have denied standing involved a significantly more speculative likelihood of obtaining ultimate relief. See *Lujan*, 504 U. S., at 564–565, n. 2 (obtaining ultimate relief "speculative"); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 42 (1976) (same). We consequently conclude that Utah has standing here, and we have jurisdiction.

III

Utah rests its statutory claim on a federal sampling statute which reads as follows:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he con-

> siders it feasible, authorize the use of the statistical method known as 'sampling' . . . ." 13 U. S. C. § 195.

We have previously read this language as forbidding apportionment-related use of "the statistical method known as 'sampling.'" *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 343 (1999). Utah claims that imputation, as practiced by the Census Bureau, is a form of that forbidden "sampling" method.

The Government argues that imputation is not "sampling." And it has used a simplified example to help explain why this is so. Imagine a librarian who wishes to determine the total number of books in a library. If the librarian finds a statistically sound way to select a sample (*e. g.*, the books contained on every 10th shelf) and if the librarian then uses a statistically sound method of extrapolating from the part to the whole (*e. g.*, multiplying by 10), then the librarian has determined the total number of books by using the statistical method known as "sampling." If, however, the librarian simply tries to count every book one by one, the librarian has not used sampling. Nor does the latter process suddenly become "sampling" simply because the librarian, finding empty shelf spaces, "imputes" to that empty shelf space the number of books (currently in use) that likely filled them—not even if the librarian goes about the imputation process in a rather technical way, say, by measuring the size of nearby books and dividing the length of each empty shelf space by a number representing the average size of nearby books on the same shelf.

This example is relevant here both in the similarities and in the differences that it suggests between sampling and imputation. In both, "'information on a portion of a population is used to infer information on the population as a whole.'" Brief for Appellants 18. And in Utah's view, and that of JUSTICE O'CONNOR, see *post*, at 482–483 (opinion concurring in part and dissenting in part), that similarity brings

the Census Bureau imputation process within the relevant statutory phrase.

On the other hand, the two processes differ in several critical respects: (1) In respect to the *nature of the enterprise*, the librarian's sampling represents an overall approach to the counting problem that from the beginning relies on data that will be collected from only a part of the total population, Declaration of Howard Hogan ¶¶ 19–23, App. 257–259 (hereinafter Hogan); (2) in respect to *methodology*, the librarian's sampling focuses on using statistically valid sample-selection techniques to determine what data to collect, ¶¶ 29–30, *id.*, at 261–262; Declaration of Joseph Waksberg ¶¶ 6, 10, *id.*, at 290–294 (hereinafter Waksberg); and (3) in respect to *the immediate objective*, the librarian's sampling seeks immediately to extrapolate the sample's relevant population characteristics to the whole population, Hogan ¶ 30, *id.*, at 262; Declaration of David W. Peterson ¶ 8, *id.*, at 352 (hereinafter Peterson).

By way of contrast, the librarian's imputation (1) does not represent an overall approach to the counting problem that will rely on data collected from only a subset of the total population, since it is a method of *processing* data (giving a value to missing data), not its collection, ¶¶ 21, 29, *id.*, at 257–258, 261–262; it (2) does not rely upon the same statistical methodology generally used for sample selection, U. S. Dept. of Commerce, Decennial Statistical Studies Division, Census 2000 Procedures and Operations, Memorandum Series B–17, Feb. 28, 2001, *id.*, at 194–196; Waksberg ¶¶ 6, 10, *id.*, at 290, 293–294; and it (3) has as its immediate objective determining the characteristics of missing individual books, not extrapolating characteristics from the sample to the entire book population, Hogan ¶ 17, *id.*, at 256–257; Peterson ¶ 9, *id.*, at 352.

These same differences distinguish Bureau imputation in the year 2000 census from "the statistical method known as 'sampling.'" 13 U. S. C. § 195. The nature of the Bureau's

enterprise was not the extrapolation of the features of a large population from a small one, but the filling in of missing data as part of an effort to count individuals one by one. But cf. *post*, at 482–483 (O'CONNOR, J., concurring in part and dissenting in part) (suggesting the contrary). The Bureau's methodology was not that typically used by statisticians seeking to find a subset that will resemble a whole through the use of artificial, random selection processes; but that used to assure that an individual unit (not a "subset"), chosen nonrandomly, will resemble other individuals (not a "whole") selected by the fortuitous unavailability of data. L. Kish, Survey Sampling 26 (1965) ("In statistical literature [sampling] is generally synonymous with random sampling"). And the Bureau's immediate objective was the filling in of missing data; not extrapolating the characteristics of the "donor" units to an entire population.

These differences, whether of degree or of kind, are important enough to place imputation outside the scope of the statute's phrase "the statistical method known as 'sampling.'" For one thing, that statutory phrase—using the words "known as" and the quotation marks that surround "sampling"—suggests a term of art with a technical meaning. And the technical literature, which we have consequently examined, see *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 201 (1974), contains definitions that focus upon differences of the sort discussed above. One text, for example, says that *"[s]urvey sampling*, or population sampling, deals with methods for selecting and observing a part (sample) of the population in order to make inferences about the whole population." Kish, *supra*, at 18. Another says that "sample, as it is used in the [statistics] literature . . . means a subset of the population that is used to gain information about the entire population," G. Henry, Practical Sampling 11 (1990), or, in other words, "a model of the population," *ibid.* Yet another says that a "sampling method is a method of selecting a fraction of the population in a way that the selected sample

represents the population." P. Sukhatme, Sampling Theory of Surveys with Applications 1 (1954). A 1953 treatise, to which Utah refers, says that a broader definition of "sample" is imprecise, adding that the term "should be reserved for a set of units . . . which has been selected in the belief that it will be representative of the whole aggregate." F. Yates, Sampling Methods for Censuses and Surveys § 1.1, p. 2 (2d rev. ed. 1953) (hereinafter Yates). And Census Bureau documents state that "professional statisticians" reserve the term "'sample' . . . for instances when the selection of the smaller population is based on the methodology of their science." Report to Congress—The Plan for Census 2000, p. 23 (revised and reissued Aug. 1997) (hereinafter Report to Congress).

These definitions apply easily and naturally to what we called "sampling" in the librarian example, given its nature, methods, and immediate objectives. These definitions do not apply to the librarian's or to the Bureau's imputation process—at least not without considerable linguistic squeezing.

For another thing, Bureau statisticians testified in the District Court that, in their expert opinion, Bureau imputation was not "sampling" as that term is used in the field of statistics. Hogan ¶¶ 18–30, App. 257–262; Waksberg ¶¶ 6–10, *id.*, at 290–294 (former Bureau statistician). Their reasons parallel those to which we have referred. *Ibid.* Although Utah presented other experts who testified to the contrary, Utah has not relied upon their testimony or expert knowledge here. Insofar as the parties now rely on expert opinion, that opinion uniformly favors the Government.

Further, the history of the sampling statute suggests that Congress did not have imputation in mind in 1958 when it wrote that law. At that time, the Bureau already was engaged in what it called "sampling," a practice that then involved asking a small subset of the population subsidiary census questions about, say, automobiles, telephones, or dish-

washers, and extrapolating the responses to produce national figures about, say, automobile ownership. See M. Anderson, The American Census: A Social History 199 (1988) (discussing "long form" survey, sent in 1950 to about 20% of population). The Secretary of Commerce asked Congress to enact a law that would make clear the Bureau had legal authority to engage in this "practice." Amendment of Title 13, United States Code, Relating to Census: Hearing on H. R. 7911 before the House Committee on the Post Office and Civil Service, 85th Cong., 1st Sess., 7 (1957) (Statement of Purpose and Need) (Secretary of Commerce, describing Bureau's ability to obtain "some . . . information . . . efficiently through a sample survey . . . rather than a complete enumeration basis"). The Secretary did not object to a legislative restriction that would, in effect, deny the Bureau sampling authority in the area of apportionment. And Congress, in part to help achieve cost savings, responded with the present statute which provides that limited authority. See S. Rep. No. 698, 85th Cong., 1st Sess., 3 (1957) ("[P]roper use of sampling methods can result in substantial economies in census taking"); S. Rep. No. 94–1256, p. 5 (1976) ("use of sampling procedures and surveys . . . urged for the sake of economy and reducing respondent burden").

This background suggests that the "sampling" to which the statute refers is the practice that the Secretary called "sampling" at the time—for that is what Congress considered. And it suggests that the statutory word does not apply to imputation—for that is a matter that Congress did not consider. Indeed, had the Secretary believed that Congress intended to restrict the Bureau's authority to engage in apportionment-related imputation, he would likely have expressed an objection, for the Bureau had used such imputation in the past and intended to use it in the future. Hogan ¶ 39, App. 266–267. Moreover, the Bureau's rationale for using sampling was quite different from its rationale for using imputation. An advance plan to sample a subset saves

money, for it restricts a survey's potential scope. Bureau imputation does not save money, for the Bureau turns to imputation only after ordinary questionnaires and interviews have failed. Rather, imputation reflects a Bureau decision to spend at least a small amount of additional money in order to avoid placing the figure "zero" next to a listed address when it is possible to do better. See ¶ 34, *id.*, at 264 ("The goal in Census 2000 was to conduct a census that was both numerically and distributively accurate").

Finally, Utah provides no satisfactory alternative account of the meaning of the phrase "the statistical method known as 'sampling.'" Its arguments suggest that the phrase should apply to any use of statistics that would help the Bureau extrapolate from items about which the Bureau knows to other items, the characteristics of which it does not know. Brief for Appellants 9. But that definitional view would include within the statutory phrase matters that could not possibly belong there—for example, the use of statistics to determine whether it is better to ask a postal worker or a neighbor about whether an apparently empty house is occupied. And it would come close to forbidding the use of all statistics, not simply one statistical method ("sampling"). Utah's express definitional statement—that "sampling" occurs whenever "information on a portion of a population is used to infer information on the population as a whole"—suffers from a similar defect. Indeed, it is even broader, coming close to a description of the mental process of inference itself. While the Census Bureau and at least one treatise have used somewhat similar language to define "sampling," they have immediately added the qualification that such is the "layman's" view, while professional statisticians, when speaking technically, speak more narrowly and more precisely. Report to Congress 23; Yates 1–2.

Utah makes several additional arguments. It says that in *House of Representatives,* the Court found that two methods, virtually identical to imputation, constituted "sampling."

It says that the Bureau, if authorized to engage in imputation, might engage in wide-scale substitution of imputation for person-by-person counting. And it says that, in any event, the Bureau's methods for imputing *status* and *occupancy*, see *supra*, at 458, are inaccurate.

In our view, however, *House of Representatives* is distinguishable. The two instances of Bureau methodology at issue there satisfied the technical criteria for "sampling" in ways that the imputation here at issue does not. In both instances, the Bureau planned at the outset to produce a statistically sound sample from which it extrapolated characteristics of an entire population. In the first instance it did so by selecting census blocks randomly from which to extrapolate global census figures in order to compare (and adjust) the accuracy of figures obtained in traditional ways with figures obtained through statistical sampling. 525 U. S., at 325–326. In the second instance it used a sample drawn from questionnaire nonrespondents in particular census tracts in order to obtain the population figure for the entire tract. The "sampling" in the second instance more closely resembles the present effort to fill in missing data, for the "sample" of nonrespondents was large (about 20% of the tract) compared to the total nonresponding population (about 30% of the entire tract). *Id.*, at 324–325. Nonetheless, we believe that the Bureau's view of the enterprise as sampling, the deliberate decision taken in advance to find an appropriate sample, the sampling methods used to do so, the immediate objective of determining through extrapolation the size of the entire nonresponding population, and the quantitative figures at issue (10% of the tract there; 0.4% here), all taken together, distinguish it—in degree if not in kind—from the imputation here at issue.

Nor are Utah's other two arguments convincing. As to the first, Utah has not claimed that the Bureau has used imputation to manipulate results. It has not explained how census-taking that fills in ultimate blanks through imputa-

tion is more susceptible to manipulation than census-taking that fills in ultimate blanks with a zero. And given the advance uncertainties as to which States imputation might favor, manipulation would seem difficult to arrange. If JUSTICE O'CONNOR's speculation comes to pass—that the Bureau would decide, having litigated this case and utilized imputation in a subsequent census, to forgo the benefits of that process because of its results—the Court can address the problem at that time. As to the second, Utah's claim concerns the nature of the imputation method, not its accuracy as applied—though we add that neither the record, see *infra*, at 477, nor JUSTICE O'CONNOR's opinion, see *post*, at 487–488, gives us any reason to doubt that accuracy here.

We note one further legal hurdle that Utah has failed to overcome—the Bureau's own interpretation of the statute. The Bureau, which recommended this statute to Congress, has consistently, and for many years, interpreted the statute as permitting imputation. Hogan ¶¶ 39, 41, 43, 46, 47, 52, App. 266–273. Congress, aware of this interpretation, has enacted related legislation without changing the statute. See, *e. g.*, Census Address List Improvement Act of 1994, Pub. L. 103–430, 108 Stat. 4393; Foreign Direct Investment and International Financial Data Improvements Act of 1990, Pub. L. 101–533, 104 Stat. 2344; Act of Oct. 14, 1986, Pub. L. 99–467, 100 Stat. 1192. (Indeed, the Bureau told Congress of its planned use of imputation in the year 2000 census without meeting objection.) And the statute itself delegates to the Secretary the authority to conduct the decennial census "in such form and content as he may determine." 13 U. S. C. § 141(a). Although we do not rely on it here, under these circumstances we would grant legal deference to the Bureau's own legal conclusion were that deference to make the difference. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

In sum, imputation differs from sampling in respect to the nature of the enterprise, the methodology used, and the im-

mediate objective sought. And as we have explained, these differences are of both kind and degree. That the differences may be of degree does not lessen their significance where we are charged with interpreting statutory language and we are faced with arguments that suggest that it covers even the most ordinary of inferences. Since that cannot be so, we have found the keys to understanding the operative phrase in its history: the fact that the Bureau itself believed imputation to stand outside the prohibition it requested Congress pass, the fact that the Bureau has consistently used imputation, and the fact that Congress, on notice of that use, has not suggested otherwise. For these reasons, we conclude that the statutory phrase "the statistical method known as 'sampling'" does not cover the Bureau's use of imputation.

IV

Utah's constitutional claim rests upon the words "actual Enumeration" as those words appear in the Constitution's Census Clause. That Clause, as changed after the Civil War (in ways that do not matter here), reads as follows:

> "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . counting the whole number of persons in each State. . . . The *actual Enumeration* shall be made within three Years after the first Meeting of the Congress of the United States, . . . in such Manner as they shall by Law direct." Art. I, § 2, cl. 3 (emphasis added); see also Amdt. 14, § 2.

Utah argues that the words "actual Enumeration" require the Census Bureau to seek out each individual. In doing so, the Bureau may rely upon documentary evidence that an individual exists, say, a postal return, or upon eyewitness evidence, say, by a census taker. It can fill in missing data through the use of testimonial reports, including secondhand or thirdhand reports, made by a family member, neighbor,

or friend. But it may not rely upon imputation, which fills in data by assuming, for example, that an unknown house has the same population characteristics as those of the closest similar house nearby.

We do not believe the Constitution makes the distinction that Utah seeks to draw. The Constitution's text does not specify any such limitation. Rather, the text uses a general word, "enumeration," that refers to a counting process without describing the count's methodological details. The textual word "actual" refers in context to the enumeration that will be used for apportioning the Third Congress, succinctly clarifying the fact that the constitutionally described basis for apportionment will not apply to the First and Second Congresses. The final part of the sentence says that the "actual Enumeration" shall take place "in such Manner as" Congress itself "shall by Law direct," thereby suggesting the breadth of congressional methodological authority, rather than its limitation. See, *e. g.*, *Wisconsin* v. *City of New York*, 517 U. S. 1, 19 (1996).

The history of the constitutional phrase supports our understanding of the text. The Convention sent to its Committee of Detail a draft stating that Congress was to "regulate the number of representatives by the number of inhabitants, . . . which number shall . . . be taken in such manner as . . . [Congress] shall direct." 2 M. Farrand, Records of the Federal Convention of 1787, pp. 178, 182–183 (rev. ed. 1966) (hereinafter Farrand). After making minor, here irrelevant, changes, the Committee of Detail sent the draft to the Committee of Style, which, in revising the language, added the words "actual Enumeration." *Id.*, at 590, 591. Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style "had no authority from the Convention to alter the meaning" of the draft Constitution submitted for its review and revision. *Powell* v. *McCormack*, 395 U. S. 486, 538–539 (1969); see 2 Farrand 553; see also *Nixon* v. *United States*, 506 U. S. 224, 231 (1993).

Hence, the Framers would have intended the current phrase, "the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct," as the substantive equivalent of the draft phrase, "which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct." 2 Farrand 183. And the Committee of Style's phrase offers no linguistic temptation to limit census methodology in the manner that Utah proposes.

Moreover, both phrases served to distinguish the census from the process of apportionment for the first Congress. Read in conjunction with the proceedings of the Constitutional Convention, the text of Article I makes clear that the original allocation of seats in the House was based on a kind of "conjectur[e]," 1 *id.*, at 578–579, in contrast to the deliberately taken count that was ordered for the future. U. S. Const., Art. I, § 2, cl. 3; 1 Farrand 602; 2 *id.*, at 106; 2 The Founders' Constitution 135–136, 139 (P. Kurland & R. Lerner eds. 1987) (hereinafter Kurland & Lerner); see also *Department of Commerce*, 503 U. S., at 448, and n. 15; *post*, at 498–500 (THOMAS, J., concurring in part and dissenting in part) (describing colonial estimates). What was important was that contrast—rather than the particular phrase used to describe the new process.

Contemporaneous general usage of the word "enumeration" adds further support. Late-18th-century dictionaries define the word simply as an "act of numbering or counting over," without reference to counting methodology. 1 S. Johnson, A Dictionary of the English Language 658 (4th rev. ed. 1773); N. Bailey, An Etymological English Dictionary (26th ed. 1789) ("numbering or summing up"); see also Webster's Third New International Dictionary 759 (1961 ed.) ("the act of counting," "a count of something (as a population)"). Utah's strongest evidence, a letter from George Washington contrasting a population "estimate" with a "census" or "enumeration," does not demonstrate the contrary, for one can indeed contrast, say, a rough estimate with an

enumeration, without intending to encompass in the former anything like the Bureau's use of imputation to fill gaps or clarify confused information about individuals. 31 Writings of George Washington 329 (J. Fitzpatrick ed. 1931); see 8 Writings of Thomas Jefferson 236 (A. Lipscomb ed. 1903) (comparing the "actual returns" with "conjectures"); 1 Farrand 602; 2 *id.*, at 106; Kurland & Lerner 135–136. And the evidence JUSTICE THOMAS sets forth, *post*, at 498–500 (opinion concurring in part and dissenting in part), demonstrates the same. The kinds of estimates to which his sources refer are those based on "the number of taxable polls, or the number of the militia." *Post*, at 494 (internal quotation marks omitted). Such sources show nothing other than that "enumeration" may be "incompatible (or at least *arguably* incompatible . . .) with gross statistical estimates," *House of Representatives*, 525 U. S., at 347 (SCALIA, J., concurring in part), but such "gross statistical estimates" are not at stake here.

Contemporaneous legal documents do not use the term "enumeration" in any specialized way. The Constitution itself, in a later article, refers to the words "actual Enumeration" as meaning "Census or Enumeration," Art. I, § 9, cl. 4, thereby indicating that it did not intend the term "actual Enumeration" as a term of art requiring, say, contact (directly or through third parties) between a census taker and each enumerated individual. The First Census Act uses the term "enumeration" almost interchangeably with the phrase "cause the number of the inhabitants . . . to be taken." And the marshals who implemented that Act did not try to contact each individual personally, as they were required only to report the names of all heads of households. Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 102. Cf. *House of Representatives*, *supra*, at 347 (SCALIA, J., concurring in part) (noting that the Census Acts of 1810 through 1950 required census workers to "visit each home in person"); see also *post*, at 504 (THOMAS, J., concurring in part and dissenting in part).

Of course, this last limitation suggests that the Framers expected census enumerators to seek to reach each individual household. And insofar as statistical methods substitute for any such effort, it may be argued that the Framers did not believe that the Constitution authorized their use. See *House of Representatives*, *supra*, at 346–349 (SCALIA, J., concurring in part). But we need not decide this matter here, for we do not deal with the substitution of statistical methods for efforts to reach households and enumerate each individual. Here the Census Bureau's method is used sparingly only after it has exhausted its efforts to reach each individual, and it does not differ in principle from other efforts used since 1800 to determine the number of missing persons. Census takers have long asked heads of households, "neighbors, landlords, postal workers, or other proxies" about the number of inhabitants in a particular place, Hogan ¶ 11, App. 253. Such reliance on hearsay need be no more accurate, is no less inferential, and rests upon no more of an individualized effort for its inferences than the Bureau's method of imputation.

Nor can Utah draw support from a consideration of the basic purposes of the Census Clause. That Clause reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the States, would determine the manner of conducting the census. See *Wesberry* v. *Sanders*, 376 U. S. 1, 9–14, and n. 34 (1964); 1 Farrand 35–36, 196–201, 540–542, 559–560, 571, 578–588, 591–597, 603; 2 *id.*, at 2–3, 106; Kurland & Lerner 86–144; see The Federalist No. 54, pp. 336–341 (C. Rossiter ed. 1961) (J. Madison); *id.*, No. 55, at 341–350 (J. Madison); *id.*, No. 58, at 356–361 (J. Madison); 31 Writings of George Washington, *supra*, at 329. These basic determinations reflect the fundamental na-

ture of the Framers' concerns. Insofar as JUSTICE THOMAS proves that the Framers chose to use population, rather than wealth or a combination of the two, as the basis for representation, *post*, at 500–503, we agree with him. What he does not show, however, is that, in order to avoid bias or for other reasons, they prescribed, or meant to prescribe, the precise method by which Congress was to determine the population. And he cannot show the latter because, for the most part, the choice to base representation on population, like the other fundamental choices the Framers made, are matters of general principle that do not directly help determine the issue of detailed methodology before us. Declaration of Jack N. Rakove in *Department of Commerce* v. *United States House of Representatives*, O. T. 1998, No. 98–404, p. 387 ("What was at issue . . . were fundamental principles of representation itself . . . not the secondary matter of exactly how census data was *[sic]* to be compiled").

Nonetheless, certain basic constitutional choices may prove relevant. The decisions, for example, to use population rather than wealth, to tie taxes and representation together, to insist upon periodic recounts, and to take from the States the power to determine methodology all suggest a strong constitutional interest in accuracy. And an interest in accuracy here favors the Bureau. That is because, as we have said, the Bureau uses imputation only as a last resort—after other methods have failed. In such instances, the Bureau's only choice is to disregard the information it has, using a figure of zero, or to use imputation in an effort to achieve greater accuracy. And Bureau information provided in the District Court suggests that those efforts have succeeded. U. S. Dept. of Commerce, Economics and Statistics Admin., Census 2000 Informational Memorandum No. 110, App. 445–448 (concluding that postcensus research confirms that imputation appropriately included individuals in the census who would otherwise have been excluded).

Of course, the Framers did not consider the imputation process. At the time they wrote the Constitution "statisticks" referred to "'a statement or view of the civil condition of a people,'" not the complex mathematical discipline it has become. P. Cohen, A Calculating People 150–151 (1982). Yet, however unaware the Framers might have been of specific future census needs, say, of automobiles for transport or of computers for calculation, they fully understood that those future needs might differ dramatically from those of their own times. And they were optimists who might not have been surprised to learn that a year 2000 census of the Nation that they founded required "processed data for over 120 million households, including over 147 million paper questionnaires and 1.5 billion pages of printed material." Hogan ¶ 8, App. 251. Consequently, they did not write detailed census methodology into the Constitution. As we have said, we need not decide here the precise methodological limits foreseen by the Census Clause. We need say only that in this instance, where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely, those limits are not exceeded.

For these reasons the judgment of the District Court is

Affirmed.

Justice O'Connor, concurring in part and dissenting in part.

In the year 2000 census, the Census Bureau used the statistical technique known as "hot-deck imputation" to calculate the state population totals that were used to apportion congressional Representatives. While I agree with the Court's general description of the imputation process, its conclusion that the appellants have standing to challenge

its use, and its conclusion that we otherwise have jurisdiction to consider that challenge, I would find that the Bureau's use of imputation constituted a form of sampling and thus was prohibited by § 195 of the Census Act, 13 U. S. C. § 1 *et seq.* Therefore, while I concur in Parts I and II of the majority's opinion, I respectfully dissent from Part III and have no occasion to decide whether the Constitution prohibits imputation, which the majority addresses in Part IV.

I

To conduct the year 2000 census, the Census Bureau (Bureau) first created a master address file that attempted to list every residential housing unit in the United States. See U. S. Dept. of Commerce, Economics and Statistics Admin., Census 2000 Operational Plan VI (Dec. 2000) (hereinafter Census 2000 Operational Plan). The Bureau then conducted a survey of every address on that list, primarily through the use of mail-back questionnaires. See *id.*, at IX.A to IX.E; *ante*, at 457. As relevant here, these questionnaires requested the name of each person living at a given address. See Census 2000 Operational Plan V.B.

Because not every address returned a questionnaire, the Bureau had its enumerators attempt to contact nonresponding addresses up to six times by phone or in person in an effort to obtain population information for each address. See Declaration of Howard Hogan ¶ 73, App. 285 (hereinafter Hogan); Census 2000 Operational Plan IX.G. This was known as "nonresponse followup." *Ibid.* Also during this followup procedure, addresses that appeared vacant were marked as such while addresses determined to be nonexistent were noted for later deletion. See Hogan ¶¶ 69, 73, App. 283, 285. When all followup procedures were completed, the Bureau still lacked population information for approximately 0.4% of the addresses on the master address list because the Bureau had been unable to classify them as either "occupied, vacant, or nonexistent." *Id.*, at 188. Additionally, the

Bureau lacked household size information for approximately 0.2% of addresses that were classified as occupied. See *id.*, at 191.

At this point, the Bureau employed the statistical technique known as "hot-deck imputation." For each unsuccessfully enumerated address, the Bureau imputed population data by copying corresponding data from a "'donor'" address. *Ante*, at 458. The donor address was the "'geographically closest neighbor of the same type (*i. e.*, apartment or single-family dwelling) that did not return a census questionnaire' by mail." *Ibid.* (quoting Brief for Appellants 7–8, 11). What this means is that donor addresses were selected only from addresses that had been personally surveyed by the Bureau's enumerators, primarily through the nonresponse followup procedure described above. See App. 156. After imputation was completed, every address on the master address list was associated with a household size number that had been determined either by imputation or by enumeration (although that number was zero for addresses ultimately classified as vacant or nonexistent).

The Bureau used the imputation-adjusted data to calculate state population totals. *Ante*, at 458. Because these totals were used to determine the apportionment of congressional Representatives, *ibid.*, we must determine whether the Bureau's use of imputation constituted a form of sampling. If it did, it was prohibited by § 195 of the Census Act, 13 U. S. C. § 1 *et seq.* See *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 338 (1999).

II

As initially enacted, § 195 provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary [of Commerce] may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U. S. C. § 195 (1970 ed.). As relevant here, Congress re-

placed "may, where he deems it appropriate" with "shall, if he considers it feasible" when it amended § 195 in 1976. Pub. L. 94–521, 90 Stat. 2464. In *House of Representatives*, we found that this amended language "might reasonably be read as either permissive or prohibitive with regard to the use of sampling for apportionment purposes." 525 U. S., at 339. Even so, we held that § 195 maintained the prohibition on sampling with respect to apportionment given the "broader context" of "over 200 years during which federal statutes [had] prohibited the use of statistical sampling where apportionment [was] concerned." *Id.*, at 339–341. With respect to § 195, then, the only question is whether "hot-deck imputation" is a form of sampling.

To answer this question, I begin with the definition of sampling the Bureau provided to Congress in connection with the year 2000 census:

> "In our common experience, 'sampling' occurs whenever the information on a portion of a population is used to infer information on the population as a whole[,] . . . [although] [a]mong professional statisticians, the term 'sample' is reserved for instances when the selection of the smaller population is based on the methodology of their science." Report to Congress—The Plan for Census 2000, p. 23 (revised and reissued Aug. 1997).

Under this definition, the Bureau's use of imputation was a form of sampling. The Bureau used a predefined, deterministic method to select a portion of the population and then used that portion of the population to estimate unknown information about the overall population. The Bureau's imputation process first selected a group of "donor" addresses, one for each address that had not been successfully enumerated. This donor group was a subset of the overall population. Indeed, the donor group was actually a subset *of a subset* of the population because it was selected from only those addresses that had not returned an initial question-

naire but were successfully enumerated through other means. This highlights the Bureau's reliance on a selected portion of collected data.

Next, the Bureau used the population of the donor group as a direct estimate of the number of people who had not been successfully enumerated. This estimate related to the "population as a whole" because it was an estimate of the overall number of people in the population who had not responded (or had not provided a consistent response, see *ante*, at 457) to the Bureau's survey efforts. See, *e. g.*, F. Yates, Sampling Methods for Censuses and Surveys 64, 130 (2d rev. ed. 1953) (describing the use of sampling to estimate survey nonresponse); *ante*, at 471 (describing the sampling at issue in *House of Representatives* as one for estimating nonresponse). Because the imputation process selected a portion of the population to estimate the number of people who had not been successfully enumerated, the process constituted a form of sampling.

To counter this conclusion, the majority contends that the Bureau's use of imputation differs from sampling in several different ways. First, the majority argues that the Bureau's use of imputation differs quantitatively from other forms of sampling, suggesting that estimating nonresponse is not sampling when the amount of nonresponse is very small. See *ante*, at 471 (contrasting the use of sampling to estimate a 10% level of nonresponse with the use of imputation to estimate a 0.4% level of nonresponse). But the majority provides no statistical basis to suggest that sampling is confined to "large" estimates. Moreover, we have already decided that the *extent* of the Bureau's reliance on sampling is irrelevant when we held that § 195 prohibits sampling for apportionment purposes regardless of whether it is used as a "'substitute'" for *or* "'supplement'" to a traditional enumeration. *House of Representatives*, *supra*, at 342.

Indeed, the majority more generally acknowledges that the Bureau's reliance on imputation may be distinguishable

only in degree from other forms of sampling. See *ante,* at 471 (stating that the sampling at issue in *House of Representatives* differs "in degree if not in kind" from the imputation at issue here). But the majority provides no statistical basis for claiming a difference of degree matters to the question of what constitutes sampling, nor does it explain how a meaningful line between sampling and nonsampling could be drawn on such a basis.

Second, the majority contends that imputation is not sampling because the sample selection method used by the Bureau does not look like "typica[l]," *ante,* at 467, selection methods in terms of *when* or *how* the relevant sample is selected. With respect to when a sample is selected, the majority contends that imputation is not sampling because it occurs after all data have been collected. See *ante,* at 466. This presumes that one cannot sample from already-collected data. But sampling from collected data is a recognized form of sampling, even when the collected data result from an attempt to survey the entire population. See Yates, *supra,* at 128.

With respect to *how* a sample is selected, the majority argues that imputation does not look like methods employed "to find a subset that will resemble a whole through the use of artificial, random selection processes." *Ante,* at 467. But the Bureau's "nearest neighbor" imputation process is just as artificial as any other form of nonrandom selection, and it is beyond dispute that nonrandom selection methods—including those that produce nonrepresentative samples—may be used for sampling. See, *e. g.,* W. Hendricks, Mathematical Theory of Sampling 239–241 (1956); P. Sukhatme, Sampling Theory of Surveys with Applications 10 (1954); F. Stephan, History of the Uses of Modern Sampling Procedures, 43 J. Am. Statistical Assn. 12, 21 (1948) (all indicating that nonrandom selection methods may be used for sampling); see also Yates, *supra,* at 17; R. Jessen, Statistical Survey Techniques 16 (1978); W. Deming, Sample Design in

Business Research 32 (1960) (together indicating that the selection of nonrepresentative or "biased" samples may be permissible, preferred, or even deliberate). Finally, even if random and unbiased selection methods were assumed to be more accurate than other methods of sampling, it would make little sense to construe § 195 as prohibiting only the most accurate forms of sampling.

Third, the majority contends that imputation is not sampling because the Bureau never meant to engage in sampling. Along these lines, the majority stresses that the Bureau's "overall approach to the counting problem," *ante*, at 466, did not reflect a "deliberate decision," *ante*, at 471, to engage in sampling. Instead, according to the majority, the Bureau's "immediate objective was the filling in of missing data," in an effort to ascertain population information on "individual" units, not "extrapolating the characteristics of the 'donor' units to an entire population." *Ante*, at 467.

The majority provides no statistical basis for defining sampling in terms of intent or immediate objectives, however, and to do so would allow the Bureau to engage in any form of sampling so long as it was characterized as something else or appeared to serve some nonsampling objective. But that would render hollow the statutory prohibition on sampling for apportionment purposes. The majority allows this to happen, however, by focusing on the Bureau's "immediate objective" of filling in missing data, which overlooks the fact that the Bureau estimated nonresponse using a selected subset of the population and imputation was simply a means to that end.

Fourth, the majority contends that some definitions of sampling, if viewed broadly, contain no limiting principle and thus might encompass even "the mental process of inference." *Ante*, at 470. But recognizing the Bureau's use of imputation as a form of sampling does not require that sampling be read so broadly. Instead, sampling under § 195 can be confined to situations where a selected subset of the popu-

lation has been directly surveyed on a particular attribute and then that subset is used to estimate population characteristics of that *same* attribute. Such a limitation is neither ill defined nor all encompassing.

Apart from the above arguments, which primarily relate to the statistical characterization of imputation, the majority makes several additional arguments. It contends that Congress' use of the term "sampling" should be read narrowly, limited to what "the Secretary called 'sampling,' at the time." *Ante*, at 469. But the statutory prohibition was not written in terms of what the Secretary viewed as sampling, nor is there any reason to think Congress intended the term "sampling" to be read narrowly as a tight restriction on the Bureau's ability to gather data for nonapportionment purposes. Rather, the "purpose . . . [was] to permit the utilization of *something less than a complete enumeration*, as implied by the word 'census,' . . . except with respect to apportionment." H. R. Rep. No. 1043, 85th Cong., 1st Sess., 10 (1957) (emphasis added). This suggests "sampling" was meant in a broad rather than narrow sense.

Moreover, because the Bureau's authorization to use sampling for nonapportionment purposes was simultaneously a prohibition on the use of sampling for apportionment purposes, it makes even less sense to construe "sampling" narrowly *when viewed as a prohibition* given the broader historical context in which § 195 marked "the first departure from the requirement that the enumerators collect all census information through personal visits to every household in the Nation." *House of Representatives*, 525 U. S., at 336. Finally, even if one were willing to assume that the statutory prohibition should not be read to cover statistical techniques the Bureau had used for apportionment purposes prior to 1957, that still would not justify the use of imputation since the Bureau had never before added people to the apportionment count using that process. See Hogan ¶¶ 39, 41, App. 266–268.

The majority also notes the possibility of *Chevron* deference with respect to the scope of the term "sampling." *Ante*, at 472 (citing *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)). But the majority ultimately does not rely on this form of deference, *ante*, at 472, nor does it indicate where the Bureau has provided an interpretation of § 195 that would have the "force of law" on this issue. See *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) (explaining that agency "[i]nterpretations . . . which lack the force of law . . . do not warrant *Chevron*-style deference"). Additionally, based on the reasons provided by Justice Thomas' partial dissent, I would find that the Bureau's use of imputation to calculate state population totals for apportionment purposes at least raises a difficult constitutional question. This provides a basis to construe § 195 as precluding imputation, regardless of whether the Bureau is entitled to any form of deference. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 574–575 (1988).

The majority downplays the idea that imputation could be used to manipulate census results, arguing that "manipulation would seem difficult to arrange" in light of the "uncertainties as to which States imputation might favor." *Ante*, at 472. But in every census where imputation would alter the resulting apportionment, the mere decision to impute or not to impute is a source of possible manipulation. While that might be averted if the Bureau were required to use imputation, I do not read the majority's opinion to demand that. Moreover, in the past, we have given deference to the Secretary's decision *not* to statistically adjust the census, even when a final decision on that matter was not made until after the census was completed. See *Wisconsin* v. *City of New York*, 517 U. S. 1, 10–11, 20–24 (1996).

Finally, the majority suggests that imputation is somehow "better" than making no statistical adjustment at all. *Ante*, at 470. But no party has cited a study suggesting that

imputation improves distributive accuracy, and the Bureau admits that numeric rather than distributive accuracy "drove the process." Hogan ¶ 34, App. 264; see also *id.*, at ¶¶ 34–35, App. 265 (acknowledging that it may be "impossible to know *a priori* the effects of a particular census operation on distributive accuracy" and that "[i]n designing Census 2000, the Census Bureau did not reject operations that would improve numeric accuracy . . . even if these operations might affect distributive accuracy *negatively*" (emphasis added)). I therefore would not assume that imputation necessarily resulted in a "better" census given the recognized importance of distributive accuracy in assessing overall accuracy. See *Wisconsin*, *supra*, at 20 (stating that "a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, viz., to determine the apportionment of the Representatives among the States").

III

Because the Bureau used "hot-deck imputation" to make the same statistical inferences it could not make through more transparent reliance on sampling, I would find that the Bureau's use of imputation was a form of sampling and thus was prohibited by § 195. I therefore respectfully dissent from Part III of the majority's opinion and have no occasion to decide whether the Constitution prohibits imputation, which the majority addresses in Part IV. For these reasons, I would reverse the judgment of the District Court.

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, concurring in part and dissenting in part.

Conducting a census to count over 200 million people is an enormously complicated and difficult undertaking. To facilitate the task, statisticians have created various methods to supplement the door-to-door inquiries associated with the "actual Enumeration" and "counting [of] the whole number

of persons in each State" required by the Constitution. Art. I, § 2, cl. 3; Amdt. 14, § 2. Today we consider whether 13 U. S. C. § 195 prohibits the use of one of these methods—hot-deck imputation—for apportionment purposes, and if not, whether its use is permissible under the Constitution. In accordance with our decision in *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992), I believe that we have jurisdiction to consider these questions concerning the year 2000 census. For essentially the same reasons given by the Court, I agree that imputation is not prohibited by 13 U. S. C. § 195.

I cannot agree, however, with the Court's resolution of the constitutional question. The Constitution apportions power among the States based on their respective populations; consequently, changes in population shift the balance of power among them. Mindful of the importance of calculating the population, the Framers chose their language with precision, requiring an "actual Enumeration," U. S. Const., Art. I, § 2, cl. 3. They opted for this language even though they were well aware that estimation methods and inferences could be used to calculate population. If the language of the Census Clause leaves any room for doubt, the historical context, debates accompanying ratification, and subsequent early Census Acts confirm that the use of estimation techniques—such as "hot-deck imputation," sampling, and the like—do not comply with the Constitution.

I

The use of the statistical technique known as hot-deck imputation increased the final year 2000 census count by 1,172,144 people, representing 0.42 percent of the Nation's total population. U. S. Dept. of Commerce, Economics and Statistics Admin., Census 2000 Informational Memorandum No. 110, App. 443. Utilization of this method in the year 2000 census had important consequences for two States in particular, North Carolina and Utah: North Carolina gained

one Representative and Utah lost one Representative as a result of hot-deck imputation. See *ante*, at 458.

While the Court has aptly described the process of "hot-deck imputation," several facts about this method are worth noting at the outset. The Census Bureau refers to hot-deck imputation procedures as "estimation." U. S. Dept. of Commerce, Decennial Statistical Studies Division, Census 2000 Procedures and Operations, Memorandum Series Q–34 (hereinafter Memorandum Series), App. 153, 156. It used this form of "estimation" for three different categories of units: (1) those units classified as occupied but with no population count (household size imputation), (2) those units that are unclassified (either occupied or vacant) but that "we know exist" (occupancy imputation), and (3) those units that are unclassified and are "either occupied, vacant, or delete" (status imputation). Memorandum Series B–17, *id.*, at 194–195. The "status imputation" category is the most troubling, because, as explained by the Department of Commerce, it refers to households "for which we know nothing," *id.*, at 195, and therefore which may not even exist.

The Census Bureau explains that "[f]or estimation purposes, six categories are defined" because each of the preceding types of units are divided into two groups: single unit addresses and multiunit addresses. *Ibid.* The Bureau calls the six categories "estimation categories," and permits only certain types of units for each category to be used as "donors." *Ibid.* The Bureau then uses these donor units, for which data has already been obtained, to impute characteristics to a neighboring unit that falls within the above categories.

Whether this "estimation" technique passes constitutional muster depends on an evaluation of the language of the Census Clause and its original understanding.[1]

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[1] We gave some consideration to a similar question in *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316 (1999),

II

The Framers constitutionalized the requirement that a census be conducted every decade. U. S. Const., Art. I, §2, cl. 3. In so doing, they chose their words with precision. Chief Justice Marshall instructed that "[a]s men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons* v. *Ogden*, 9 Wheat. 1, 188 (1824). We should be guided, therefore, by the Census Clause's "original meaning, for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 359 (1995) (THOMAS, J., concurring in judgment) (quoting *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905)).

Article I, §2, cl. 3, as modified by §2 of the Fourteenth Amendment, provides: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The Census Clause specifies that this "actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten

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when considering a challenge to the Department of Commerce's decision to use statistical sampling in the decennial census for apportionment purposes. There was no need, however, to decide the constitutional question in that case because we held that 13 U. S. C. §195 "prohibits the use of sampling in calculating the population for purposes of apportionment." 525 U. S., at 340. Both JUSTICE STEVENS and JUSTICE SCALIA, however, weighed in on the matter. See *id.*, at 362–364 (STEVENS, J., dissenting); *id.*, at 346–349 (SCALIA, J., concurring in part).

Years, in such Manner as they shall by Law direct." Art. I, § 2, cl. 3.[2]

The Constitution describes the process both as "counting the whole numbers of persons" and as an "actual Enumeration." Dictionary definitions contemporaneous with the ratification of the Constitution inform our understanding. "Actual" was defined at the time of the founding as "really done: In *Metaphysics*, that is actual, or in act, which has a real being or existence, and is opposite to *Potential*." N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789); see also T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (defining "actual" as "[r]eally in act, not merely potential; in act, not purely in speculation"). Sheridan defined "[e]numeration" as "[t]he act of numbering or counting over" and "[t]o enumerate" as "to reckon up singly; to count over distinctly." See also 1 S. Johnson, A Dictionary of the English Language 658 (4th rev. ed. 1773) (defining "enumerate" as "[t]o reckon up singly; to count over distinctly; to number"; and "enumeration" as "[t]he act of numbering or counting over; number told out"). "Count" was defined as "to number; to tell." *Id.*, at 435.[3] See also 1 N. Webster, An American Dictionary of the English Language (1828) ("To number; to tell or name one by one, or by small numbers, for ascertaining the whole number of units in a collection").

As JUSTICE SCALIA explained in *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 346–347 (1999) (opinion concurring in part), dictionary def-

[2] The "actual Enumeration" was originally to be used both for apportionment of Members of the House of Representatives and for direct taxation. Adoption of the Sixteenth Amendment, however, removed the requirement of apportionment for direct taxes. U. S. Const., Amdt. 16 ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration").

[3] The word "count" did not appear in the original version of Art. I, § 2, cl. 3. It did, however, appear in the definitions of "enumeration."

initions contemporaneous with the founding "demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number." "The notion of counting 'singly,' 'separately,' 'number by number,' 'distinctly,' which runs through these definitions is incompatible (or at least *arguably* incompatible, which is all that needs to be established) with gross statistical estimates." *Id.*, at 347.[4] Nor can it be said that these definitions encompass estimates by imputation.[5]

In addition, at the time of the founding, "conjecture" and "estimation" were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause. During debate over the first Census Act, James Madison made such a distinction, noting that the census would provide an "exact number of every division" as compared to "assertions and conjectures." 2 The Founders' Constitution 139 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution). Similarly, when describing a document containing the results of the first census, Thomas Jefferson noted the difference between the returns that were "actual" and those that were added in red ink by "conjectur[e]." 8 The Writings of Thomas Jefferson 229 (A. Lipscomb ed. 1903). George Mason, at one point, observed that he "doubted much whether the conjectural rule which was

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[4] The parenthetical reflects the fact that JUSTICE SCALIA was construing a statutory provision so as to avoid serious constitutional doubt. See *House of Representatives*, *supra*, at 346 (opinion concurring in part).

[5] Moreover, while the Court states that the Constitution "uses a general word, 'enumeration,' that refers to a counting process without describing the count's methodological details," *ante*, at 474, the meaning of "enumeration" has not materially changed since the time of the founding. To "enumerate" is now defined as "to ascertain the number of: COUNT," and also "to specify one after another: LIST." See Webster's Ninth New Collegiate Dictionary 416 (1988). "Enumeration" meant at the time of the founding, as it does now, to count individually and specifically and simply does not admit of various counting methodologies.

to precede the census, would be as just, as it would be rendered by an actual census." Founders' Constitution 108.[6]

Historians and commentators after the founding also distinguished actual enumerations from conjectures, demonstrating that there was a common understanding of these terms. For instance, an 1835 book about statistics in the United States explains that "[t]he number of inhabitants in this country, prior to its separation from Great Britain, rests principally on conjectural estimates." T. Pitkin, A Statistical View of the Commerce of the United States of America 582 (hereinafter Pitkin); see also Brief for Appellants 40–41. Prior to the revolution, when the British Board of Trade called upon the Governors to provide an account of their populations, some Colonies made "actual enumerations," such as Connecticut in 1756 and in 1774, while others made estimates "founded upon the number of taxable polls, or the number of the militia." Pitkin 582–583. A widely cited 1800 article published in England by John Rickman after the first United States census also used the term "actual enumeration" several times to describe the count that "must always be under the real number," noting at the same time that this "method (fraught with trouble and expence) attempts an accuracy not necessary, or indeed attainable, in a fluctuating subject." John Rickman's Article on the Desirability of Taking A Census, reprinted in D. Glass, Numbering the People 111 (1973) (hereinafter Glass). See also Brief for Appellants 47. Discussion of an "actual enumeration" can be contrasted to his subsequent proposal for England, which included estimation methods resembling both sampling and imputation since Rickman deemed it appropriate to make "general inferences"

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[6] By "conjectural rule," we can presume that he meant to refer to the population estimates used by the Constitutional Convention to determine the number of Representatives of Congress from each State prior to the first census. See H. Alterman, Counting People: The Census in History 188 (1969) (hereinafter Alterman).

from modern registers to make up for deficient registers. Glass 111–112.

To be sure, the Census Clause enables Congress to prescribe the "Manner" in which the enumeration is taken. The Court suggests that "enumeration" implies the breadth of Congress' methodological authority, rather than its constraints. See *ante*, at 474. But while Congress may dictate the manner in which the census is conducted,[7] it does not have unbridled discretion. For the purposes of apportionment, it must follow the Constitution's command of an "actual Enumeration." Madison made this point clear during debate of the first Census Act when he noted the difficulties "attendant on the taking the census, in the way required by the constitution, and which we are obliged to perform." Founders' Constitution 139.

The Court also places undue weight on the penultimate version of the Clause, the iteration that was given to the Committee of Detail and Committee of Style. See *ante*, at 474–475. Whatever may be said of the earlier version, the Court rejected a similar reliance in *Nixon* v. *United States*, 506 U. S. 224, 231 (1993), because "we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned lan-

[7] As described *infra*, at 503–504, Congress has implemented this power in a variety of ways, such as by authorizing marshals to "cause the number of the inhabitants to be taken" and to appoint as many assistants as necessary, establishing the timeframe within which the census is to be completed, and setting methods of payment for assistants. Act of Mar. 1, 1790, § 1, reprinted in C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 925 (1900) (hereinafter Wright). In recent years, the Bureau through its delegated power has adopted a number of measures to reduce error, including "an extensive advertising campaign, a more easily completed census questionnaire, and increased use of automation, which among other things facilitated the development of accurate maps and geographic files for the 1990 census." *Wisconsin* v. *City of New York*, 517 U. S. 1, 8 (1996).

guage." Carrying the majority's "argument to its logical conclusion would constrain us to say that the *second to last draft* would govern in every instance where the Committee of Style added an arguably substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent." *Id.*, at 231–232. Rather than rely on the draft, I focus on the words of the adopted Constitution.

III

The original understanding can be discerned not only by examining the text but also by considering the "meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721 (1838). The history of census taking in the Colonies and elsewhere, discussions surrounding the ratification of the Census Clause, and the early statutes implementing the Clause provide insight into its meaning.

A

Census taking is an age-old practice. With only a few exceptions, however, before the 19th century most countries conducted partial enumerations that were supplemented by estimates of the unenumerated portion of the population. Wolfe, Population Censuses Before 1790, 27 J. Am. Statistical Assn. 357 (1932) (hereinafter Wolfe). The contentious history of censuses, partial or otherwise, has long influenced decisions about whether to undertake them. See *id.*, at 358 ("The Biblical account of the Lord's wrath at the taking of [the 'census' taken by David] remained an argument against census taking even as late as the eighteenth century").[8] It

[8] This traditional religious objection to census taking was based on the "sin of David, who brought a plague upon Israel by 'numbering' the people (2 Sam. 24:1–25, 1 Chron. 21:1–30)." P. Cohen, A Calculating People 256,

is a history rampant with manipulation for political and fiscal gains. See generally *id.*, at 359–370; Alterman 43, 54; Glass 19–20.

At times, political resistance to censuses precluded their taking. Suspicion of government and opposition on religious grounds, for example, prevented a general census in France during the 18th century. Wolfe 367; see also Alterman 49. And in England, while "estimates and conjectures" as to changes in the population were frequently made in the 18th century, a 1753 proposal to provide for a general enumeration was rejected by Parliament, because it was thought that a census might reveal England's "weakness to her enemies," and that it might be followed by "some public misfortune or epidemical distemper." Wolfe 368 (internal quotation marks omitted).[9]

England was in part responsible for the first colonial censuses, as the British Board of Trade required population counts so that it could properly administer the Colonies. D. Halacy, Census: 190 Years of Counting America 29 (1980) (hereinafter Halacy). The Colonies had their own encounters with various population counting methods. Prior to 1790, there were at least 38 population counts taken in the Colonies. See Alterman 165. According to one historian, however, there was "reason to suspect, [that the censuses were] often intentionally misleading, when officials, on the one hand of the boastful, or on the other hand of the timid type, thought to serve some interest by exaggeration or by understatement." F. Dexter, Estimates of Population in the

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n. 24 (1982) (hereinafter Cohen). Some colonial governors apparently blamed their inability to administer censuses on this fear, although it is unclear to what extent this actually reflected public sentiment. *Ibid.*

[9] The 1753 bill contemplated by the British Parliament received a great deal of publicity and attention. Glass 17. The proposal provided that overseers would "go from house to house in their parishes, recording the numbers of persons actually dwelling in each house during the twelve preceeding hours." *Id.*, at 18.

American Colonies, in Proceedings of the American Antiquarian Society 22 (1887) (hereinafter Dexter).

Many Americans resisted census-taking efforts. According to an 1887 inventory of the Colonies' attempts at population estimates, "Connecticut pursued in her colonial history the policy of hiding her strength in quietness; so far as might not be inconsistent with general truthfulness, she preferred to make no exhibit of her actual condition." *Id.*, at 31.[10] A 1712 census in New York "met with so much opposition, from superstitious fear of its breeding sickness, that only partial returns were obtained." *Id.*, at 34 (citations omitted). See also Century 3. In New Jersey, the population counts of the mid-18th century apparently comprised "such guesses as the Royal Governors could make, for the satisfaction of their superiors." Dexter 36. In 1766, Benjamin Franklin "supposed that there might be about 160,000 whites in Pennsylvania . . . but he did not profess to speak with accuracy, and was under a bias which led him, perhaps unconsciously, into cautious understatement." *Id.*, at 38. Georgia was apparently "singularly misrepresented, being overestimated in the Federal Convention of 1787 at nearly half as much again as her real amount of population, while the rest of the colonies were underestimated considerably,—the total of the Convention's figures falling short of the reality by more than half a million." *Id.*, at 49.

The Framers also had experience with various statistical techniques. For example, Thomas Jefferson, who as Secretary of State would later be charged with running the first official national census, had a great interest in mathematics

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[10] See also Dept. of Commerce and Labor, A Century of Population Growth: From the First Census of the United States to the Twelfth, 1790–1900, p. 4 (1909) (hereinafter Century) ("The people of Massachusetts and Connecticut manifested considerable opposition to census taking, seeing no advantage in it to themselves, and fearing that in some way the information obtained would be used by the British authorities to their disadvantage").

and numbers. See Halacy 33; Cohen 112–113. In 1782, Jefferson estimated Virginia's population and his calculation exhibited an awareness that statistical estimation techniques could be used to calculate population. Virginia had been unable to manage a full census for the Continental Congress; eight counties had failed to turn in any census data. J. Cassedy, Demography in Early America: Beginnings of the Statistical Mind, 1600–1800, p. 228 (1969) (hereinafter Cassedy). Jefferson had to extrapolate from incomplete tax returns, militia muster rolls, and other data. Nonetheless, he produced an estimate of 567,614. *Ibid.* First, he listed certain known facts, including data about Virginia's population in all but eight counties. In the eight counties for which information was not available, he knew that there had been 3,161 men in the militia in 1779 and 1780. He then listed five assumptions, such as "[t]he number of people under 16 years of age was equal to the number 16 years and over," on which he based his final estimate. Alterman 168–169.

Another elaborate effort at population calculation was undertaken by the Governor of Massachusetts in 1763, who estimated his Colony's population in three ways. First, he made an estimate from a return to the General Court of "'rateable polls'" of males over 16 eligible to vote. He added an estimate of males who were too poor to pay the poll tax, and then added similar numbers of females. He made another estimate by multiplying the militia returns by four. He calculated a third estimate from the number of houses. Since many believed that houses averaged five occupants and others "preferred five and a half," he used both numbers. After giving the British Board of Trade several numbers, however, he concluded that the "actual population was none of these figures" and the population was in fact higher. Cassedy 73. In any event, "[s]ince all of the returns used in the estimates had been made for tax purposes, it was understood that they would be well on the low side." *Ibid.*

The Framers were quite familiar not only with various census-taking methods but also with impediments to their successful completion. The Continental Congress had already used population estimates to make decisions about taxation, and such efforts were met with resistance. In 1775, the Continental Congress had ascertained population estimates for the Colonies in order to apportion the taxes and costs of the Revolutionary War. Pitkin 583. See also Halacy 30–31 ("Debts incurred in the Revolutionary War hastened the ordering of a standard form of census. A census of the colonies had been ordered, but some of them never complied, and the rest did so in different ways"). New Hampshire in particular complained that the estimate of its population for the purposes of calculating Revolutionary War costs was too high. Pitkin 583. It had "caused an actual enumeration to be . . . made, by which it appeared, that the number of her inhabitants" was 20,000 lower than the estimate. *Ibid.* See also Brief for Appellants 47. New Hampshire petitioned the Continental Congress to change the amount of taxation. New Hampshire's effort was in vain, because Congress "refused to alter her proportion of her taxes on that account." *Ibid.* See also 10 New Hampshire Provincial and State Papers 580 (reprint 1973) ("[T]he [proportion of taxes assigned New Hampshire by Congress in 1781] is too high by a very considerable sum, that by our numbers which were taken in the year 1775 by the selectmen of the several Towns & Parishes & Return made under Oath . . . this proportion will appear much too large").

B

The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes. Debate about apportionment and the census consequently focused for the most part on creating a standard that would limit political chicanery. While the Framers did not extensively discuss the method of census-taking, many

expressed the desire to bind or "shackle" the legislature so that neither future Congresses nor the States would be able to let their biases influence the manner of apportionment. See Founders' Constitution 103–104. As James Madison explained:

> "In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition, if not on the cooperation of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality." The Federalist No. 54, pp. 340–341 (C. Rossiter ed. 1961).

Alexander Hamilton likewise noted, in a discussion about the proportion of taxes that "[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression." *Id.*, No. 36, at 220.

Discussion revealed a keen awareness that absent some fixed standard, the numbers were bound to be subject to political manipulation. While Gouverneor Morris appears to have been one of the strongest opponents of "fettering the Legislature too much," he at least recognized that if the mode for taking the census was "unfixt the Legislature may use such a mode as will defeat the object: and perpetuate the inequality." Founders' Constitution 102. He believed, however, that "[i]f we can't agree on a rule that will be just

at this time, how can we expect to find one that will be just in all times to come." *Id.*, at 104. Edmund Randolph, on the other hand, noted that if dangers suggested by Gouverneor Morris were "real, of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." *Id.*, at 103.

During debate of a proposal "to take a periodical census," George Mason noted that he "did not object to the conjectural ratio which was to prevail in the outset" for apportionment, prior to the census, but "considered a Revision from time to time according to some permanent & precise standard as essential to . . . fair representation." *Id.*, at 102–103. "From the nature of man," Mason observed, "we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it." *Id.*, at 103.

Some who initially believed that the Congress should have discretion changed their minds after listening to the arguments by Randolph, Mason, and others. Roger Sherman, for example, "was at first for leaving the matter wholly to the discretion of the Legislature; but he had been convinced by the observations of (Mr. Randolph & Mr. Mason) that the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." *Id.*, at 104. Nathaniel Ghorum perceptively noted that "[i]f the Convention who are comparatively so little biassed by local views are so much perplexed, How can it be expected that the Legislature hereafter under the full biass of those views, will be able to settle a standard." *Ibid.* On the other hand, Reid continued to believe that "the Legislature ought not to be too much shackled." *Ibid.* He also thought that "[it] would make the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union." *Ibid.*

While debate continued, with various iterations of the Clause considered, it was clear that the principle concern was that the Constitution establish a standard resistant to manipulation. As Justice Story later observed, "apportion[ing] representatives among the states according to their relative numbers . . . had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised." Commentaries on the Constitution of the United States § 327, p. 238 (R. Rotunda & J. Nowak eds. 1987).

C

We have long relied on contemporaneous constructions of the Constitution when interpreting its provisions, for "early congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning.' " *Printz* v. *United States*, 521 U. S. 898, 905 (1997) (citations omitted). See also *Myers* v. *United States*, 272 U. S. 52, 175 (1926) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions" (collecting cases)). Accordingly, I turn next to the early Census Acts, which provide significant additional evidence that the Framers meant what they said in adopting the words "actual Enumeration."

From the first census, Congress directed that the census be taken by actually counting the people. *House of Representatives*, 525 U. S., at 335. Congress enacted a series of requirements for how to accomplish the counting; none mention the use of sampling or any other statistical technique or method of estimation. Rather, the first Census Act described, among other things, how many census takers (or deputies) could be used, their pay, the consequences of falsifying papers, what address to attribute to persons who had

more than one address, and how to count those who did not have an address. Congress ordered the first census to begin on August 2, 1790, and to be completed within nine months. Century 45. Marshals and their assistants were required to "take an oath or affirmation" to "'truly cause to be made, a just and perfect enumeration and description of all persons resident within [their] district[s].'" Act of Mar. 1, 1790, § 1, reprinted in Wright 925.

The Act required marshals to aggregate the numbers, but there was no provision allowing the marshals to estimate or extrapolate in order to fill in missing data. The Act provided that the "assistants" could, for a particular family, use data given by one member of that family. But the information could be taken only from persons over age 16, and these persons were required to give the assistant "a true account." § 6, *id.*, at 926. No other method of counting appears to have been permissible. And failure to make a return or falsifying a return triggered heavy monetary penalties and the threat of prosecution. §§ 2, 3, *ibid.* In 1810, Congress added an express statement that "'the said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise.'" *House of Representatives*, *supra*, at 335 (citing Act of Mar. 26, 1810, § 1, 2 Stat. 565–566). The provision requiring census takers to visit personally each home appeared in statutes governing the next 14 censuses. See 525 U. S., at 335–336, and n. 5 (surveying Census Acts).

There was widespread awareness that the early censuses were not entirely accurate. The enumerators confronted many problems, including confusion regarding which houses belonged to which districts, danger on the roads, the unwillingness of citizens to give the required information, superstition, and a fear from some that the census was connected to taxation. Century 45–46. For example, in a 1791 letter from George Washington to Gouverneor Morris dated before the first census was complete, Washington noted the differ-

ence between the "enumeration" and an estimate he had previously given, and acknowledged that the official census would not be accurate:

> "In one of my letters to you the account which I gave of the number of inhabitants which would probably be found in the United States on enumeration, was too large. The estimate was then founded on the ideas held out by the Gentlemen in Congress of the population of their several States, each of whom (as was very natural) looking thro' a magnifying glass would speak of the greatest extent, to which there was any probability of their numbers reaching. Returns of the Census have already been made from several of the States and a tolerably just estimate has been formed now in others, by which it appears that we shall hardly reach four millions; but one thing is certain our *real* numbers will exceed, greatly, the official returns of them." 31 Writings of George Washington 329 (J. Fitzpatrick ed. 1931).

Apparently concerned about the effect that the results of the first census would have on foreign opinion, Jefferson, in a 1791 letter sending the results abroad, explained: "I enclose you a copy of our census, which, so far as it is written in black ink, is founded on actual returns, what is in red ink being conjectured, but very near the truth. Making very small allowance for omissions, which we know to have been very great, we may safely say we are above four millions." 8 Writings of Thomas Jefferson, at 229. While perhaps disappointed with the results of the census, he noted the difference between the returns that were "actual" and those that were added in red ink by "conjectur[e]." *Ibid.*[11] There is

[11] It was later believed that the disappointment was "largely due to the exaggerated estimates of colonial population." Wright 17. See also Alterman 205 ("Many census historians believe, as Washington hinted . . . that the disappointment was due to the exaggerated hopes born of a newly won independence, as well as to the unrealistic estimates of the colonial population").

no suggestion, however, that his additional "conjectures" were used for apportionment. See T. Woolsey, The First Century of the Republic 221 (1876); Alterman 205. "Despite its deficiencies, the census provided the factual base about the American people which officials and scholars needed." Cassedy 220. Thus, while the Court asserts that there was a "strong constitutional interest in accuracy," *ante*, at 478, the stronger suggestion is that the Framers placed a higher value on preventing political manipulation.

IV

The text, history, and a review of the original understanding of the Census Clause confirm that an actual enumeration means an actual count, without estimation. While more sophisticated statistical techniques may be available today than at the time of the founding, the Framers had a great deal of familiarity with alternative methods of calculating population. They decided to constitutionalize the arduous task of an actual enumeration. I am persuaded that much like the earlier methods of estimation, hot-deck imputation—a modern statistical technique that the Census Bureau refers to as "estimation"—is not constitutionally permissible.

In recent decades, decisions regarding whether, and what kind of, imputation and other statistical methods should be utilized have changed from administration to administration. Departing from past practice, imputation was first used in the year 1960 census. The Bureau has used some form of it in every decennial census since then. Plaintiffs' Statement of Undisputed Facts, App. 44; Response to Plaintiffs' Statement of Material Facts, *id.*, at 222. In the year 1970 census, about 900,000 persons were imputed to the apportionment count through household size and occupancy imputation. The Census Bureau also used a form of estimation that combined imputation and sampling. Declaration of Howard Hogan, *id.*, at 268–269 (hereinafter Hogan). In 1980, the use of imputation shifted one seat in the House of Representa-

tives from Indiana to Florida, *id.*, at 46, 224, making the year 2000 census at least the second time that its use has changed apportionment.[12]

At the earliest, status imputation was used in the year 1990 census, although there is some dispute as to whether it was even used then. *Id.*, at 45–46, n. 4; but see *id.*, at 223 (stating that "the 1990 imputation procedures continued the prior practice of using household size imputation and occupancy imputation but added status imputation"). Regardless, it apparently had no impact on apportionment. See *id.*, at 45–46, n. 4. In the year 1990 census, the Secretary specifically decided against using a different form of estimation. The "Secretary's administrative decision declining to make an adjustment observed that '[t]he imputation scheme used . . . [was] based on a series of assumptions that are mostly guesswork.'" Brief for Federal Petitioners in *Wisconsin* v. *City of New York*, O. T. 1995, Nos. 94–1614 etc., p. 8. The Secretary even noted that "large-scale statistical adjustment of the census through [this method] would 'abandon a two hundred year tradition of how we actually count people,'" and that "statistical adjustment of the 1990 census might open the door to political tampering in the future." *Wisconsin* v. *City of New York*, 517 U. S. 1, 10–12 (1996).

Though different in kind, our recent history of experimentation with census-taking methods bears similarity to the various preratification estimates and enumerations. While I would not speculate about the Bureau's decisionmaking process, it is quite evident that the Framers, aware that the use of any estimation left the door open to political abuse, adopted the words "actual Enumeration" to preclude the availability of methods that permit political manipulation.

Additionally, hot-deck imputation is properly understood as an estimation, which by definition cannot be an actual

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[12] The Bureau states it "no longer has data available to determine whether count imputation affected apportionment in the 1960 or the 1970 Censuses." App. 224.

counting of persons. The Court contends that imputation does not differ in principle from other traditional methods of counting, such as questioning of "'neighbors, landlords, postal workers, or other proxies'" about the number of inhabitants in a particular place. *Ante*, at 477. But that point is flawed in several important respects. To begin with, from the first census, such information was taken through an actual inquiry of a family member who was over the age of 16. Act of Mar. 1, 1790, § 6, reprinted in Wright 926. That household member was "obliged to render to such assistant of the division, a true account, if required, to the best of his or her knowledge, of all and every person belonging to such family respectively . . . on pain of forfeiting twenty dollars, to be sued for and recovered by such assistant." *Ibid.* Estimation was not allowed and family members who were caught providing false information were subject to fines.

Questioning neighbors was not permitted until 1880 and even then census data could only be based on information provided by those "living nearest to such place of abode." Act of Mar. 3, 1879, § 8, *id.*, at 937. Again, family members or agents of families were required by law "to render a true account" and those who "willfully fail[ed] or refuse[d]" were "guilty of a misdemeanor" and required to "pay a sum not exceeding one hundred dollars." § 14, *id.*, at 938. That process is far different from a computation where data about one "donor" house, that appears on "Census Burea[u] records," Hogan, App. 255, compiled far away from the actual residence, is used to estimate data about another. With "status imputation," for example, the Census Bureau is willing to impute data even though it categorizes these households as "Donees" "for which we know nothing." Memorandum Series B–17, *id.*, at 195. While subsequent Acts may permit other forms of proxy, they do not assist with our analysis of the original understanding. Nor are we called upon to judge their constitutionality here. Because hot-deck imputation is an estimation procedure that includes persons not

"actually" counted, its use to adjust the census for apportionment purposes runs afoul of the Constitution.

The Court's further reflection that "the Bureau's only choice is to disregard the information it has, using a figure of zero, or to use imputation in an effort to achieve greater accuracy," *ante*, at 478, makes no difference as to whether it is constitutionally permissible. Even if hot-deck imputation produces more accurate results (and we do not have the means to answer that question), the Framers well understood that some Americans would go uncounted. Accuracy is not the dispositive factor in the constitutional consideration. Despite their awareness that estimation techniques could be used to supplement data, the Framers chose instead to require an "actual Enumeration" or "counting of whole persons." Disappointment following the first census did not prompt a change in this view or in the text. A zero must remain a zero under the dictates of the Constitution.

The Court takes the position that "enumeration" may be incompatible with gross statistical estimates, but concludes that such gross estimates are not at stake here. See *ante*, at 476. I derive little comfort from the fact that the Court has drawn a constitutional line at "'gross statistical estimates.'" *Ibid.* The Court neglects to explain the boundaries of such gross estimates, begging the question of how "gross" must "gross" be? The Court nonchalantly comments that the Census Bureau used the method "sparingly," see *ante*, at 477, and that the "inference involves a tiny percent of the population," *ante*, at 479. But the consequences are far from trivial. One State's representation in Congress is reduced while another's is fortified. If the use of hot-deck imputation in the next Census shifts the balance of power in "only" two or three seats, will the Court continue to defend the method? Today, we deal with hot-deck imputation. But if history is our guide, surely other statistical methods will be employed in future censuses and there will be similar challenges. By accepting one method of estimation as con-

stitutionally permissible, the Court has opened the door, and we will be continually called to judge whether one form of estimation is more acceptable than another.[13]

* * *

After much debate and faced with a long history of political manipulation, the Framers decided to make the taking of an "actual Enumeration" a constitutional requirement. While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document. As a leading French statistician noted: "The United States presents in its history a phenomenon that has no parallel—that of a people who initiated the statistics of their country on the very day that they formed their government, and who regulated, in the same instrument, the census of their citizens, their civil and political rights, and the destiny of their people." Alterman 164. Well familiar with methods of estimation, the Framers chose to make an "actual Enumeration" part of our constitutional structure. Today, the Court undermines their decision, leaving the basis of our representative government vulnerable to political manipulation.

For the reasons stated above, I respectfully dissent from Part IV of the Court's opinion and would reverse the judgment of the District Court.

JUSTICE SCALIA, dissenting.

For the reasons I set forth in my opinion in *Franklin* v. *Massachusetts*, 505 U. S. 788, 823–829 (1992) (concurring in part and concurring in judgment)—and for an additional one brought forth in the briefing and argument of the present

[13] See *House of Representatives*, 525 U. S., at 349 (SCALIA, J., concurring in part) ("The prospect of this Court's reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one").

case—I disagree with the Court's holding that appellants have standing under Article III of the Constitution to bring this suit.

As the Court acknowledges, in order to establish standing, appellants must show that the federal courts "have the power to redress the injury that the [federal appellees] allegedly caused [them]." *Ante*, at 459 (internal quotation marks omitted). Yet the Court does not dispute that, even if appellants were to succeed in their challenge and a court were to order the Secretary of Commerce to recalculate the final census, their injury would *not* be redressed "unless the President accepts the new numbers, changes his calculations accordingly, and issues a new reapportionment statement to Congress . . . ." *Franklin, supra*, at 824. That fact is fatal to appellants' standing because appellants have not sued the President to force him to take these steps—and could not successfully do so even if they tried, since "no court has authority to direct the President to take an official act," 505 U. S., at 826. As the Court acknowledged in *Franklin*, the President enjoys the discretion to refuse to issue a new reapportionment statement to Congress: "[H]e is not . . . required to adhere to the policy decisions reflected in the Secretary's report." *Id.*, at 799; see also *id.*, at 800. It displays gross disrespect to the President to assume that he will obediently follow the advice of his subordinates—in this case, a new report by his Secretary, recommending that he alter his prior determination. *Id.*, at 824–825 (SCALIA, J., concurring in part and concurring in judgment). Thus, because appellants' "standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 562 (1992) (internal quotation marks omitted), standing in this case does not exist.

The case for appellants' standing is even weaker than I described it in *Franklin*. Redress of their alleged injuries

depends not only on a particular exercise of the President's discretion, but also on the exercise of the unbridled discretion of a majority of 435 Representatives and 100 Senators (or two-thirds if the President does not agree), whom federal courts are equally powerless to order to take official acts.

Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Pursuant to that authorization, Congress has provided that, once the President transmits to Congress the decennial reapportionment statement that the statute requires, 46 Stat. 26, 2 U. S. C. § 2a(a), "[e]ach State shall be entitled, . . . until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in [that] statement," § 2a(b). Thus, the law provides only two means by which Utah's entitlement can be altered: "the taking effect of a reapportionment under this section or subsequent statute." *Ibid.* The first means refers to the next decennial census;[1] the second to a new law enacted in the interim. Thus, even if the President *wanted* to transfer one congressional seat from North Carolina to Utah, he could not do so before 2011 unless *Congress* enacted a new law authorizing such a reapportionment.

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[1] It cannot be deemed to refer to reapportionment under the *new* Presidential statement that appellants seek, because "reapportionment under this section" pursuant to the 2000 census *has already occurred.* The Presidential statement effecting "reapportionment under this section" must be transmitted "[o]n the first day, or within one week thereafter, of the first regular session" of the first Congress after the census, § 2a(a)—a deadline met by the President's statement under challenge here, but now long since passed.

The Court no doubt realizes that it is not even conceivable that appellants could have standing if redress of their injuries hinged on action by Congress; accordingly, it is driven to assert that the law does not mean what it says. The statute, the Court argues, "do[es] not expressly say" what is to occur when the numbers the Secretary reported to the President are flawed; accordingly, because it "makes good sense" to do so, the Court reads into the statute a third means by which the reapportionment can be altered: judicially decreed "mechanical revision" of "a clerical, a mathematical, or a calculation error" in the Secretary's report. *Ante*, at 462. This is an astonishing exercise of raw judicial power. The statute says very clearly what is to occur when *anything* (including a clerical, mathematical, or calculation error in the Secretary's report) renders the completed apportionment worthy of revision: nothing at all, unless *Congress* deems it worthy of revision and enacts a new law making or authorizing the revision that *Congress* thinks appropriate. There was no reason for the statute to list "expressly" the infinite number of circumstances in which the reapportionment could *not* be altered by other means, because it expressly said that the States' "entitle[ment]" to the number of Representatives shown in the presidential statement *could* be altered *only by the two prescribed means.* There is simply no other way to read the governing text: that the States "shall be entitled" to the reapportionment set forth in the President's statement "until" one of two events occurs, undeniably means that *unless* one of those two events occurs the States remain "entitled" to the reapportionment. What a wild principle of interpretation the Court today embraces: When a statute says that an act can be done *only* by means x or y, it can also be done by other means that "make good sense" under the circumstances, unless *all* the circumstances in which it cannot be done have been listed.

I would not subscribe to application of this deformed new canon of construction even if there were something about

"clerical error" that made it uniquely insusceptible of correction by the means set forth in the statute. But there is not. Indeed, what more plausible and predictable occasion for congressional revision could there be than the demonstration of an error in the reported census count? By taking the responsibility for determining and remedying that error away from Congress, where the statute has placed it, and grasping it with its own hands, the Court commits a flagrant violation of the separation of powers.

The Court can find no excuse in our precedents for today's holding. It relies on three of our cases in which it says we "found standing in similar circumstances," *ante*, at 464. They are similar as day and night are similar. Two of them, *Federal Election Comm'n* v. *Akins*, 524 U. S. 11 (1998), and *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252 (1991), are inapposite because redress of the plaintiffs' injuries did not require action by an independent third party that was not (and could not be) brought to answer before a federal court, much less by a third party for whom (as for the President) it would be disrespectful for us to presume a course of action, and much, much less in violation of the explicit text of a statute.[2] Although in the third case, *Bennett* v. *Spear*, 520 U. S. 154 (1997), we found standing to challenge the action of one agency (Fish and Wildlife Service) despite the fact that redress ultimately depended upon action by another agency (Bureau of Reclamation) not before the Court, we made it quite clear that we came to this conclusion only because in the matter at issue the one agency had the power to coerce action by the other: "[I]t does not suffice," we said, "if the injury complained of is the result of the *independent* action of some third party not before the court." *Id.*, at 169

[2] Moreover, in *Metropolitan Washington* there was no doubt that, if a court enjoined the challenged action, the injuries it allegedly caused would be redressed *automatically* by operation of law. See 501 U. S., at 265 (citing 49 U. S. C. App. § 2456(h)).

(internal quotation marks and brackets omitted). We found that, "while the [Service] theoretically serves an advisory function, in reality it has a powerful coercive effect on the action agency." *Ibid.* (internal quotation marks and citation omitted). In this case, by contrast, we simply cannot say—both because it is not true and because it displays gross disrespect to do so—that the action of the President is "coerced" by the Secretary. Not to mention, once again, the statute that explicitly leaves this question to Congress.

For these reasons, I would vacate the judgment of the District Court and remand with instructions to dismiss for want of jurisdiction.

Syllabus

BE&K CONSTRUCTION CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 01–518. Argued April 16, 2002—Decided June 24, 2002

Petitioner, who had a contract to modernize a steel mill, and the mill owner filed a federal lawsuit against respondent unions, claiming that the unions had engaged in lobbying, litigation, and other concerted activities in order to delay the project because petitioner had nonunion employees. Ultimately, petitioner lost on or withdrew each of its claims. In the meantime, two unions lodged complaints against petitioner with respondent National Labor Relations Board (Board). After the federal court proceedings ended, the Board's general counsel issued an administrative complaint, alleging that petitioner, by filing and maintaining its lawsuit, had violated § 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. 29 U. S. C. §§ 157, 158(a)(1). The Board ruled in the general counsel's favor, finding that the lawsuit was unmeritorious because its claims were dismissed or voluntarily withdrawn with prejudice, and that it was filed to retaliate against the unions, whose conduct was protected under the NLRA. It ordered petitioner to cease and desist from prosecuting such suits, to post notice to its employees acknowledging the Board's finding and promising not to pursue such litigation in the future, and to pay the unions' legal fees and expenses incurred in the lawsuit. The Sixth Circuit granted the Board's enforcement petition. Relying on *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 747, it held that because the Judiciary had already found petitioner's claims against the unions unmeritorious or dismissed, evidence of a simple retaliatory motive sufficed to adjudge petitioner of committing an unfair labor practice. It also rejected petitioner's argument that under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, only baseless or sham suits can restrict the otherwise unfettered right to seek court resolution of differences, finding that case inapplicable because its immunity standard was established in the antitrust context.

Syllabus

Held: The Board's standard for imposing liability is invalid. Pp. 524–537.

(a) The right to petition is one of the most precious liberties safeguarded by the Bill of Rights. This Court has considered that right when interpreting federal law, recognizing in the antitrust context, for example, that genuine petitioning is immune from liability, but sham petitioning is not. The two-part definition adopted in *Professional Real Estate Investors* requires that sham antitrust litigation must be objectively baseless such that no reasonable litigant could realistically expect success on the merits, and that the litigant's subjective motivation must conceal an attempt to interfere directly with a competitor's business relationship through the use of the governmental process as an anticompetitive weapon. 508 U. S., at 60–61. This suit raises the same underlying issue of when litigation may be found to violate federal law, but with respect to the NLRA. Recognizing the connection, the Court has previously decided that the Board can enjoin lawsuits by analogizing to the antitrust context, holding that the Board could enjoin ongoing baseless suits brought with a retaliatory motive. Here, however, the issue is the standard for declaring completed suits unlawful. In *Bill Johnson's*, the Court addressed that issue in dicta, noting a standard which would allow the Board to declare that a lost or withdrawn suit violated the NLRA if it was retaliatory. However, at issue in *Bill Johnson's* were ongoing suits, and the Court did not consider the precise scope of the term "retaliation." Although its statements regarding completed litigation were intended to guide further proceedings, the Court did not expressly order the Board to adhere to its prior unlawfulness finding under the stated standard. Exercising its customary refusal to be bound by dicta, the Court turns to the question presented. Pp. 524–528.

(b) Because of its objective component, *Professional Real Estate Investors'* sham litigation standard protects reasonably based petitioning from antitrust liability; because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not. The Board argues that the broad immunity necessary in the antitrust context, with, *e. g.*, its treble damages remedy and privately initiated lawsuits, is unnecessary in the labor law context where, *e. g.*, most adjudication cannot be launched solely by private action and the Board cannot issue punitive remedies. At most, those arguments show that the NLRA poses less of a burden on petitioning, not that its burdens raise no First Amendment concerns. If the Board may declare that a reasonably based, but unsuccessful, retaliatory lawsuit violates the NLRA, the resulting illegality finding is a burden by itself. The finding also poses a threat of reputational harm that is

different and additional to any burden imposed by other penalties. Having identified this burden, the Court must examine the petitioning activity it affects. The *Bill Johnson's* Court said that the Board could enjoin baseless retaliatory suits because they fell outside the First Amendment and thus were analogous to "false statements." 461 U. S., at 743. At issue here, however, is a class of reasonably based but unsuccessful lawsuits. Whether this class falls outside the Petition Clause at least presents a difficult constitutional question, given the following considerations. First, even though all lawsuits in this class are unsuccessful, the class includes suits involving genuine grievances because genuineness does not turn on whether the grievance succeeds. Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Finally, the analogy of baseless suits to false statements does not directly extend to suits that are unsuccessful but reasonably based. Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, this Court must also consider the significance of that particular limitation, which is fairly included within the question presented. Pp. 528–533.

(c) The Board's definition of a retaliatory suit as one brought with a motive to interfere with the exercise of protected NLRA § 7 rights covers a substantial amount of genuine petitioning. For example, an employer's suit to stop what the employer reasonably believes is illegal union conduct may interfere with or deter some employees' exercise of NLRA rights. But if the employer's motive still reflects a subjectively genuine desire to test the conduct's legality, then declaring the suit illegal affects genuine petitioning. The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Yet ill will is not uncommon in litigation, and this Court, in other First Amendment contexts, has found it problematic to regulate some demonstrably false expression based on the presence of ill will. Thus, the difficult constitutional question is not made significantly easier by the Board's retaliatory motive limitation. The final question is whether in light of the NLRA's important goals, the Board may nevertheless burden an unsuccessful but reasonably based suit that was brought with a retaliatory purpose. While the speech burdens are different here than in the antitrust context, the Court is still faced with the difficult constitutional question whether a class of petitioning may be declared unlawful when a substantial portion is subjectively and objectively genuine. This Court avoided a similarly difficult First Amendment issue in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575, by adopting a limiting construction of the relevant NLRA provision. Section 158(a)(1)'s prohibition on interfering, restraining, or coercing is facially as broad as the prohibition in *DeBartolo*, and it need

not be read so broadly as to reach the entire class of cases the Board has deemed retaliatory. Because nothing in § 158(a)(1)'s text indicates that it must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, the Court declines to do so. And because the Board's standard for imposing NLRA liability allows it to penalize such suits, its standard is invalid. Pp. 533–537.

246 F. 3d 619, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Scalia, J., filed a concurring opinion, in which Thomas, J., joined, *post*, p. 537. Breyer, J., filed an opinion concurring in part and concurring in the judgment, in which Stevens, Souter, and Ginsburg, JJ., joined, *post*, p. 538.

Maurice Baskin argued the cause and filed briefs for petitioner.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief for the National Labor Relations Board were *Solicitor General Olson*, *Austin C. Schlick*, *Arthur F. Rosenfeld*, *John H. Ferguson*, *Norton J. Come*, and *John Emad Arbab*. *Sandra Rae Benson*, *Theodore Franklin*, *Jonathan P. Hiatt*, *James B. Coppess*, *Peter D. Nussbaum*, *Meera Trehan*, and *Laurence Gold* filed a brief for respondent Unions.*

Justice O'Connor delivered the opinion of the Court.

Petitioner sued respondent unions, claiming that their lobbying, litigation, and other concerted activities violated federal labor law and antitrust law. After petitioner lost on or withdrew each of its claims, the National Labor Relations Board decided petitioner had violated federal labor law by prosecuting an unsuccessful suit with a retaliatory motive. The Court of Appeals affirmed. Because we find the Board

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States et al. by *Stanley R. Strauss*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Joshua A. Ulman;* and for the Society for Human Resource Management et al. by *Mark A. Carter* and *Daniel V. Yager*.

lacked authority to assess liability using this standard, we reverse and remand.

I

Petitioner, an industrial general contractor, received a contract to modernize a California steel mill near the beginning of 1987. 246 F. 3d 619, 621 (CA6 2001). According to petitioner, various unions attempted to delay the project because petitioner's employees were nonunion. *Ibid.* That September, petitioner and the mill operator filed suit against those unions in the District Court for the Northern District of California. App. to Pet. for Cert. 33a. The suit was based on the following basic allegations: First, the unions had lobbied for adoption and enforcement of an emissions standard, despite having no real concern the project would harm the environment. 246 F. 3d, at 621. Second, the unions had handbilled and picketed at petitioner's site—and also encouraged strikes among the employees of petitioner's subcontractors—without revealing reasons for their disagreement. *Ibid.* Third, to delay the construction project and raise costs, the unions had filed an action in state court alleging violations of California's Health and Safety Code. *Id.*, at 621–622. Finally, the unions had launched grievance proceedings against petitioner's joint venture partner based on inapplicable collective bargaining agreements. *Id.*, at 622.

Initially, petitioner and the mill operator sought damages under § 303 of the Labor-Management Relations Act, 1947 (LMRA), 61 Stat. 158, as amended, 29 U. S. C. § 187, which provides a cause of action against labor organizations for injuries caused by secondary boycotts prohibited under § 158(b)(4). 246 F. 3d, at 622. But after the District Court granted the unions' motion for summary judgment on the plaintiffs' lobbying- and grievance-related claims, the plaintiffs amended their complaint to allege that the unions' activities violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–2, which prohibit certain agree-

ments in restraint of trade, monopolization, and attempts to monopolize. 246 F. 3d, at 622. The District Court dismissed the amended complaint, however, because it realleged claims that had already been decided. *Id.*, at 622–623. The District Court also dismissed the plaintiffs' claim regarding the unions' state court lawsuit since the plaintiffs had no evidence that the suit was not reasonably based and because two unions that the plaintiffs sued were never parties to that state court action. *Id.*, at 623.

The plaintiffs filed a second amended complaint. It included their remaining claims but again realleged claims that had already been decided. *Ibid.;* App. 32–33. The District Court dismissed the decided claims and imposed sanctions on the plaintiffs under Federal Rule of Civil Procedure 11. 246 F. 3d, at 623. At that point, the mill operator dismissed its remaining claims with prejudice. *Ibid.* The District Court then granted summary judgment to the unions on petitioner's antitrust claim once petitioner was unable to show the unions had formed a combination with nonlabor entities for an illegitimate purpose. *Ibid.* Petitioner dismissed its remaining claims and appealed. *Id.*, at 623–624.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of petitioner's antitrust claim. It held that the District Court erred in requiring petitioner to prove that the unions combined with nonlabor entities for an illegitimate purpose, but found the error harmless since the unions had antitrust immunity when lobbying officials or petitioning courts and agencies, unless the activity was a sham. *USS–POSCO Industries* v. *Contra Costa County Bldg. & Const. Trades Council, AFL–CIO,* 31 F. 3d 800, 810 (CA9 1994). Petitioner did not argue that the unions' litigation activity had been objectively baseless, but maintained that "the unions [had] engaged in a pattern of *automatic* petitioning of governmental bodies . . . *without regard* to . . . the merits of said petitions." *Ibid.* (internal quotation marks omitted; emphasis added). The Ninth Circuit allowed that

petitioner's claim, if proved, could overcome the unions' antitrust immunity, but rejected it nonetheless because "fifteen of the twenty-nine [actions filed by the unions] . . . have proven successful. The fact that more than half of all the actions . . . turn out to have merit cannot be reconciled with the charge that the unions were filing [them] willy-nilly without regard to success." *Id.*, at 811 (footnote omitted).

The Ninth Circuit reversed the District Court's award of Rule 11 sanctions, however, after petitioner explained that it had realleged decided claims based on Circuit precedent suggesting that doing so was necessary to preserve them on appeal. *Ibid.* Although the Ninth Circuit decided that rule did not apply to amended complaints following summary judgment, it held that petitioner's view was not frivolous and that its counsel could not be blamed for "err[ing] on the side of caution." *Id.*, at 812.

In the meantime, two unions had lodged complaints against petitioner with the National Labor Relations Board (Board), 246 F. 3d, at 624, and after the federal proceedings ended, the Board's general counsel issued an administrative complaint against petitioner, alleging that it had violated § 8(a)(1) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(1), by filing and maintaining the federal lawsuit. App. to Pet. for Cert. 29a. Section 8(a)(1) prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. 29 U. S. C. §§ 157, 158(a)(1).

A three-member panel of the Board addressed cross-motions for summary judgment and ruled in favor of the general counsel. The panel determined that petitioner's federal lawsuit had been unmeritorious because all of petitioner's claims were dismissed or voluntarily withdrawn with prejudice. App. to Pet. for Cert. 30a, 47a, 49a. The panel then examined whether petitioner's suit had been filed to retaliate against the unions for engaging in activities protected under

the NLRA. The panel first concluded that the unions' conduct was protected activity, *id.*, at 50a–59a, and then decided that petitioner's lawsuit had been unlawfully motivated because it was "directed at protected conduct" and "necessarily tended to discourage similar protected activity," and because petitioner admitted it had filed suit "'to stop certain [u]nion conduct which it believed to be unprotected,'" *id.*, at 59a–60a. The panel found additional evidence of retaliatory motive because petitioner had sued some unions that were not parties to the state court lawsuit. *Id.*, at 60a. The panel also found evidence of retaliatory motive because petitioner's LMRA claims had an "utter absence of merit" and had been dismissed on summary judgment. *Id.*, at 61a. After determining that petitioner's suit had violated the NLRA because it was unsuccessful and retaliatory, the panel ordered petitioner to cease and desist from prosecuting such suits and to post notice to its employees admitting it had been found to have violated the NLRA and promising not to pursue such litigation in the future. *Id.*, at 65a–67a. The panel also ordered petitioner to pay the unions' legal fees and expenses incurred in defense of the federal suit. *Id.*, at 65a.

Petitioner sought review of the Board's decision in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned for enforcement of its order. The Sixth Circuit granted the Board's petition. Relying on *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 747 (1983), the Sixth Circuit held that "because the judicial branch of government had already determined that [petitioner's] claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive . . . suffice[d] to adjudge [petitioner] of committing an unfair labor practice." 246 F. 3d, at 628. The court rejected petitioner's argument that under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49 (1993), "only baseless or 'sham' suits serve to restrict the otherwise unfettered right to seek court resolution of differences."

246 F. 3d, at 629. Instead, the court decided *Professional Real Estate Investors* was inapplicable because its immunity standard had been established in the antitrust context without reference to any standard for determining if completed litigation violates the NLRA. 246 F. 3d, at 629. The Sixth Circuit found that substantial evidence supported the Board's inference of retaliatory motive because petitioner had filed an unmeritorious suit, realleged previously decided claims, sought treble damages on its antitrust claim, and sought damages from unions not parties to the state court suit. *Id.*, at 629–631. The court also upheld the Board's award of attorney's fees. *Id.*, at 632.

Petitioner sought review of the Sixth Circuit's judgment by a petition for certiorari that raised four separate questions. We granted certiorari on the following rephrased question:

> "Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49 (1993)?" 534 U. S. 1074 (2002).

We now reverse the judgment of the Sixth Circuit and remand.

II

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222 (1967), and have explained that the right is implied

by "[t]he very idea of a government, republican in form," *United States* v. *Cruikshank*, 92 U. S. 542, 552 (1876).

We have also considered the right to petition when interpreting federal law. In the antitrust context, for example, we held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136 (1961). We based our interpretation in part on the principle that we would not "lightly impute to Congress an intent to invade . . . freedoms" protected by the Bill of Rights, such as the right to petition. *Id.*, at 138. We later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Mine Workers* v. *Pennington*, 381 U. S. 657, 670 (1965).

These antitrust immunity principles were then extended to situations where groups "use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 511 (1972) (emphasis added). We thus made explicit that "the right to petition extends to all departments of the Government," and that "[t]he right of access to the courts is . . . but one aspect of the right of petition." *Id.*, at 510.

Even then, however, we emphasized that such immunity did not extend to "illegal and reprehensible practice[s] which may corrupt the . . . judicial proces[s]," *id.*, at 513, hearkening back to an earlier statement that antitrust immunity would not extend to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, *supra*, at 144. This line of cases thus establishes that while

genuine petitioning is immune from antitrust liability, sham petitioning is not.

In *Professional Real Estate Investors*, we adopted a two-part definition of sham antitrust litigation: first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "concea[l] an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." 508 U. S., at 60–61 (internal quotation marks omitted; emphasis in original). For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively.

This case raises the same underlying issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act. Recognizing this underlying connection, we previously decided whether the Board could enjoin state court lawsuits by analogizing to the antitrust context. In *Bill Johnson's*, a restaurant owner had filed a state court lawsuit against individuals who picketed its restaurant after a waitress was fired. 461 U. S., at 733–734. The owner alleged that the picketing was harassing and dangerous and that a leaflet distributed by the picketers was libelous. *Id.*, at 734. The waitress filed a charge with the Board claiming the suit had been filed in retaliation for participation in protected activities. *Id.*, at 735. The Administrative Law Judge (ALJ) decided that the owner's suit lacked a reasonable basis and was intended to penalize protected activity based on his assessment of the evidence and its credibility. *Id.*, at 736, 744. The Board upheld this determination and ordered the owner to withdraw its suit and pay the defendants' legal expenses. *Id.*, at 737. The Court of Appeals enforced the order. *Ibid.*

We vacated the judgment, however, holding that First Amendment and federalism concerns prevented "[t]he filing

and prosecution of a well-founded lawsuit" from being "enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [NLRA]." *Id.*, at 737, 743. We also held that the Board may not decide that a suit is baseless by making credibility determinations, as the ALJ had done, when genuine issues of material fact or state law exist. *Id.*, at 745, 746–747. In recognition of our sham exception to antitrust immunity, however, we reasoned that "[w]e should follow a similar course under the NLRA" and held that the Board could enjoin baseless suits brought with a retaliatory motive, *id.*, at 744 (citing *California Motor Transport*, *supra*), and then remanded for further proceedings, 461 U. S., at 749.

At issue today is not the standard for enjoining ongoing suits but the standard for declaring completed suits unlawful. In *Bill Johnson's*, we remarked in dicta about that situation:

> "If judgment goes against the employer in the state court, . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' [NLRA] §7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the [NLRA]." *Id.*, at 747.

Under this standard, the Board could declare that a lost or withdrawn suit violated the NLRA if it was retaliatory. In

Bill Johnson's, however, the issue before the Court was whether the Board could enjoin an ongoing state lawsuit without finding that the suit lacked a reasonable basis in law or fact. *Id.*, at 733. To resolve that issue, we had no actual need to decide whether the Board could declare unlawful reasonably based suits that were ultimately unsuccessful. Indeed, the Board had yet to declare such a suit unlawful: It had attempted to enjoin an *un*completed suit that it had declared *baseless*. *Id.*, at 736–737. Nor did we have occasion to consider the precise scope of the term "retaliation." See *infra*, at 533, 537.

Moreover, although our statements regarding completed litigation were intended to guide further proceedings, we did not expressly order the Board to adhere to its prior finding of unlawfulness under the standard we stated. See 461 U. S., at 749–750, n. 15 ("[O]n remand the Board *may* reinstate its finding that petitioner acted unlawfully . . . *if* the Board adheres to its previous finding that the suit was filed for a retaliatory purpose" (emphasis added)). Thus, exercising our "customary refusal to be bound by dicta," *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 24 (1994), we turn to the question presented.

III

Because of its objective component, the sham litigation standard in *Professional Real Estate Investors* protects reasonably based petitioning from antitrust liability. Because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not. The Board admits such broad immunity is justified in the antitrust context because it properly "balances the risk of anticompetitive lawsuits against the chilling effect" on First Amendment petitioning that might be caused by "the treble-damages remedy and other distinct features of antitrust litigation," such as the fact that antitrust claims may be privately initiated and may impose high

discovery costs. Brief for Respondent NLRB 40–41. According to the Board, however, such broad protection is unnecessary in the labor law context because, outside of the LMRA, enforcement of the NLRA requires the Board's general counsel to first authorize the issuance of an administrative complaint; thus, an adjudication cannot be launched solely by private action. See 29 U. S. C. § 153(d); *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 118–119 (1987). Nor can the Board issue punitive remedies, see *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10–12 (1940), and instead is limited to restoring the previolation status quo, see *id.*, at 12–13; *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 265 (1969). The Board also allows "little prehearing discovery." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 236 (1978).

At most, however, these arguments demonstrate that the threat of an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication. This does not mean the burdens posed by the NLRA raise no First Amendment concerns. To determine if they do, we must first isolate those burdens.

Here, the Board's determination that petitioner's lawsuit violated the NLRA resulted in an order requiring petitioner to post certain notices, refrain from filing similar suits, and pay the unions' attorney's fees. Petitioner did not challenge below the Board's authority to impose the notice and injunction penalties upon a finding of illegality, but did challenge the Board's authority to award attorney's fees, albeit unsuccessfully. 246 F. 3d, at 631–632. Although petitioner sought review of the fee issue, Pet. for Cert. i, we did not grant certiorari on that specific question, instead asking the parties to address whether the Board may impose liability for a retaliatory lawsuit that was unsuccessful even if it was not objectively baseless. 534 U. S. 1074 (2002).

As we see it, a threshold question here is whether the Board may declare that an unsuccessful retaliatory lawsuit

violates the NLRA even if reasonably based. If it may, the resulting finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties, such as a fee award. Because we can resolve this case by looking only at the finding of illegality, we need not decide whether the Board otherwise has authority to award attorney's fees when a suit is found to violate the NLRA.

Having identified this burden, we must examine the petitioning activity it affects. In *Bill Johnson's*, we held that the Board may not enjoin reasonably based state court lawsuits in part because of First Amendment concerns. 461 U. S., at 742–743. We implied those concerns are no longer present when a suit ends because "the employer has had its day in court." *Id.*, at 747. By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the First Amendment historically provides greater protection from prior restraints than after-the-fact penalties, see *Alexander* v. *United States*, 509 U. S. 544, 553–554 (1993), and enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. But this analogy at most suggests that injunctions may raise greater First Amendment concerns, not that after-the-fact penalties raise no concerns. Likewise, the fact that *Bill Johnson's* allowed certain *baseless* suits to be enjoined tells little about the propriety of imposing penalties on various classes of *nonbaseless* suits.

We said in *Bill Johnson's* that the Board could enjoin baseless retaliatory suits because they fell outside of the First Amendment and thus were analogous to "false statements." 461 U. S., at 743. We concluded that "[j]ust as false state-

ments are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Ibid.* (citations omitted). While this analogy is helpful, it does not suggest that the class of baseless litigation is *completely* unprotected: At most, it indicates such litigation should be unprotected "just as" false statements are. And while false statements may be unprotected for their own sake, "[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters.*" *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974) (emphasis added); *id.*, at 342 (noting the need to protect some falsehoods to ensure that "the freedoms of speech and press [receive] that 'breathing space' essential to their fruitful exercise" (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963))). An example of such "breathing space" protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280, 285 (1964).

It is at least consistent with these "breathing space" principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose. But we need not resolve whether objectively baseless litigation requires any "breathing room" protection, for what is at issue here are suits that are not baseless in the first place. Instead, as an initial matter, we are dealing with the class of reasonably based but unsuccessful lawsuits. But whether this class of suits falls outside the scope of the First Amend-

ment's Petition Clause at the least presents a difficult constitutional question, given the following considerations.

First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs. See, *e. g.*, *Professional Real Estate Investors*, 508 U. S., at 58–61 (protecting suits from antitrust liability whenever they are objectively or subjectively genuine); *Pennington*, 381 U. S., at 670 (shielding from antitrust immunity any "concerted effort to influence public officials"). Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances."

Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the "'public airing of disputed facts,'" *Bill Johnson's*, *supra*, at 743 (quoting Balmer, Sham Litigation and the Antitrust Law, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims).

Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the

fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved—or could prove—the contrary.

Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, however, we must also consider the significance of that particular limitation, which is fairly included within the question presented. See 534 U. S. 1074 (2002) (granting certiorari on whether the Board "may impose liability on an employer for filing a losing *retaliatory* lawsuit, even if the employer could show the suit was not objectively baseless" (emphasis added)).

IV

In the context of employer-filed lawsuits, we previously indicated that retaliatory suits are those "filed in retaliation for the exercise of the employees' [NLRA] § 7 rights." *Bill Johnson's,* 461 U. S., at 747. Because we did not specifically address what constitutes "retaliation," however, the precise scope of that term was not defined. The Board's view is that a retaliatory suit is one "brought with a motive to *interfere* with the exercise of protected [NLRA §]7 rights." Brief for Respondent NLRB 46 (emphasis added). As we read it, however, the Board's definition broadly covers a substantial amount of genuine petitioning.

For example, an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that petitioner believed was unprotected. App. to Pet. for Cert. 59a–60a. If such

a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.

The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Brief for Respondent NLRB 47. Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U. S., at 69 (STEVENS, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. See *id.*, at 60–61.

Even in other First Amendment contexts, we have found it problematic to regulate some *demonstrably false* expression based on the presence of ill will. For example, we invalidated a criminal statute prohibiting false statements about public officials made with ill will. See *Garrison* v. *Louisiana*, 379 U. S. 64, 73–74 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred"). Indeed, the requirement that private defamation plaintiffs prove the falsity of speech on matters of public concern may indirectly shield much speech concealing ill motives. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 776–777 (1986); see also *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 53 (1988) (prohibiting use of ill motive to create liability for speech in the realm of public debate about public figures).

For these reasons, the difficult constitutional question we noted earlier, *supra*, at 531–533, is not made significantly easier by the Board's retaliatory motive limitation since that

limitation fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine.

The final question is whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably based suit when it concludes the suit was brought with a retaliatory purpose. As explained above, *supra*, at 525–526, we answered a similar question in the negative in the antitrust context. And while the burdens on speech at issue in this case are different from those at issue in *Professional Real Estate Investors*, we are still faced with a difficult constitutional question: namely, whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine.

In a prior labor law case, we avoided a similarly difficult First Amendment issue by adopting a limiting construction of the relevant NLRA provision. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). At issue there was the scope of § 8(b)(4) of the NLRA, 29 U. S. C. § 158(b)(4), which limits unions from "threaten[ing], coerc[ing], or restrain[ing] any person engaged in commerce or in an industry affecting commerce" with respect to certain prohibited purposes. § 158(b)(4)(ii). The Board read this provision to cover handbilling that urged customers not to shop at a mall where the purpose of the handbilling was to convince the mall's proprietor to influence a tenant to quit dealing with a nonunion contractor. 485 U. S., at 574. A prior case had held that the same statutory prohibition on threats, coercion, and restraints was "'nonspecific, indeed vague,' and [thus] should be interpreted with 'caution' and not given a 'broad sweep.'" *Id.*, at 578 (quoting *NLRB* v. *Drivers*, 362 U. S. 274, 290 (1960)). Likewise, in *DeBartolo*, we found that the statutory provisions and their legislative history indicated no clear intent to reach the handbilling in question, 485 U. S., at 578–588, and so we simply read the statute not to cover it,

thereby avoiding the First Amendment question altogether, *id.*, at 588.

Here, the relevant NLRA provision is § 8(a)(1), 29 U. S. C. § 158(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [29 U. S. C. §]157." Section 157 provides, in relevant part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

Section 158(a)(1)'s prohibition on interfering, restraining, or coercing in connection with the above rights is facially as broad as the prohibition at issue in *DeBartolo*. And while it might be read to reach the entire class of suits the Board has deemed retaliatory, it need not be read so broadly. Indeed, even considered in context, there is no suggestion that these provisions were part of any effort to cover that class of suits. See §§ 158(a)(2)–(5) (generally prohibiting employers from interfering with the formation and administration of a union, from discriminating in employment practices based on union membership, from discharging employees who provide testimony or file charges under the NLRA, and from refusing to bargain collectively with employee representatives).

Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid. We do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the

outcome, in retaliation for NLRA protected activity, since the Board's standard does not confine itself to such suits. Likewise, we need not decide what our dicta in *Bill Johnson's* may have meant by "retaliation." 461 U. S., at 747; see *supra*, at 527–528. Finally, nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure—or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with JUSTICE BREYER that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process. See *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, 60–61 (1993).

Choosing to make explicit what is implied, and then disagreeing with that result, JUSTICE BREYER describes a number of differences between the NLRA and the Sherman Act, all of which suggest to him that a complainant enjoys greater First Amendment rights to file a lawsuit in the face of the latter than the former. *Post*, at 541–544 (opinion concurring in part and concurring in judgment). Missing from his list, however, is the most important difference of all, which suggests—indeed, demands—precisely the oppo-

site conclusion. Under the Sherman Act, the entity making the factual determination whether the objectively reasonable suit was brought with an unlawful motive would have been an Article III court; even with that protection, we thought the right of access to Article III courts too much imperiled. Under the NLRA, however, the entity making the factual finding that determines whether a litigant will be punished for filing an objectively reasonable lawsuit will be an executive agency, the National Labor Relations Board. That this difference undermines JUSTICE BREYER's analysis, there can be no doubt. At the very least, it poses a difficult question under the First Amendment: whether an *executive agency* can be given the power to punish a reasonably based suit filed in an Article III court whenever *it* concludes—insulated from *de novo* judicial review by the substantial-evidence standard of 29 U. S. C. §§ 160(e), (f)—that the complainant had one motive rather than another. This makes resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts. It would be extraordinary to interpret a statute which is silent on this subject to intrude upon the courts' ability to decide *for themselves* which postulants for their assistance should be punished.

For this reason, I am able, unlike JUSTICE BREYER, to join the Court's opinion in full—including its carefully circumscribed statement that "nothing in our holding today should be read to question the validity of common litigation sanctions *imposed by courts themselves*," *ante*, at 537 (emphasis added).

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

As I understand the Court's opinion, it focuses on employer lawsuits that are (1) reasonably based, (2) unsuccessful, and (3) filed with a "retaliatory motive," *i. e.*, a motive to

interfere with protected union conduct. See *ante*, at 532–533. The Court holds that the National Labor Relations Act (NLRA or Act) does not permit the National Labor Relations Board to declare unlawful under § 8(a) of the Act, 29 U. S. C. § 158(a), an employer's filing suit *in the circumstances present here*, which is to say, in the kind of case in which the Board rests its finding of "retaliatory motive" almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union. *Ante*, at 522–524. The Court expressly leaves open *other circumstances* in which the evidence of "retaliation" or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union. *Ante*, at 536–537; see also *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, 73–76 (1993) (STEVENS, J., joined by O'CONNOR, J., concurring in judgment) (discussing colorable suits that would not be filed but for an illegal purpose). And it does not address at all lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under § 7(a) of the NLRA, 29 U. S. C. § 157.

I concur in the Court's opinion insofar as it holds no more than I have just set forth. While I recognize the broad leeway the Act gives the Board to make findings and to determine appropriate relief, § 10(c), 29 U. S. C. § 160; see *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612, n. 32 (1969); *Shepard* v. *NLRB*, 459 U. S. 344, 349 (1983), I concur because the descriptions given by the Board and the Court of Appeals of the Board's reasons for finding unlawful employer activity here, insofar as they are probative, seem to me to rest on little more than the fact that the employer filed a reasonably based but ultimately unsuccessful lawsuit. See 329 N. L. R. B. No. 68 (1999), App. to Pet. for Cert. 59a–61a

(finding retaliatory motive because the suit was "directed at protected conduct," "necessarily tended to discourage similar protected activity," was admittedly brought to stop conduct BE&K Construction Company thought was unprotected, involved unions other than those parties to certain suits against the company, and was unmeritorious); 246 F. 3d 619, 629–630 (CA6 2001). *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731, 747 (1983), suggested that "the Board would be warranted in taking . . . into account" for unfair labor practice purposes the fact that an employer had lost its suit, but it did not suggest, as it seems the Board thought here, that losing a lawsuit against a union, in and of itself, virtually alone, shows retaliation. See *id.*, at 743 (suggesting that retaliatory suits might be those that "would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act").

Insofar as language in the Court's opinion might suggest a more far-reaching rule, see *ante,* at 524–533, I do not agree. For one thing, I believe that *Bill Johnson's* decided many of the questions the Court declares unanswered. See *ante,* at 527–528, 537. It held that while the Board may not *halt* the prosecution of a lawsuit unless the suit lacks an objectively reasonable basis, it nonetheless "may . . . proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case" when an employer brings a merely "unmeritorious" retaliatory suit and loses. 461 U. S., at 747. It added that the "employer's suit having proved unmeritorious, the Board *would be warranted in taking that fact into account* in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." *Ibid.* (emphasis added). The courts, the Board, the bar, employers, and unions alike have treated the Court's discussion of completed lawsuits in *Bill Johnson's* as a holding and have followed it for 20 years. See, *e. g., Petrochem Insulation, Inc.* v. *NLRB,* 240 F. 3d 26, 32 (CADC), cert. denied, 534 U. S. 992

(2001); *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F. 3d 1085, 1088 (CA9 1995); *NLRB* v. *International Union of Operating Engineers, Local 520, AFL–CIO*, 15 F. 3d 677, 679 (CA7 1994); *Braun Elec. Co.*, 324 N. L. R. B. 1, 2 (1997); *Summitville Tiles*, 300 N. L. R. B. 64, 65, and n. 6 (1990); *Machinists Lodge 91 (United Technologies)*, 298 N. L. R. B. 325, 326 (1990), enf'd, 934 F. 2d 1288 (CA2 1991). I can find no good reason to characterize the statements in *Bill Johnson's* as dicta—though I recognize that the Court's language so characterizing *Bill Johnson's* is itself dicta.

For another thing, I do not believe that this Court's antitrust precedent determines the outcome here. See *Professional Real Estate*, *supra; Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). That precedent finds all but sham lawsuits exempt from the reach of the *antitrust laws*. *Professional Real Estate*, *supra*, at 60–61; *Noerr*, *supra*, at 144. It does not hold employers enjoy a similar exemption from the reach of the *labor laws*. And it should not do so, for antitrust law and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.

Certain differences, while minor, are worth noting given the Court's concern to avoid discouraging legitimate lawsuits. To apply antitrust law to a defendant's reasonably based but unsuccessful anticompetitive lawsuit, for example, threatens the defendant with treble damages—a considerable deterrent. See *ante*, at 528. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with a shift in liability for attorney's fees. See *ante*, at 529. Similarly, to apply antitrust law to a defendant's reasonably based but unsuccessful anticompetitive lawsuit threatens the defendant with high court-defense costs against any and all who initiate suit. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with the typically far lower costs of defending the charge

before a congressionally authorized and politically accountable administrative agency that acts as a screen for meritless complaints. See *ibid.;* see also 64 NLRB Ann. Rep. 5 (1999) (showing that of 27,450 unfair labor practice cases closed in 1999, only 1.4% were resolved by an order of the Board in a contested case).

Other differences, those related to scope, purpose, and history, are major and determinative. Antitrust law focuses generally upon anticompetitive conduct that can arise in myriad circumstances. Anticompetitively motivated lawsuits occupy but one tiny corner of the anticompetitive-activity universe. To circumscribe the boundaries of that corner does not significantly limit the scope of antitrust law or undermine any basic related purpose.

By way of contrast, the NLRA finds in the need to regulate an employer's antiunion lawsuits much of its historical reason for being. Throughout the 19th century, courts had upheld prosecutions of unions as criminal conspiracies. C. Tomlins, The State and the Unions 36–45 (1985). They had struck down protective labor legislation—for, say, shorter working hours or better working conditions. W. Forbath, Law and the Shaping of the American Labor Movement 38, and n. 7 (1991) (by 1900, courts had struck down roughly 60 labor laws, and by 1920, roughly 300). They had granted injunctions against employees and labor unions that weakened the unions' ability to organize. *Id.*, at 61–62 (conservatively estimating at least 4,300 injunctions issued in labor conflicts between 1880 and 1930). And in the process they had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions. See, *e. g.*, *In re Debs*, 158 U. S. 564 (1895) (applying Interstate Commerce Act of 1887 to union activities); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) (applying Sherman Act); see generally F. Frankfurter & N. Greene, The Labor Injunction (1930).

Congress initially passed the Clayton Act, 15 U. S. C. §§ 12–27, 44, to prevent employers from using the law, particularly antitrust law, in this way. In doing so, Congress hoped to "substitut[e] the opinion of Congress as to the propriety of the purpose [of union activities] for that of differing judges" who were "prejudicial to a position of equality between workingman and employer." *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 485–486 (1921) (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). When the Clayton Act proved insufficient, Congress passed the Norris-LaGuardia Act, 29 U. S. C. § 101, which made the labor injunction unlawful. See *United States* v. *Hutcheson*, 312 U. S. 219, 235–236 (1941) ("The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction"); see also *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365, 369–370, n. 7 (1960) (enactment of Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited"). Similar objectives informed Congress' later enactment of the NLRA, which took from the courts much of the power to regulate "the relations between employers of labor and workingmen" by granting authority to an administrative agency. *Duplex Printing*, *supra*, at 486 (Brandeis, J., dissenting); see *Mine Workers* v. *Pennington*, 381 U. S. 657, 703 (1965) (Goldberg, J., dissenting from opinion but concurring in reversal) (describing how Justice Brandeis' dissent in *Duplex Printing* "carried the day in the courts of history" when Congress passed Norris-LaGuardia and the NLRA).

The upshot is that an employer's antiunion lawsuit occupies a position far closer to the heart of the labor law than does a defendant's anticompetitive lawsuit in respect to antitrust law. And that fact makes all the difference. Indeed,

given these differences of history and purpose, I do not see how the Court could treat labor law, which sought to give the Board power to regulate an employer's antiunion conduct, including retaliatory lawsuits, as if it were antitrust law, where no comparable purpose is evident. Perhaps that is why this Court previously made clear that these two areas of law significantly differ. Compare *Professional Real Estate*, 508 U. S., at 55–60, with *Bill Johnson's*, 461 U. S., at 747.

I do not know why the Court reopens these matters in its opinion today. See *ante*, at 528, 536–537. But I note that it has done so only to leave them open. It does not, in the end, decide them. On that understanding, but only to the extent that I describe at the outset, see *supra*, at 538–540, I join the Court's opinion.

Syllabus

HARRIS *v.* UNITED STATES

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

No. 00–10666. Argued March 25, 2002—Decided June 24, 2002

Petitioner, who sold illegal narcotics at his pawnshop with an unconcealed semiautomatic pistol at his side, was arrested for violating, *inter alia*, 18 U. S. C. § 924(c)(1)(A), which provides in relevant part that a person who in relation to a drug trafficking crime uses or carries a firearm "shall, in addition to the punishment provided for such crime," "(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to . . . not less than 7 years; and (iii) if the firearm is discharged, be sentenced to . . . not less than 10 years." Because the Government proceeded on the assumption that the provision defines a single crime and that brandishing is a sentencing factor to be found by the judge following trial, the indictment said nothing about brandishing or subsection (ii), simply alleging the elements from the principal paragraph. Petitioner was convicted. When his presentence report recommended that he receive the 7-year minimum sentence, he objected, arguing that brandishing was an element of a separate statutory offense for which he was not indicted or convicted. At the sentencing hearing, the District Court overruled his objection, found that he had brandished the gun, and sentenced him to seven years in prison. Affirming, the Fourth Circuit rejected petitioner's statutory argument and found that *McMillan* v. *Pennsylvania*, 477 U. S. 79, foreclosed his argument that if brandishing is a sentencing factor, the statute is unconstitutional under *Apprendi* v. *New Jersey*, 530 U. S. 466. In *Apprendi*, this Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum is, in effect, an element of the crime, which must be submitted to a jury, and proved beyond a reasonable doubt (and, in federal prosecutions, alleged in an indictment handed down by a grand jury). But 14 years earlier, *McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the judge found that the defendant had possessed a firearm.

Held: The judgment is affirmed.

243 F. 3d 806, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II, and IV, concluding:

Syllabus

1. As a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense, in which brandishing and discharging are sentencing factors to be found by the judge, not offense elements to be found by the jury. Pp. 552–556.

(a) The prohibition's structure suggests that brandishing and discharging are sentencing factors. Federal laws usually list all offense elements in a single sentence and separate the sentencing factors into subsections. *Castillo* v. *United States*, 530 U. S. 120, 125. The instant statute's lengthy principal paragraph lists the elements of a complete crime. Toward the end of the paragraph is the word "shall," which often divides offense-defining provisions from sentence-specifying ones. *Jones* v. *United States*, 526 U. S. 227, 233. And following "shall" are the separate subsections, which explain how defendants are to "be sentenced." Thus this Court can presume that the principal paragraph defines a single crime and its subsections identify sentencing factors. Pp. 552–553.

(b) As *Jones* illustrates, the statute's text might provide evidence to the contrary, but the critical textual clues here reinforce the single-offense interpretation. Brandishing has been singled out as a paradigmatic sentencing factor, *Castillo*, *supra*, at 126. Under the Sentencing Guidelines, moreover, brandishing and discharging are factors that affect sentences for numerous crimes. The incremental changes in the minimum penalty at issue here are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration. Pp. 553–554.

(c) The canon of constitutional avoidance—which provides that when a statute is susceptible of two constructions, the Court must adopt the one that avoids grave and doubtful constitutional questions—plays no role here. The constitutional principle that petitioner says a single-offense interpretation of the statute would violate—that any fact increasing the statutory minimum sentence must be accorded the safeguards assigned to elements—was rejected in *McMillan.* Petitioner's suggestion that the canon be used to avoid overruling one of this Court's own precedents is novel and, given that *McMillan* was in place when § 924(c)(1)(A) was enacted, unsound. Congress would have had no reason to believe that it was approaching the constitutional line by following the instruction this Court gave in *McMillan.* Pp. 554–556.

2. Reaffirming *McMillan* and employing the approach outlined in that opinion, the Court concludes that § 924(c)(1)(A)(ii) is constitutional. Basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the Fifth and Sixth Amendments' requirements. Congress simply dictated the precise weight

to be given to one traditional sentencing factor. *McMillan*, *supra*, at 89–90. Pp. 568–569.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA, concluded in Part III that § 924(c)(1)(A)(ii) is constitutional under *McMillan*, which remains sound authority after *Apprendi*. The Court will not overrule a precedent absent a special justification. The justification offered by petitioner is that *Apprendi* and *McMillan* cannot be reconciled. Those decisions are consistent, however, because there is a fundamental distinction between the factual findings at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime by the Framers of the Bill of Rights. That cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. This sort of fact is more like the facts judges have traditionally considered when exercising their discretion to choose a sentence within the range authorized by the jury's verdict—facts that the Constitution does not require to be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. Legislatures have relied upon *McMillan*'s holding, and there is no reason to overturn these statutes or cast uncertainty upon sentences imposed under them. Pp. 556–568.

JUSTICE BREYER concluded that although *Apprendi* v. *New Jersey*, 530 U. S. 466, cannot easily be distinguished from this case in terms of logic, the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here). This does not mean to suggest approval of mandatory minimum sentences as a matter of policy. Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of the Sentencing Guidelines. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity

Syllabus

that Congress created the Guidelines to eliminate. Applying *Apprendi* in this case would not, however, lead Congress to abolish, or to modify, such statutes; and it would take from the judge the power to make a factual determination, while giving that power not to juries, but to prosecutors. The legal consequences of extending *Apprendi* are also seriously adverse, for doing so would diminish further Congress' otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases. Pp. 569–572.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Part III, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 569. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 569. THOMAS, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 572.

William C. Ingram, by appointment of the Court, 534 U. S. 1160, argued the cause for petitioner. With him on the briefs were *Louis C. Allen III*, *Elizabeth A. Flagg*, and *Jeffrey T. Green*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Matthew D. Roberts*, and *Nina Goodman*.*

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute et al. by *Stephen P. Halbrook;* and for Families Against Mandatory Minimums Foundation by *Peter Goldberger* and *Mary Price*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *David Samson*, Attorney General of New Jersey, and *Lisa Sarnoff Gochman*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa*

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join.

Once more we consider the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence. Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts. In federal prosecutions, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" alleging all the elements of the crime. U. S. Const., Amdt. 5; see *Hamling* v. *United States*, 418 U. S. 87, 117 (1974). "In all criminal prosecutions," state and federal, "the accused shall enjoy the right to . . . trial . . . by an impartial jury," U. S. Const., Amdt. 6; see *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), at which the government must prove each element beyond a reasonable doubt, see *In re Winship*, 397 U. S. 358, 364 (1970).

Yet not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these

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of Nevada, *Betty D. Montgomery* of Ohio, *D. Michael Fisher* of Pennsylvania, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Elliot M. Davis* of the Virgin Islands, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor. The Court described one limitation in this respect two Terms ago in *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury, and proved beyond a reasonable doubt." Fourteen years before, in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), the Court had declined to adopt a more restrictive constitutional rule. *McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.

The principal question before us is whether *McMillan* stands after *Apprendi*.

I

Petitioner William Joseph Harris sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. He was later arrested for violating federal drug and firearms laws, including 18 U. S. C. § 924(c)(1)(A). That statute provides in relevant part:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

"(i) be sentenced to a term of imprisonment of not less than 5 years;

"(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

"(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The Government proceeded on the assumption that § 924(c)(1)(A) defines a single crime and that brandishing is a sentencing factor to be considered by the judge after the trial. For this reason the indictment said nothing of brandishing and made no reference to subsection (ii). Instead, it simply alleged the elements from the statute's principal paragraph: that "during and in relation to a drug trafficking crime," petitioner had "knowingly carr[ied] a firearm." At a bench trial the United States District Court for the Middle District of North Carolina found petitioner guilty as charged.

Following his conviction, the presentence report recommended that petitioner be given the 7-year minimum because he had brandished the gun. Petitioner objected, citing this Court's decision in *Jones* v. *United States*, 526 U. S. 227 (1999), and arguing that, as a matter of statutory interpretation, brandishing is an element of a separate offense, an offense for which he had not been indicted or tried. At the sentencing hearing the District Court overruled the objection, found by a preponderance of the evidence that petitioner had brandished the gun, and sentenced him to seven years in prison.

In the Court of Appeals for the Fourth Circuit petitioner again pressed his statutory argument. He added that if brandishing is a sentencing factor as a statutory matter, the statute is unconstitutional in light of *Apprendi*—even though, as petitioner acknowledged, the judge's finding did not alter the maximum penalty to which he was exposed. Rejecting these arguments, the Court of Appeals affirmed. 243 F. 3d 806 (2001). Like every other Court of Appeals to have addressed the question, it held that the statute makes

brandishing a sentencing factor. *Id.,* at 812; accord, *United States* v. *Barton,* 257 F. 3d 433, 443 (CA5 2001); *United States* v. *Carlson,* 217 F. 3d 986, 989 (CA8 2000); *United States* v. *Pounds,* 230 F. 3d 1317, 1319 (CA11 2000). The court also held that the constitutional argument was foreclosed by *McMillan.* 243 F. 3d, at 809.

We granted certiorari, 534 U. S. 1064 (2001), and now affirm.

II

We must first answer a threshold question of statutory construction: Did Congress make brandishing an element or a sentencing factor in § 924(c)(1)(A)? In the Government's view the text in question defines a single crime, and the facts in subsections (ii) and (iii) are considerations for the sentencing judge. Petitioner, on the other hand, contends that Congress meant the statute to define three different crimes. Subsection (ii), he says, creates a separate offense of which brandishing is an element. If petitioner is correct, he was neither indicted nor tried for that offense, and the 7-year minimum did not apply.

So we begin our analysis by asking what § 924(c)(1)(A) means. The statute does not say in so many words whether brandishing is an element or a sentencing factor, but the structure of the prohibition suggests it is the latter. Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "into subsections." *Castillo* v. *United States,* 530 U. S. 120, 125 (2000). Here, § 924(c)(1)(A) begins with a lengthy principal paragraph listing the elements of a complete crime—"the basic federal offense of using or carrying a gun during and in relation to" a violent crime or drug offense. *Id.,* at 124. Toward the end of the paragraph is "the word 'shall,' which often divides offense-defining provisions from those that specify sentences." *Jones,* 526 U. S., at 233. And following "shall" are the separate subsections, which explain how defendants are to "be sentenced." Subsection (i) sets a catch-

all minimum and "certainly adds no further element." *Ibid.* Subsections (ii) and (iii), in turn, increase the minimum penalty if certain facts are present, and those subsections do not repeat the elements from the principal paragraph.

When a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors. But even if a statute "has a look to it suggesting that the numbered subsections are only sentencing provisions," *id.*, at 232, the text might provide compelling evidence to the contrary. This was illustrated by the Court's decision in *Jones*, in which the federal carjacking statute, which had a similar structure, was interpreted as setting out the elements of multiple offenses.

The critical textual clues in this case, however, reinforce the single-offense interpretation implied by the statute's structure. Tradition and past congressional practice, for example, were perhaps the most important guideposts in *Jones.* The fact at issue there—serious bodily injury—is an element in numerous federal statutes, including two on which the carjacking statute was modeled; and the *Jones* Court doubted that Congress would have made this fact a sentencing factor in one isolated instance. *Id.*, at 235–237; see also *Castillo*, *supra*, at 126–127; *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230 (1998). In contrast, there is no similar federal tradition of treating brandishing and discharging as offense elements. In *Castillo* v. *United States*, *supra*, the Court singled out brandishing as a paradigmatic sentencing factor: "Traditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (*e. g.*, that the defendant . . . brandished a gun)." *Id.*, at 126. Under the Sentencing Guidelines, moreover, brandishing and discharging affect the sentences for numerous federal crimes. See, *e. g.*, United States Sentencing Commission, Guidelines Manual §§ 2A2.2(b)(2), 2B3.1(b)(2), 2B3.2(b)(3)(A), 2E2.1(b)(1), 2L1.1(b)(4) (Nov. 2001). Indeed, the Guidelines appear to have been the only antecedents for the statute's

brandishing provision. The term "brandished" does not appear in any federal offense-defining provision save 18 U. S. C. § 924(c)(1)(A), and did not appear there until 1998, when the statute was amended to take its current form. The numbered subsections were added then, describing, as sentencing factors often do, "special features of the manner in which" the statute's "basic crime" could be carried out. *Castillo*, *supra*, at 126. It thus seems likely that brandishing and discharging were meant to serve the same function under the statute as they do under the Guidelines.

We might have had reason to question that inference if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors. *Jones* is again instructive. There the Court accorded great significance to the "steeply higher penalties" authorized by the carjacking statute's three subsections, which enhanced the defendant's maximum sentence from 15 years, to 25 years, to life—enhancements the Court doubted Congress would have made contingent upon judicial factfinding. 526 U. S., at 233; see also *Castillo*, *supra*, at 131; *Almendarez-Torres*, *supra*, at 235–236. The provisions before us now, however, have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion. Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm. The incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration.

Nothing about the text or history of the statute rebuts the presumption drawn from its structure. Against the single-

offense interpretation to which these considerations point, however, petitioner invokes the canon of constitutional avoidance. Under that doctrine, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909). It is at least an open question, petitioner contends, whether the Fifth and Sixth Amendments require every fact increasing a federal defendant's minimum sentence to be alleged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. To avoid resolving that question (and possibly invalidating the statute), petitioner urges, we should read § 924(c)(1)(A) as making brandishing an element of an aggravated federal crime.

The avoidance canon played a role in *Jones*, for the subsections of the carjacking statute enhanced the maximum sentence, and a single-offense interpretation would have implicated constitutional questions later addressed—and resolved in the defendant's favor—by *Apprendi*. See *Jones*, *supra*, at 243, n. 6 ("[A]ny 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"). Yet the canon has no role to play here. It applies only when there are serious concerns about the statute's constitutionality, *Reno* v. *Flores*, 507 U. S. 292, 314, n. 9 (1993), and petitioner's proposed rule—that the Constitution requires any fact increasing the statutory minimum sentence to be accorded the safeguards assigned to elements—was rejected 16 years ago in *McMillan*. Petitioner acknowledges as much but argues that recent developments cast doubt on *McMillan*'s viability. To avoid deciding whether *McMillan* must be overruled, he says, we should construe the problem out of the statute.

Petitioner's suggestion that we use the canon to avoid overruling one of our own precedents is novel and, given that *McMillan* was in place when § 924(c)(1)(A) was enacted, unsound. The avoidance canon rests upon our "respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991). The statute at issue in this case was passed when *McMillan* provided the controlling instruction, and Congress would have had no reason to believe that it was approaching the constitutional line by following that instruction. We would not further the canon's goal of eliminating friction with our coordinate branch, moreover, if we alleviated our doubt about a constitutional premise we had supplied by adopting a strained reading of a statute that Congress had enacted in reliance on the premise. And if we stretched the text to avoid the question of *McMillan*'s continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed. We decline to adopt that approach.

As the avoidance canon poses no obstacle and the interpretive circumstances point in a common direction, we conclude that, as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury.

III

Confident that the statute does just what *McMillan* said it could, we consider petitioner's argument that § 924(c)(1)(A)(ii) is unconstitutional because *McMillan* is no longer sound authority. *Stare decisis* is not an "inexorable command," *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting), but the doctrine is "of fundamental importance to the rule of law," *Welch* v. *Texas*

Dept. of Highways and Public Transp., 483 U. S. 468, 494 (1987). Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

The special justification petitioner offers is our decision in *Apprendi*, which, he says, cannot be reconciled with *McMillan*. Cf. *Ring* v. *Arizona*, *post*, at 609 (overruling *Walton* v. *Arizona*, 497 U. S. 639 (1990), because "*Walton* and *Apprendi* are irreconcilable"). We do not find the argument convincing. As we shall explain, *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.

Though defining criminal conduct is a task generally "left to the legislative branch," *Patterson* v. *New York*, 432 U. S. 197, 210 (1977), Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt, *Jones*, 526 U. S., at 240–241; *Mullaney* v. *Wilbur*, 421 U. S. 684, 699 (1975). *McMillan* and *Apprendi* asked whether certain types of facts, though labeled sentencing factors by the legislature, were nevertheless "traditional elements" to which these constitutional safe-

guards were intended to apply. *Patterson* v. *New York*, *supra*, at 211, n. 12.

McMillan's answer stemmed from certain historical and doctrinal understandings about the role of the judge at sentencing. The mid-19th century produced a general shift in this country from criminal statutes "providing fixed-term sentences to those providing judges discretion within a permissible range." *Apprendi*, 530 U. S., at 481. Under these statutes, judges exercise their sentencing discretion through "an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). The Court has recognized that this process is constitutional—and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. See, *e. g.*, *United States* v. *Watts*, 519 U. S. 148, 156 (1997) *(per curiam); Nichols* v. *United States*, 511 U. S. 738, 747 (1994); *Williams* v. *New York*, 337 U. S. 241, 246 (1949). As the Court reiterated in *Jones:* "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." 526 U. S., at 248. Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.

That proposition, coupled with another shift in prevailing sentencing practices, explains *McMillan.* In the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's factfinding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence. See, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 820 (1991). One example of reform, the

kind addressed in *McMillan*, was mandatory minimum sentencing. The Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), imposed a minimum prison term of five years when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm while committing the crime of conviction.

In sustaining the statute the *McMillan* Court placed considerable reliance on the similarity between the sentencing factor at issue and the facts judges contemplate when exercising their discretion within the statutory range. Given that the latter are not elements of the crime, the Court explained, neither was the former:

> "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. Section 9712 'ups the ante' for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. . . . Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished . . . would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, . . . but it does not." 477 U. S., at 87–88 (footnote omitted).

In response to the argument that the Act evaded the Constitution's procedural guarantees, the Court noted that the statute "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *Id.*, at 89–90.

That reasoning still controls. If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legislatures require the judge to impose a minimum sentence when those facts are found—a sentence the judge could have imposed absent the finding. It does not matter, for the purposes of the constitutional analysis, that in statutes like the Pennsylvania Act the "State provides" that a fact "shall give rise both to a special stigma and to a special punishment." *Id.*, at 103 (STEVENS, J., dissenting). Judges choosing a sentence within the range do the same, and "[j]udges, it is sometimes necessary to remind ourselves, are part of the State." *Apprendi*, *supra*, at 498 (SCALIA, J., concurring). These facts, though stigmatizing and punitive, have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt. There is no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of them as the elements of the crime.

This conclusion might be questioned if there were extensive historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements. The evidence on this score, however, is lacking. Statutes like the Pennsylvania Act, which alter the minimum sentence without changing the maximum, were for the most part the product of the 20th century, when legislatures first asserted control over the sentencing judge's discretion. Courts at the founding (whose views might be relevant, given the contemporaneous adoption of the Bill of Rights, see *Apprendi*, 530 U. S., at 478–484) and in the mid-19th century (whose views might be relevant, given that sentencing ranges first arose then, see *id.*, at 501–518 (THOMAS, J., concurring)) were not as a general matter required to decide whether a fact giving rise to a mandatory minimum sentence within the available range was to be alleged in the indictment and

proved to the jury. See King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1474–1477 (2001). Indeed, though there is no clear record of how history treated these facts, it is clear that they did not fall within the principle by which history determined what facts were elements. That principle defined elements as "fact[s] . . . legally essential to the punishment to be inflicted." *United States* v. *Reese*, 92 U. S. 214, 232 (1876) (Clifford, J., dissenting) (citing 1 J. Bishop, Law of Criminal Procedure § 81, p. 51 (2d ed. 1872)). This formulation includes facts that, as *McMillan* put it, "alte[r] the maximum penalty," 477 U. S., at 87, but it does not include facts triggering a mandatory minimum. The minimum may be imposed with or without the factual finding; the finding is by definition not "essential" to the defendant's punishment.

McMillan was on firm historical ground, then, when it held that a legislature may specify the condition for a mandatory minimum without making the condition an element of the crime. The fact of visible firearm possession was more like the facts considered by judges when selecting a sentence within the statutory range—facts that, as the authorities from the 19th century confirm, have never been charged in the indictment, submitted to the jury, or proved beyond a reasonable doubt:

> "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances. 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. This is an entirely different thing from punishing one for what is not alleged against him." Bishop, Criminal Procedure § 85, at 54.

Since sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the "heaviest punishment" they face if convicted. *Ibid.* Judges, in turn, have always considered uncharged "aggravating circumstances" that, while increasing the defendant's punishment, have not "swell[ed] the penalty above what the law has provided for the acts charged." *Ibid.* Because facts supporting a mandatory minimum fit squarely within that description, the legislature's choice to entrust them to the judge does not implicate the "competition . . . between judge and jury over . . . their respective roles," *Jones*, 526 U. S., at 245, that is the central concern of the Fifth and Sixth Amendments.

At issue in *Apprendi*, by contrast, was a sentencing factor that did "swell the penalty above what the law has provided," Bishop, *supra*, § 85, at 54, and thus functioned more like a "traditional elemen[t]." *Patterson* v. *New York*, 432 U. S., at 211, n. 12. The defendant had been convicted of illegal possession of a firearm, an offense for which New Jersey law prescribed a maximum of 10 years in prison. See N. J. Stat. Ann. §§ 2C:39–4(a), 2C:43–6(a)(2) (1995). He was sentenced to 12 years, however, because a separate statute permitted an enhancement when the judge found, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race." § 2C:44–3(e) (Supp. 2001–2002).

The Court held that the enhancement was unconstitutional. "[O]ur cases in this area, and . . . the history upon which they rely," the Court observed, confirmed the constitu-

tional principle first identified 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." 530 U. S., at 490. Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any "fact that . . . 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," the Court concluded, *id.*, at 483, would have been, under the prevailing historical practice, an element of an aggravated offense. See *id.*, at 479–481; see also *id.*, at 501–518 (THOMAS, J., concurring).

Apprendi's conclusions do not undermine *McMillan*'s. There was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule did not extend to those facts. Indeed, the Court made clear that its holding did not affect *McMillan* at all:

> "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." 530 U. S., at 487, n. 13.

The sentencing factor in *McMillan* did not increase "the penalty for a crime beyond the prescribed statutory maximum," 530 U. S., at 490; nor did it, as the concurring opinions in *Jones* put it, "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," 526 U. S., at 253 (SCALIA, J., concurring). As the *Apprendi* Court observed, the *McMillan* finding merely required the

judge to impose "a specific sentence *within the range* authorized by the jury's finding that the defendant [was] guilty." 530 U. S., at 494, n. 19; see also *Jones*, *supra*, at 242 ("[T]he *Winship* issue [in *McMillan*] rose from a provision that a judge's finding (by a preponderance) of visible possession of a firearm would require a mandatory minimum sentence for certain felonies, but a minimum that fell within the sentencing ranges otherwise prescribed").

As its holding and the history on which it was based would suggest, the *Apprendi* Court's understanding of the Constitution is consistent with the holding in *McMillan*. Facts extending the sentence beyond the statutory maximum had traditionally been charged in the indictment and submitted to the jury, *Apprendi* said, because the function of the indictment and jury had been to authorize the State to impose punishment:

> "The evidence . . . that punishment was, by law, tied to the offense . . . and the evidence that American judges have exercised sentencing discretion within a legally prescribed range . . . 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." 530 U. S., at 483, n. 10.

The grand and petit juries thus form a "'strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government].'" *Duncan* v. *Louisiana*, 391 U. S., at 151 (quoting W. Blackstone, Commentaries on the Laws of England 349 (T. Cooley ed. 1899)). Absent authorization from the trial jury—in the form of a finding, by proof beyond a reasonable doubt, of the facts warranting the extended sentence under the New Jersey statute—the State had no power to sentence the defendant to more than

10 years, the maximum "authorized by the jury's guilty verdict." *Apprendi*, 530 U. S., at 494. "[T]hose facts that determine the maximum sentence the law allows," then, are necessarily elements of the crime. *Id.*, at 499 (SCALIA, J., concurring).

Yet once the jury finds all those facts, *Apprendi* says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum. That is why, as *Apprendi* noted, "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.*" *Id.*, at 481. That is also why, as *McMillan* noted, nothing in this history suggests that it is impermissible for judges to find facts that give rise to a mandatory minimum sentence below "the maximum penalty for the crime committed." 477 U. S., at 87–88. In both instances the judicial factfinding does not "expose a defendant to a punishment greater than that otherwise legally prescribed." *Apprendi, supra,* at 483, n. 10. Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi.*

Petitioner argues, however, that the concerns underlying *Apprendi* apply with equal or more force to facts increasing the defendant's minimum sentence. Those factual findings, he contends, often have a greater impact on the defendant

than the findings at issue in *Apprendi*. This is so because when a fact increasing the statutory maximum is found, the judge may still impose a sentence far below that maximum; but when a fact increasing the minimum is found, the judge has no choice but to impose that minimum, even if he or she otherwise would have chosen a lower sentence. Cf. *Almendarez-Torres*, 523 U. S., at 244–245. Why, petitioner asks, would fairness not also require the latter sort of fact to be alleged in the indictment and found by the jury under a reasonable-doubt standard? The answer is that because it is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less" than that. *Apprendi*, *supra*, at 498 (SCALIA, J., concurring). If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

In light of the foregoing, it is not surprising that the decisions for the Court in both *Apprendi* and *Jones* insisted that they were consistent with *McMillan*—and that a distinction could be drawn between facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum. See, *e. g.*, *Apprendi*, *supra*, at 494, n. 19 ("The term [sentencing factor] appropriately describes a circumstance, which may be either aggravating or mitigat-

ing 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"); *Jones*, 526 U. S., at 242 ("*McMillan*, then, recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: . . . [M]ay judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?"); see also *Almendarez-Torres*, *supra*, at 256 (SCALIA, J., dissenting) ("[N]o one can read *McMillan* . . . without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, *rather than* substantially increasing the available sentence"). That distinction may continue to stand. The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.

Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date. Legislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. Congress and the States have conditioned mandatory minimum sentences upon judicial findings that, as here, a firearm was possessed,

brandished, or discharged, Ala. Code § 13A–5–6(a)(4) (1994); Kan. Stat. Ann. § 21–4618 (1995); Minn. Stat. Ann. § 609.11 (Supp. 2002); N. J. Stat. Ann. §§ 2C:43–6(c), 6(d) (1998); or among other examples, that the victim was over 60 years of age, 42 Pa. Cons. Stat. § 9717(a) (1998); that the defendant possessed a certain quantity of drugs, Ill. Comp. Stat., ch. 730, § 5/5–5–3(c)(2)(D) (2000); that the victim was related to the defendant, Alaska Stat. § 12.55.125(b) (2000); and that the defendant was a repeat offender, Md. Ann. Code, Art. 27, § 286 (Supp. 2000). We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.

IV

Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that the federal provision at issue, 18 U. S. C. § 924(c)(1)(A)(ii), is constitutional. Basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments. Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *McMillan*, 477 U. S., at 89–90. That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.

The Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. See, *e. g.*, Brief for Families Against Mandatory Minimums Foundation as *Amicus Curiae* 25, n. 16; cf. *Almendarez-Torres*, *supra*, at 245 (citing United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System 26–34 (Aug. 1991)). These criticisms may be sound, but they would persist whether the judge or the jury found the facts giving rise to the minimum. We hold only that the

Constitution permits the judge to do so, and we leave the other questions to Congress, the States, and the democratic processes.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

Petitioner bases his statutory argument that brandishing must be interpreted as an offense element on *Jones* v. *United States*, 526 U. S. 227 (1999). He bases his constitutional argument that regardless of how the statute is interpreted, brandishing must be charged in the indictment and found by the jury beyond a reasonable doubt on *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). As I dissented in *Jones* and *Apprendi* and still believe both were wrongly decided, I find it easy to reject petitioner's arguments. Even assuming the validity of *Jones* and *Apprendi*, however, I agree that petitioner's arguments that brandishing must be charged in the indictment and found by the jury beyond a reasonable doubt are unavailing. I therefore join JUSTICE KENNEDY's opinion in its entirety.

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

I cannot easily distinguish *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction. At the same time, I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here). And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join the Court's

judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.

In saying this, I do not mean to suggest my approval of mandatory minimum sentences as a matter of policy. During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike. See, *e. g.,* Remarks of Chief Justice William H. Rehnquist, Nat. Symposium on Drugs and Violence in America 9–11 (June 18, 1993); Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) (mandatory minimums are "imprudent, unwise and often an unjust mechanism for sentencing"); Breyer, Federal Sentencing Guidelines Revisited, 14 Crim. Justice 28 (Spring 1999); Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185, 192–196 (1993); Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199 (1993); Raeder, Rethinking Sentencing and Correctional Policy for Nonviolent Drug Offenders, 14 Crim. Justice 1, 53 (Summer 1999) (noting that the American Bar Association has opposed mandatory minimum sentences since 1974).

Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. See *Melendez* v. *United States*, 518 U. S. 120, 132–133 (1996) (BREYER, J., concurring in part and dissenting in part); cf. *Koon* v. *United States*, 518 U. S. 81, 95–96 (1996). They rarely reflect an ef-

fort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. U. S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System i–iv, 31–33 (1991) (Sentencing Report); see also Schulhofer, *supra*, at 214–220. They rarely are based upon empirical study. See Rehnquist, *supra*, at 9–10; Hatch, *supra*, at 198. And there is evidence that they encourage subterfuge, leading to more frequent downward departures (on a random basis), thereby making them a comparatively ineffective means of guaranteeing tough sentences. See Sentencing Report 53.

Applying *Apprendi* in this case would not, however, lead Congress to abolish, or to modify, mandatory minimum sentencing statutes. Rather, it would simply require the prosecutor to charge, and the jury to find beyond a reasonable doubt, the existence of the "factor," say, the amount of unlawful drugs, that triggers the mandatory minimum. In many cases, a defendant, claiming innocence and arguing, say, mistaken identity, will find it impossible simultaneously to argue to the jury that the prosecutor has overstated the drug amount. How, the jury might ask, could this "innocent" defendant know anything about that matter? The upshot is that in many such cases defendant and prosecutor will enter into a stipulation before trial as to drug amounts to be used at sentencing (if the jury finds the defendant guilty). To that extent, application of *Apprendi* would take from the judge the power to make a factual determination, while giving that power not to juries, but to prosecutors. And such consequences, when viewed through the prism of an open, fair sentencing system, are seriously adverse.

The legal consequences of extending *Apprendi* to the mandatory minimum sentencing context are also seriously adverse. Doing so would diminish further Congress' otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases. I have discussed these matters fully in my *Apprendi* dissent. See 530 U. S., at 555. For the reasons set forth there, and in other opinions, see *Jones* v. *United States*, 526 U. S. 227, 254 (1999) (KENNEDY, J., dissenting); *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), I would not apply *Apprendi* in this case.

I consequently join Parts I, II, and IV of the Court's opinion and concur in its judgment.

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

The range of punishment to which petitioner William J. Harris was exposed turned on the fact that he brandished a firearm, a fact that was neither charged in his indictment nor proved at trial beyond a reasonable doubt. The United States Court of Appeals for the Fourth Circuit nonetheless held, in reliance on *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), that the fact that Harris brandished a firearm was a mere sentencing factor to which no constitutional protections attach. 243 F. 3d 806, 808–812 (2001).

McMillan, however, conflicts with the Court's later decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), as the dissenting opinion in *Apprendi* recognized. See *id.*, at 533 (O'CONNOR, J., dissenting). The Court's holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi* just two years ago. Given that considerations of *stare decisis* are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defend-

ants, I would reaffirm *Apprendi*, overrule *McMillan*, and reverse the Court of Appeals.

I

Harris was indicted for distributing marijuana in violation of 21 U. S. C. § 841 and for carrying a firearm "in relation to" a drug trafficking crime in violation of 18 U. S. C. § 924(c)(1)(A). Harris pleaded guilty to distributing marijuana but disputed that he had carried a firearm "in relation to" a drug trafficking crime. The District Court disagreed,[1] and he was convicted by the judge, having waived his right to trial by jury. Although the mandatory minimum prison sentence under § 924(c)(1)(A)(i) is five years in prison, the presentence report relied on § 924(c)(1)(A)(ii), which increases the mandatory minimum prison sentence to seven years when the firearm is brandished.[2] At sentencing, the District Court acknowledged that it was a "close question" whether Harris "brandished" a firearm, and noted that "[t]he only thing that happened here is [that] he had [a gun] during the drug transaction." App. 231–232, 244–247. The District Court nonetheless found by a preponderance of the evidence that Harris had brandished a firearm and as a result sentenced him to the minimum mandatory sentence of seven years' imprisonment for the violation of § 924(c)(1)(A).

Relying on *McMillan*, the Court of Appeals affirmed the sentence and held as a matter of statutory interpretation that brandishing is a sentencing factor, not an element of the § 924(c)(1)(A) offense. Accordingly, the Court of Appeals

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[1] Harris owned a pawn shop and routinely wore a gun at work; the District Court accepted that it was Harris' ordinary practice to wear a gun whether or not he was selling small amounts of marijuana to his friends. The District Court, however, determined that the gun was carried "in relation to" a drug trafficking offense within the meaning of § 924(c) because it was "unable to draw the distinction that if it is [carried] for a legitimate purpose, it cannot be for an illegitimate purpose." App. 163.

[2] The presentence report recommended that Harris be given a term of imprisonment of zero to six *months* for the distribution charge.

concluded that the allegation of brandishing a firearm did not need to be charged in the indictment or proved beyond a reasonable doubt in order for the 7-year mandatory minimum to be triggered.

II

The Court construes § 924(c)(1)(A) to "defin[e] a single offense," *ante*, at 556, rather than the multiple offenses the Court found in a similarly structured statute in *Jones* v. *United States*, 526 U. S. 227 (1999).[3] In reliance on *McMillan*, it then discounts the increasing mandatory minimum sentences set forth in the statutory provision as constitutionally irrelevant. In the plurality's view, any punishment less than the statutory maximum of life imprisonment for any violation of § 924(c)(1)(A) avoids the single principle the Court now gleans from *Apprendi:* "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,' whether the statute calls it an element or a sentencing factor, 'must be submitted to a jury, and proved beyond a reasonable doubt.'" *Ante*, at 550 (quoting *Apprendi*, *supra*, at 490). According to the plurality, the historical practices underlying the Court's decision in *Apprendi* with respect to penalties that exceed the statutory maximum do not support extension of *Apprendi*'s rule to facts that increase a defendant's mandatory minimum sentence. Such fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny.

A

The Federal Constitution provides those "accused" in federal courts with specific rights, such as the right "to be informed of the nature and cause of the accusation," the right to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and the right to be tried by "an impartial jury of the State

[3] See 18 U. S. C. § 2119.

and district wherein the crime shall have been committed." Amdts. 5 and 6. Also, no Member of this Court disputes that due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived. See *In re Winship*, 397 U. S. 358, 364 (1970). As with *Apprendi*, this case thus turns on the seemingly simple question of what constitutes a "crime."

This question cannot be answered by reference to statutory construction alone solely because the sentence does not exceed the statutory maximum. As I discussed at great length in *Apprendi*, the original understanding of what facts are elements of a crime was expansive:

> "[I]f 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 . . . 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 for that entitlement is an element." 530 U. S., at 501 (concurring opinion).

The fact that a defendant brandished a firearm indisputably alters the prescribed range of penalties to which he is exposed under 18 U. S. C. § 924(c)(1)(A). Without a finding that a defendant brandished or discharged a firearm, the penalty range for a conviction under § 924(c)(1)(A)(i) is five

years to life in prison. But with a finding that a defendant brandished a firearm, the penalty range becomes harsher, seven years to life imprisonment. § 924(c)(1)(A)(ii). And if the court finds that a defendant discharged a firearm, the range becomes even more severe, 10 years to life. § 924(c)(1)(A)(iii). Thus, it is ultimately beside the point whether as a matter of statutory interpretation brandishing is a sentencing factor, because as a constitutional matter brandishing must be deemed an element of an aggravated offense. See *Apprendi*, *supra*, at 483, n. 10 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense").

I agree with the Court that a legislature is free to decree, within constitutional limits, which facts are elements that constitute a crime. See *ante*, at 550. But when the legislature provides that a particular fact shall give rise "'both to a special stigma and to a special punishment,'" *ante*, at 560 (plurality opinion) (quoting *McMillan*, 477 U. S., at 103 (STEVENS, J., dissenting)), the constitutional consequences are clear. As the Court acknowledged in *Apprendi*, society has long recognized a necessary link between punishment and crime, 530 U. S., at 478 ("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"). This link makes a great deal of sense: Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act? We made clear in *Apprendi* that if a statute "'annexes a higher degree of punishment'" based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt. *Id.*, at 480 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51 (15th ed. 1862)).

This constitutional limitation neither interferes with the legislature's ability to define statutory ranges of punishment nor calls into question judicial discretion to impose "judgment *within the range* prescribed by statute." *Apprendi*, 530 U. S., at 481. But it does protect the criminal defendant's constitutional right to know, *ex ante*, those circumstances that will determine the applicable range of punishment and to have those circumstances proved beyond a reasonable doubt:

> "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." *Id.*, at 484.

B

The Court truncates this protection and holds that "facts, sometimes referred to as sentencing factors," do not need to be "alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt," *ante*, at 550, so long as they do not increase the penalty for the crime beyond the statutory maximum. This is so even if the fact alters the statutorily mandated sentencing range, by increasing the mandatory minimum sentence. But to say that is in effect to claim that the imposition of a 7-year, rather than a 5-year, mandatory minimum does not change the constitutionally relevant sentence range because, regardless, either sentence falls between five years and the statutory maximum of life, the longest sentence range available under the statute. This analysis is flawed precisely because the statute provides incremental sentencing ranges, in which the mandatory minimum sentence varies upward if a defendant "brandished" or "discharged" a weapon. As a matter of common sense, an

increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.

Actual sentencing practices appear to bolster this conclusion. The suggestion that a 7-year sentence could be imposed even without a finding that a defendant brandished a firearm ignores the fact that the sentence imposed when a defendant is found only to have "carried" a firearm "in relation to" a drug trafficking offense appears to be, almost uniformly, if not invariably, five years. Similarly, those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years. Cf. United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1 (illustrating that almost all persons sentenced for violations of 18 U. S. C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment). This is true even though anyone convicted of violating § 924(c)(1)(A) is theoretically eligible to receive a sentence as severe as life imprisonment.[4] Yet under the decision today, those key facts actually responsible for fixing a defendant's punishment need not be charged in an indictment or proved beyond a reasonable doubt.

The incremental increase between five and seven years in prison may not seem so great in the abstract (of course it must seem quite different to a defendant actually being incarcerated). However, the constitutional analysis adopted by the plurality would hold equally true if the mandatory

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[4] Indeed it is a certainty that in virtually every instance the sentence imposed for a § 924(c)(1)(A) violation is tied directly to the applicable mandatory minimum. See United States Sentencing Commission, Guidelines Manual § 2K2.4, comment., n. 1 (Nov. 2001) (stating clearly that "the guideline sentence for a defendant convicted under 18 U. S. C. § 924(c) . . . is the minimum term required by the relevant statute. . . . A sentence above the minimum term . . . is an upward departure").

minimum for a violation of § 924(c)(1) without brandishing was five years, but the mandatory minimum with brandishing was life imprisonment. The result must be the same because surely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity. So long as it was clear that Congress intended for "brandishing" to be a sentencing factor, that fact would still have to be neither charged in the indictment nor proved beyond a reasonable doubt. But if this is the case, then *Apprendi* can easily be avoided by clever statutory drafting.

It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." 530 U. S., at 483, n. 10. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.

This is no less true because mandatory minimum sentences are a 20th-century phenomena. As the Government acknowledged at oral argument, this fact means only that historical practice is not directly dispositive of the question whether facts triggering mandatory minimums must be treated like elements. Tr. of Oral Arg. 47. The Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins. Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum. In either case the defendant cannot predict the judgment from the face of the

felony, see 530 U. S., at 478–479, and the absolute statutory limits of his punishment change, constituting an increased penalty. In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty. See *id.*, at 490; *Jones*, 526 U. S., at 253 (SCALIA, J., concurring).

III

McMillan rested on the premise that the "'applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.'" 477 U. S., at 85 (quoting *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977)). Thus, it cannot withstand the logic of *Apprendi*, at least with respect to facts for which the legislature has prescribed a new statutory sentencing range. *McMillan* broke from the "traditional understanding" of crime definition, a tradition that "continued well into the 20th century, at least until the middle of the century." *Apprendi*, *supra*, at 518 (THOMAS, J., concurring). The Court in *McMillan* did not, therefore, acknowledge that the change in the prescribed sentence range upon the finding of particular facts changed the prescribed range of penalties in a constitutionally significant way. Rather, while recognizing applicable due process limits, it concluded that the mandatory minimum at issue did not increase the prescribed range of penalties but merely required the judge to impose a specific penalty "within the range already available to it." 477 U. S., at 87–88. As discussed, *supra*, at 577–579, this analysis is inherently flawed.

Jones called into question, and *Apprendi* firmly limited, a related precept underlying *McMillan:* namely, the State's authority to treat aggravated behavior as a factor increasing the sentence, rather than as an element of the crime. Although the plurality resurrects this principle, see *ante*, at 559–560, 565, it must do so in the face of the Court's contrary

conclusion in *Apprendi*, which adopts the position taken by the dissent in *McMillan:* "[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*." 477 U. S., at 103 (STEVENS, J., dissenting). See *Apprendi*, *supra*, at 483–484.

Nor should *stare decisis* dictate the outcome in this case; the *stare decisis* effect of *McMillan* is considerably weakened for a variety of reasons. As an initial matter, where the Court has wrongly decided a constitutional question, the force of *stare decisis* is at its weakest. See *Ring* v. *Arizona*, *post*, at 608; *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). And while the relationship between punishment and the constitutional protections attached to the elements of a crime traces its roots back to the common law, *McMillan* was decided only 16 years ago.[5] No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect. The United States concedes, with respect to prospective application, that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury. Tr. of Oral Arg. 42. Consequently, one is hard pressed to give credence to the plurality's suggestion that "[i]t is critical not to abandon" *McMillan* "at this late date." *Ante*, at 567. Rather, it is imperative that the Court maintain absolute fidelity to the protections of the individual af-

[5] Mandatory minimum sentence schemes are themselves phenomena of fairly recent vintage genesis. See *ante*, at 558–559; see also *Apprendi* v. *New Jersey*, 530 U. S. 466, 518 (2000) (THOMAS, J., concurring) ("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").

forded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Finally, before today, no one seriously believed that the Court's earlier decision in *McMillan* could coexist with the logical implications of the Court's later decisions in *Apprendi* and *Jones*. In both cases, the dissent said as much:

> "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*." *Apprendi*, 530 U. S., at 533 (O'CONNOR, J., dissenting).

See also *Jones*, 526 U. S., at 268 (KENNEDY, J., dissenting) ("[B]y its terms, JUSTICE SCALIA's view . . . would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*. Once the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered"). There is no question but that *stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

Further supporting the essential incompatibility of *Apprendi* and *McMillan*, JUSTICE BREYER concurs in the judgment but not the entire opinion of the Court, recognizing that he "cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction." *Ante*, at 569 (opinion concurring in part and concurring in judgment). This leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding, and at least one Member explicitly continues to reject both *Apprendi* and *Jones*. *Ante*, at 569 (O'CONNOR, J., concurring).

* * *

"Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*," in *Apprendi*, "we reserve[d] for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." 530 U. S., at 487, n. 13. But that day has come, and adherence to *stare decisis* in this case would require infidelity to our constitutional values. Because, like most Members of this Court, I cannot logically distinguish the issue here from the principles underlying the Court's decision in *Apprendi*, I respectfully dissent.

Syllabus

RING *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 01–488. Argued April 22, 2002—Decided June 24, 2002

At petitioner Ring's Arizona trial for murder and related offenses, the jury deadlocked on premeditated murder, but found Ring guilty of felony murder occurring in the course of armed robbery. Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made by a judge conducting a separate sentencing hearing. The judge at that stage must determine the existence or nonexistence of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances." The death sentence may be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Following such a hearing, Ring's trial judge sentenced him to death. Because the jury had convicted Ring of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was, *inter alia*, the victim's actual killer. See *Enmund* v. *Florida*, 458 U. S. 782. Citing accomplice testimony at the sentencing hearing, the judge found that Ring was the killer. The judge then found two aggravating factors, one of them, that the offense was committed for pecuniary gain, as well as one mitigating factor, Ring's minimal criminal record, and ruled that the latter did not call for leniency.

On appeal, Ring argued that Arizona's capital sentencing scheme violates the Sixth Amendment's jury trial guarantee by entrusting to a judge the finding of a fact raising the defendant's maximum penalty. See *Jones* v. *United States*, 526 U. S. 227; *Apprendi* v. *New Jersey*, 530 U. S. 466. The State responded that this Court had upheld Arizona's system in *Walton* v. *Arizona*, 497 U. S. 639, 649, and had stated in *Apprendi* that *Walton* remained good law. The Arizona Supreme Court observed that *Apprendi* and *Jones* cast doubt on *Walton*'s continued viability and found that the *Apprendi* majority's interpretation of Arizona law, 530 U. S., at 496–497, was wanting. JUSTICE O'CONNOR's *Apprendi* dissent, *id.*, at 538, the Arizona court noted, correctly described how capital sentencing works in that State: A defendant cannot receive a death sentence unless the judge makes the factual determination that a statutory aggravating factor exists. Nevertheless, recognizing that it was bound by the Supremacy Clause to apply *Walton*, a decision this Court had not overruled, the Arizona court rejected Ring's constitu-

tional attack. It then upheld the trial court's finding on the pecuniary gain aggravating factor, reweighed that factor against Ring's lack of a serious criminal record, and affirmed the death sentence.

Held: Walton and *Apprendi* are irreconcilable; this Court's Sixth Amendment jurisprudence cannot be home to both. Accordingly, *Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U. S., at 647–649. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U. S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury. Pp. 597–609.

(a) In upholding Arizona's capital sentencing scheme against a charge that it violated the Sixth Amendment, the *Walton* Court ruled that aggravating factors were not "elements of the offense"; they were "sentencing considerations" guiding the choice between life and death. 497 U. S., at 648. *Walton* drew support from *Cabana* v. *Bullock*, 474 U. S. 376, in which the Court held there was no constitutional bar to an appellate court's finding that a defendant killed, attempted to kill, or intended to kill, as *Enmund*, *supra*, required for imposition of the death penalty in felony-murder cases. If the Constitution does not require that the *Enmund* finding be proved as an element of the capital murder offense or that a jury make that finding, *Walton* stated, it could not be concluded that a State must denominate aggravating circumstances "elements" of the offense or commit to a jury only, and not to a judge, determination of the existence of such circumstances. 497 U. S., at 649. Subsequently, the Court suggested in *Jones* that any fact (other than prior conviction) that increases the maximum penalty for a crime must be submitted to a jury, 526 U. S., at 243, n. 6, and distinguished *Walton* as having characterized the finding of aggravating facts in the context of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the sentencing range's ceiling, 526 U. S., at 251. Pp. 597–601.

(b) In *Apprendi*, the sentencing judge's finding that racial animus motivated the petitioner's weapons offense triggered application of a state "hate crime enhancement" that doubled the maximum authorized sentence. This Court held that the sentence enhancement violated Apprendi's right to a jury determination whether he was guilty of every element of the crime with which he was charged, beyond a reasonable doubt. 530 U. S., at 477. That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. *Id.*, at 476. The dispositive question, the Court said, is one not of form, but of effect. *Id.*, at 494. If a State makes an increase in a defendant's

authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. See *id.*, at 482–483. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Id.*, at 483. *Walton* could be reconciled with *Apprendi*, the Court asserted: The key distinction was that an Arizona first-degree murder conviction carried a maximum sentence of death; once a jury has found the defendant guilty of all the elements of an offense which carries death as its maximum penalty, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. 530 U. S., at 497. In dissent in *Apprendi*, JUSTICE O'CONNOR described as "demonstrably untrue" the majority's assertion that the jury makes all the findings necessary to expose the defendant to a death sentence. Such a defendant, she emphasized, cannot receive a death sentence unless a judge makes the critical factual determination that a statutory aggravating factor exists. *Id.*, at 538. *Walton*, JUSTICE O'CONNOR's dissent insisted, if followed, would have required the Court to uphold Apprendi's sentence. 530 U. S., at 537. Pp. 601–603.

(c) Given the Arizona Supreme Court's finding that the *Apprendi* dissent's portrayal of Arizona's capital sentencing law was precisely right, and recognizing that the Arizona court's construction of the State's own law is authoritative, see *Mullaney* v. *Wilbur*, 421 U. S. 684, 691, this Court is persuaded that *Walton*, in relevant part, cannot survive *Apprendi*'s reasoning. In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's ruling that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one of effect, not form. 530 U. S., at 494. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict. *Ibid.* The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *id.*, at 541 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See *ibid.* Arizona's argument based on the *Walton* distinction between an offense's elements and sentencing factors is rendered untenable by *Ap-*

Syllabus

prendi's repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question "who decides," judge or jury. See, *e. g.*, 530 U. S., at 492. Arizona further urges that aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination because death is different: States have constructed elaborate sentencing procedures in death cases because of constraints this Court has said the Eighth Amendment places on capital sentencing, see, *e. g.*, *id.*, at 522–523 (THOMAS, J., concurring). Apart from the Eighth Amendment provenance of aggravating factors, however, Arizona presents no specific reason for excepting capital defendants from the constitutional protections extended to defendants generally, and none is readily apparent. *Id.*, at 539 (O'CONNOR, J., dissenting). In various settings, the Court has interpreted the Constitution to require the addition of an element or elements to the definition of a crime in order to narrow its scope. See, *e. g.*, *United States* v. *Lopez*, 514 U. S. 549, 561–562. If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. The Sixth Amendment jury trial right does not turn on the relative rationality, fairness, or efficiency of potential factfinders. *Apprendi*, 530 U. S., at 498 (SCALIA, J., concurring). In any event, the superiority of judicial factfinding in capital cases is far from evident, given that the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury. Although *stare decisis* is of fundamental importance to the rule of law, this Court has overruled prior decisions where, as here, the necessity and propriety of doing so has been established. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172. Pp. 603–609.

200 Ariz. 267, 25 P. 3d 1139, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 610. KENNEDY, J., filed a concurring opinion, *post*, p. 613. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 613. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 619.

Andrew D. Hurwitz argued the cause for petitioner. With him on the briefs were *John A. Stookey* and *Daniel L. Kaplan.*

Janet Napolitano, Attorney General of Arizona, argued the cause for respondent. With her on the brief were *Patrick Irvine,* Solicitor General, *Kent E. Cattani,* and *Robert L. Ellman* and *Kathleen P. Sweeney,* Assistant Attorneys General.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the Sixth Amendment right to a jury trial in capital prosecutions. In Arizona, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.

In *Walton* v. *Arizona,* 497 U. S. 639 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "element[s] of the offense of capital murder." *Id.,* at 649. Ten years later, however, we decided *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), which held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty

*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Bill Pryor,* Attorney General of Alabama, *Nathan A. Forrester,* Solicitor General, and *A. Vernon Barnett IV* and *Michael B. Billingsley,* Deputy Solicitors General, joined by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Alan G. Lance* of Idaho, *Steve Carter* of Indiana, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia; for Arizona Voice for Crime Victims, Inc., et al. by *Steve Twist* and *Douglas E. Beloof;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factor[s]." *Id.*, at 492.

Apprendi's reasoning is irreconcilable with *Walton*'s holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

I

At the trial of petitioner Timothy Ring for murder, armed robbery, and related charges, the prosecutor presented evidence sufficient to permit the jury to find the facts here recounted. On November 28, 1994, a Wells Fargo armored van pulled up to the Dillard's department store at Arrowhead Mall in Glendale, Arizona. Tr. 57, 60–61 (Nov. 14, 1996). Courier Dave Moss left the van to pick up money inside the store. *Id.*, at 61, 73–74. When he returned, the van, and its driver, John Magoch, were gone. *Id.*, at 61–62.

Later that day, Maricopa County Sheriff's Deputies found the van—its doors locked and its engine running—in the parking lot of a church in Sun City, Arizona. *Id.*, at 99–100 (Nov. 13, 1996). Inside the vehicle they found Magoch, dead from a single gunshot to the head. *Id.*, at 101. According to Wells Fargo records, more than $562,000 in cash and $271,000 in checks were missing from the van. *Id.*, at 10 (Nov. 18, 1996).

Prompted by an informant's tip, Glendale police sought to determine whether Ring and his friend James Greenham were involved in the robbery. The police investigation revealed that the two had made several expensive cash purchases in December 1994 and early 1995. *E. g.*, *id.*, at 153–156 (Nov. 14, 1996); *id.*, at 90–94 (Nov. 21, 1996). Wiretaps

were then placed on the telephones of Ring, Greenham, and a third suspect, William Ferguson. *Id.*, at 19–21 (Nov. 18, 1996).

In one recorded phone conversation, Ring told Ferguson that Ring might "cu[t] off" Greenham because "[h]e's too much of a risk": Greenham had indiscreetly flaunted a new truck in front of his ex-wife. State's Exh. 49A, pp. 11–12. Ring said he could cut off his associate because he held "both [Greenham's] and mine." *Id.*, at 11. The police engineered a local news broadcast about the robbery investigation; they included in the account several intentional inaccuracies. Tr. 3–5, 13–14 (Nov. 19, 1996). On hearing the broadcast report, Ring left a message on Greenham's answering machine to "remind me to talk to you tomorrow and tell you about what was on the news tonight. Very important, and also fairly good." State's Exh. 55A, p. 2.

After a detective left a note on Greenham's door asking him to call, Tr. 115–118 (Nov. 18, 1996), Ring told Ferguson that he was puzzled by the attention the police trained on Greenham. "[H]is house is clean," Ring said; "[m]ine, on the other hand, contains a very large bag." State's Exh. 70A, p. 7.

On February 14, 1995, police furnished a staged reenactment of the robbery to the local news, and again included deliberate inaccuracies. Tr. 5 (Nov. 19, 1996). Ferguson told Ring that he "laughed" when he saw the broadcast, and Ring called it "humorous." State's Exh. 80A, p. 3. Ferguson said he was "not real worried at all now"; Ring, however, said he was "slightly concern[ed]" about the possibility that the police might eventually ask for hair samples. *Id.*, at 3–4.

Two days later, the police executed a search warrant at Ring's house, discovering a duffel bag in his garage containing more than $271,000 in cash. Tr. 107–108, 111, 125 (Nov. 20, 1996). They also found a note with the number "575, 995" on it, followed by the word "splits" and the letters "F," "Y," and "T." *Id.*, at 127–130. The prosecution asserted

that "F" was Ferguson, "Y" was "Yoda" (Greenham's nickname), and "T" was Timothy Ring. *Id.*, at 42 (Dec. 5, 1996).

Testifying in his own defense, Ring said the money seized at his house was startup capital for a construction company he and Greenham were planning to form. *Id.*, at 10–11 (Dec. 3, 1996). Ring testified that he made his share of the money as a confidential informant for the Federal Bureau of Investigation and as a bail bondsman and gunsmith. *Id.*, at 162, 166–167, 180 (Dec. 2, 1996). But an FBI agent testified that Ring had been paid only $458, *id.*, at 47 (Nov. 20, 1996), and other evidence showed that Ring had made no more than $8,800 as a bail bondsman, *id.*, at 48–51 (Nov. 21, 1996); *id.*, at 21 (Nov. 25, 1996).

The trial judge instructed the jury on alternative charges of premeditated murder and felony murder. The jury deadlocked on premeditated murder, with 6 of 12 jurors voting to acquit, but convicted Ring of felony murder occurring in the course of armed robbery. See Ariz. Rev. Stat. Ann. §§ 13–1105(A) and (B) (West 2001) ("A person commits first degree murder if . . . [a]cting either alone or with one or more other persons the person commits or attempts to commit . . . [one of several enumerated felonies] . . . and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person. . . . Homicide, as prescribed in [this provision] requires no specific mental state other than what is required for the commission of any of the enumerated felonies.").

As later summed up by the Arizona Supreme Court, "the evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch." 200 Ariz. 267, 280, 25 P. 3d 1139, 1152 (2001). Although clear evidence connected Ring to the robbery's proceeds, nothing submitted at trial put him at the scene of the robbery. See *ibid.* Furthermore, "[f]or all we know from the trial evidence," the Arizona court stated, "[Ring] did not participate in, plan, or even expect the killing. This lack of evidence no doubt ex-

plains why the jury found [Ring] guilty of felony, but not premeditated, murder." *Ibid.*

Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13–703." Ariz. Rev. Stat. Ann. § 13–1105(C) (West 2001). The cross-referenced section, § 13–703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed." § 13–703(C) (West Supp. 2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Ibid.*

At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances"[1] and any "mitigating circum-

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[1] The aggravating circumstances, enumerated in Ariz. Rev. Stat. Ann. § 13–703(G) (West Supp. 2001), are:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

"2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

"3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

"4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

"6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

"7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

stances."[2] The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and "there are no mitigating circumstances sufficiently substantial to call for leniency." § 13–703(F).

Between Ring's trial and sentencing hearing, Greenham pleaded guilty to second-degree murder and armed robbery. He stipulated to a 27½-year sentence and agreed to cooperate with the prosecution in the cases against Ring and Ferguson. Tr. 35–37 (Oct. 9, 1997).

Called by the prosecution at Ring's sentencing hearing, Greenham testified that he, Ring, and Ferguson had been planning the robbery for several weeks before it occurred. According to Greenham, Ring "had I guess taken the role as leader because he laid out all the tactics." *Id.*, at 39. On the day of the robbery, Greenham said, the three watched the armored van pull up to the mall. *Id.*, at 45. When Magoch opened the door to smoke a cigarette, Ring shot him with a rifle equipped with a homemade silencer. *Id.*, at 42, 44–45. Greenham then pushed Magoch's body aside and drove the van away. *Id.*, at 45. At Ring's direction, Greenham drove to the church parking lot, where he and Ring transferred the money to Ring's truck. *Id.*, at 46, 48. Later, Greenham recalled, as the three robbers were dividing up the money,

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"8. The defendant has been convicted of one or more other homicides, as defined in § 13–1101, which were committed during the commission of the offense.

"9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

"10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer."

[2] The statute enumerates certain mitigating circumstances, but the enumeration is not exclusive. "The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death . . . ." § 13–703(H).

Ring upbraided him and Ferguson for "forgetting to congratulate [Ring] on [his] shot." *Id.*, at 60.

On cross-examination, Greenham acknowledged having previously told Ring's counsel that Ring had nothing to do with the planning or execution of the robbery. *Id.*, at 85–87. Greenham explained that he had made that prior statement only because Ring had threatened his life. *Id.*, at 87. Greenham also acknowledged that he was now testifying against Ring as "pay back" for the threats and for Ring's interference in Greenham's relationship with Greenham's ex-wife. *Id.*, at 90–92.

On October 29, 1997, the trial judge entered his "Special Verdict" sentencing Ring to death. Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was Magoch's actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life." App. to Pet. for Cert. 46a–47a; see *Enmund* v. *Florida*, 458 U. S. 782 (1982) (Eighth Amendment requires finding that felony-murder defendant killed or attempted to kill); *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987) (qualifying *Enmund*, and holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a "major participa[nt] in the felony committed" and who demonstrated "reckless indifference to human life").

Citing Greenham's testimony at the sentencing hearing, the judge concluded that Ring "is the one who shot and killed Mr. Magoch." App. to Pet. for Cert. 47a. The judge also found that Ring was a major participant in the robbery and that armed robbery "is unquestionably a crime which carries with it a grave risk of death." *Ibid.*

The judge then turned to the determination of aggravating and mitigating circumstances. See § 13–703. He found two aggravating factors. First, the judge determined that Ring committed the offense in expectation of receiving something

of "pecuniary value," as described in § 13–703; "[t]aking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result." App. to Pet. for Cert. 49a. Second, the judge found that the offense was committed "in an especially heinous, cruel or depraved manner." *Ibid.* In support of this finding, he cited Ring's comment, as reported by Greenham at the sentencing hearing, expressing pride in his marksmanship. *Id.*, at 49a–50a. The judge found one nonstatutory mitigating factor: Ring's "minimal" criminal record. *Id.*, at 52a. In his judgment, that mitigating circumstance did not "call for leniency"; he therefore sentenced Ring to death. *Id.*, at 53a.

On appeal, Ring argued that Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U. S. Constitution because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty. See *Jones* v. *United States*, 526 U. S. 227 (1999); *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). The State, in response, noted that this Court had upheld Arizona's system in *Walton* v. *Arizona*, 497 U. S. 639 (1990), and had stated in *Apprendi* that *Walton* remained good law.

Reviewing the death sentence, the Arizona Supreme Court made two preliminary observations. *Apprendi* and *Jones*, the Arizona high court said, "raise some question about the continued viability of *Walton*." 200 Ariz., at 278, 25 P. 3d, at 1150. The court then examined the *Apprendi* majority's interpretation of Arizona law and found it wanting. *Apprendi*, the Arizona court noted, described Arizona's sentencing system as one that "'requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' and not as a system that 'permits a judge to determine the existence of a factor which makes a crime a capital offense.'" 200 Ariz., at 279, 25 P. 3d, at 1151 (quoting *Apprendi*, 530 U. S., at 496–497). JUSTICE O'CONNOR's *Apprendi* dissent, the Arizona court noted, squarely rejected

the *Apprendi* majority's characterization of the Arizona sentencing scheme: "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." 200 Ariz., at 279, 25 P. 3d, at 1151 (quoting *Apprendi*, 530 U. S., at 538).

After reciting this Court's divergent constructions of Arizona law in *Apprendi*, the Arizona Supreme Court described how capital sentencing in fact works in the State. The Arizona high court concluded that "the present case is precisely as described in Justice O'Connor's dissent [in *Apprendi*]—Defendant's death sentence required the judge's factual findings." 200 Ariz., at 279, 25 P. 3d, at 1151. Although it agreed with the *Apprendi* dissent's reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled. It therefore rejected Ring's constitutional attack on the State's capital murder judicial sentencing system. 200 Ariz., at 280, 25 P. 3d, at 1152.

The court agreed with Ring that the evidence was insufficient to support the aggravating circumstance of depravity, *id.*, at 281–282, 25 P. 3d, at 1153–1154, but it upheld the trial court's finding on the aggravating factor of pecuniary gain. The Arizona Supreme Court then reweighed that remaining factor against the sole mitigating circumstance (Ring's lack of a serious criminal record), and affirmed the death sentence. *Id.*, at 282–284, 25 P. 3d, at 1154–1156.

We granted Ring's petition for a writ of certiorari, 534 U. S. 1103 (2002), to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*. See, *e. g.*, *United States* v. *Promise*, 255 F. 3d 150, 159–160 (CA4 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* "perplexing"); *Hoffman* v. *Arave*, 236 F. 3d 523, 542 (CA9 2001) ("*Apprendi* may

raise some doubt about *Walton*."); *People* v. *Kaczmarek*, 318 Ill. App. 3d 340, 351–352, 741 N. E. 2d 1131, 1142 (2000) ("[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here."). We now reverse the judgment of the Arizona Supreme Court.

II

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P. 3d, at 1151 (citing Ariz. Rev. Stat. § 13–703). This was so because, in Arizona, a "death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P. 3d, at 1151 (citing § 13–703). The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,[3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.[4]

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[3] "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

[4] Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490–491, n. 16 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt* v. *Florida*, 428 U. S. 242, 252 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitution-

As earlier indicated, see *supra*, at 588, 595–596, this is not the first time we have considered the constitutionality of Arizona's capital sentencing system. In *Walton* v. *Arizona*, 497 U. S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 648 (quoting *Hildwin* v. *Florida*, 490 U. S. 638, 640–641 (1989) *(per curiam)*). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U. S., at 648 (internal quotation marks omitted).

Walton drew support from *Cabana* v. *Bullock*, 474 U. S. 376 (1986), in which the Court held there was no constitutional bar to an appellate court's finding that a defendant killed, attempted to kill, or intended to kill, as *Enmund* v. *Florida*, 458 U. S. 782 (1982), required for imposition of the death penalty in felony-murder cases. The *Enmund* finding could be made by a court, *Walton* maintained, because it entailed no "'element of the crime of capital murder'"; it "only place[d] 'a substantive limitation on sentencing.'" 497

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ally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U. S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

U. S., at 649 (quoting *Cabana*, 474 U. S., at 385–386). "If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding," *Walton* stated, "we cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." 497 U. S., at 649.

In dissent in *Walton*, JUSTICE STEVENS urged that the Sixth Amendment requires "a jury determination of facts that must be established before the death penalty may be imposed." *Id.*, at 709. Aggravators "operate as statutory 'elements' of capital murder under Arizona law," he reasoned, "because in their absence, [the death] sentence is unavailable." *Id.*, at 709, n. 1. "If th[e] question had been posed in 1791, when the Sixth Amendment became law," JUSTICE STEVENS said, "the answer would have been clear," for "[b]y that time,

> "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned." *Id.*, at 710–711 (quoting White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 10–11 (1989)).

Walton was revisited in *Jones* v. *United States*, 526 U. S. 227 (1999). In that case, we construed the federal carjacking statute, 18 U. S. C. § 2119 (1994 ed. and Supp. V), which, at the time of the criminal conduct at issue, provided that a person possessing a firearm who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall—(1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and (3) if death results, be . . . imprisoned for any number of years up to life . . . ." The question presented in *Jones* was whether the statute "defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict." 526 U. S., at 229.

The carjacking statute, we recognized, was "susceptible of [both] constructions"; we adopted the one that avoided "grave and doubtful constitutional questions." *Id.*, at 239 (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)). Section 2119, we held, established three separate offenses. Therefore, the facts—causation of serious bodily injury or death—necessary to trigger the escalating maximum penalties fell within the jury's province to decide. See *Jones*, 526 U. S., at 251–252. Responding to the dissenting opinion, the *Jones* Court restated succinctly the principle animating its view that the carjacking statute, if read to define a single crime, might violate the Constitution: "[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.

Jones endeavored to distinguish certain capital sentencing decisions, including *Walton*. Advancing a "careful reading of *Walton*'s rationale," the *Jones* Court said: *Walton* "charac-

terized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." 526 U. S., at 251.

Dissenting in *Jones*, JUSTICE KENNEDY questioned the Court's account of *Walton*. The aggravating factors at issue in *Walton*, he suggested, were not merely circumstances for consideration by the trial judge in exercising sentencing discretion within a statutory range of penalties. "Under the relevant Arizona statute," JUSTICE KENNEDY observed, "Walton could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment." 526 U. S., at 272 (citation omitted). *Jones*, JUSTICE KENNEDY concluded, cast doubt—needlessly in his view—on the vitality of *Walton:*

> "If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, *Walton* would appear to have been a better candidate for the Court's new approach than is the instant case." 526 U. S., at 272.

One year after *Jones*, the Court decided *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). The defendant-petitioner in that case was convicted of, *inter alia*, second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. See *id.*, at 469–470. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that Apprendi's crime had been motivated by racial animus. That finding triggered application of New Jersey's "hate crime enhancement," which doubled Apprendi's maximum authorized sentence. The judge sentenced Apprendi to 12 years in prison, 2 years over the maximum that would have applied but for the enhancement.

We held that Apprendi's sentence violated his right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*, at 477 (quoting *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995)). That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. New Jersey, the Court observed, "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." *Apprendi*, 530 U. S., at 476. "Merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Ibid.*

The dispositive question, we said, "is one not of form, but of effect." *Id.*, at 494. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. See *id.*, at 482–483. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483; see also *id.*, at 499 (SCALIA, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.").

Walton could be reconciled with *Apprendi*, the Court finally asserted. The key distinction, according to the *Apprendi* Court, was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. "[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." 530 U. S., at 497 (emphasis deleted) (quoting

Almendarez-Torres v. *United States*, 523 U. S. 224, 257, n. 2 (1998) (SCALIA, J., dissenting)).

The *Apprendi* dissenters called the Court's distinction of *Walton* "baffling." 530 U. S., at 538 (opinion of O'CONNOR, J.). The Court claimed that "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Ibid.* That, the dissent said, was "demonstrably untrue," for 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." *Ibid.* *Walton*, the *Apprendi* dissenters insisted, if properly followed, would have required the Court to uphold Apprendi's sentence. "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." 530 U. S., at 537 (opinion of O'CONNOR, J.).

The Arizona Supreme Court, as we earlier recounted, see *supra*, at 595–596, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in JUSTICE O'CONNOR's dissent precisely right: "Defendant's death sentence required the judge's factual findings." 200 Ariz., at 279, 25 P. 3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, see *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the

only sentencing options, see Ariz. Rev. Stat. Ann. § 13–1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9–19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U. S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.;* see 200 Ariz., at 279, 25 P. 3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," *Apprendi*, 530 U. S., at 541 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13–1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment *as provided by § 13–703.*" (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U. S., at 541 (O'CONNOR, J., dissenting).

Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra*, at 598–599; Tr. of Oral Arg. 28–29. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable;[5] *Apprendi* repeatedly in-

[5] In *Harris* v. *United States*, *ante*, p. 545, a majority of the Court concludes that the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence. See *ante*, at 567 (plurality opinion) ("The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. [A] finding [that triggers a mandatory minimum sentence] restrain[s] the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be."); *ante*, at 569 (BREYER, J., concurring in part and

structs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. See, *e. g.*, 530 U. S., at 492 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19 ("[W]hen 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."); *id.*, at 495 ("[M]erely 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." (internal quotation marks omitted)); see also *id.*, at 501 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . 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.").

Even if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, Arizona further urges, aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination. As Arizona's counsel maintained at oral argument, there is no doubt that

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concurring in judgment) ("[T]he Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).").

"[d]eath is different." Tr. of Oral Arg. 43. States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 21–25 (citing *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*); see also *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *Apprendi*, 530 U. S., at 522–523 (THOMAS, J., concurring) ("[I]n the area of capital 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.").

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." *Id.*, at 539 (O'CONNOR, J., dissenting). The notion "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 . . . is without precedent in our constitutional jurisprudence." *Ibid.*

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. See, *e. g.*, *United States* v. *Lopez*, 514 U. S. 549, 561–562 (1995) (suggesting that addition to federal gun possession statute of "express jurisdictional element" requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause); *Branden-*

burg v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)* (First Amendment prohibits States from "proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Lambert* v. *California*, 355 U. S. 225, 229 (1957) (Due Process Clause of Fourteenth Amendment requires "actual knowledge of the duty to register or proof of the probability of such knowledge" before ex-felon may be convicted of failing to register presence in municipality). If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.

Arizona suggests that judicial authority over the finding of aggravating factors "may . . . be a better way to guarantee against the arbitrary imposition of the death penalty." Tr. of Oral Arg. 32. The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be

> "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . 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." *Apprendi*, 530 U. S., at 498 (SCALIA, J., concurring).

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circum-

stances in capital cases by entrusting those determinations to the jury.[6]

Although "'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]' . . . [o]ur precedents are not sacrosanct." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) (quoting *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 494 (1987)). "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." 491 U. S., at 172. We are satisfied that this is such a case.

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[6] Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. See Ark. Code Ann. § 5–4–602 (1993); Cal. Penal Code Ann. § 190.3 (West 1999); Conn. Gen. Stat. § 53a–46a (2001); Ga. Code Ann. § 17–10–31.1 (Supp. 1996); Ill. Comp. Stat. Ann., ch. 720, § 5/9–1(d) (West 1993); Kan. Stat. Ann. § 21–4624(b) (1995); Ky. Rev. Stat. Ann. § 532.025(1)(b) (1993); La. Code Crim. Proc. Ann., Art. § 905.1 (West 1997); Md. Ann. Code, Art. 27, § 413(b) (1996); Miss. Code Ann. § 99–19–101 (1973–2000); Mo. Rev. Stat. §§ 565.030, 565.032 (1999 and Supp. 2002); Nev. Rev. Stat. Ann. § 175.552 (Michie 2001); N. H. Rev. Stat. Ann. § 630:5(II) (1996); N. J. Stat. Ann. § 2C:11–3(c) (Supp. 2001); N. M. Stat. Ann. § 31–20A–1 (2000); N. Y. Crim. Proc. Law § 400.27 (McKinney Supp. 2001–2002); N. C. Gen. Stat. § 15A–2000 (1999); Ohio Rev. Code Ann. § 2929.03 (West 1997); Okla. Stat., Tit. 21, § 701.10(A) (Supp. 2001); Ore. Rev. Stat. Ann. § 163.150 (1997); 42 Pa. Cons. Stat. § 9711 (Supp. 2001); S. C. Code Ann. § 16–3–20(B) (1985); S. D. Codified Laws § 23A–27A–2 (1998); Tenn. Code Ann. § 39–13–204 (Supp. 2000); Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 2001); Utah Code Ann. § 76–3–207 (Supp. 2001); Va. Code Ann. § 19.2–264.3 (2000); Wash. Rev. Code § 10.95.050 (1990); Wyo. Stat. Ann. § 6–2–102 (2001).

Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. See Colo. Rev. Stat. § 16–11–103 (2001) (three-judge panel); Idaho Code § 19–2515 (Supp. 2001); Mont. Code Ann. § 46–18–301 (1997); Neb. Rev. Stat. § 29–2520 (1995).

Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See Ala. Code §§ 13A–5–46, 13A–5–47 (1994); Del. Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind. Code Ann. § 35–50–2–9 (Supp. 2001).

For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U. S., at 647–649. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U. S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.

* * *

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . 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, 155–156 (1968).

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[7]

It is so ordered.

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[7] We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict. See *Neder* v. *United States*, 527 U. S. 1, 25 (1999) (this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

The question whether *Walton* v. *Arizona*, 497 U. S. 639 (1990), survives our decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), confronts me with a difficult choice. What compelled Arizona (and many other States) to specify particular "aggravating factors" that must be found before the death penalty can be imposed, see 1973 Ariz. Sess. Laws ch. 138, § 5 (originally codified as Ariz. Rev. Stat. § 13–454), was the line of this Court's cases beginning with *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*. See *Walton*, 497 U. S., at 659–660 (SCALIA, J., concurring in part and concurring in judgment). In my view, that line of decisions had no proper foundation in the Constitution. *Id.*, at 670 ("'[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed'" (quoting *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (REHNQUIST, J., dissenting))). I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

On the other hand, as I wrote in my dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 248 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

The quandary is apparent: Should I continue to apply the last-stated principle when I know that the only reason the fact *is* essential is that this Court has mistakenly said that the Constitution *requires* state law to impose such "aggra-

vating factors"? In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather "*every* finding of fact underlying the sentencing decision," including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment. 497 U. S., at 647 (emphasis added). But even if the point had been put with greater clarity in *Walton*, I think I still would have approved the Arizona scheme—I would have favored the States' freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.

Since *Walton*, I have acquired new wisdom that consists of two realizations—or, to put it more critically, have discarded old ignorance that consisted of the failure to realize two things: First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event. Some States, for example, already had aggravating-factor requirements for capital murder (*e. g.*, murder of a peace officer, see 1965 N. Y. Laws p. 1022 (originally codified at N. Y. Penal Law § 1045)) when *Furman* was decided. When such a State has added aggravating factors, are the new ones the *Apprendi*-exempt product of *Furman*, and the old ones not? And even as to those States that did not previously have aggravating-factor requirements, who is to say that their adoption of a new one today—or, for that matter, even their retention of old ones adopted immediately post-*Furman*—is still the product of that case, and not of a changed social belief that murder *simpliciter* does not deserve death?

Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal

legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, see *Apprendi*, *supra*, at 523 (O'CONNOR, J., dissenting), cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Accordingly, *whether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.

I add one further point, lest the holding of today's decision be confused by the separate concurrence. JUSTICE BREYER, who refuses to accept *Apprendi*, see 530 U. S., at 555 (dissenting opinion); see also *Harris* v. *United States*, *ante*, at 569 (BREYER, J., concurring in part and concurring in judgment), nonetheless concurs in today's judgment because he "believe[s] that jury sentencing in capital cases is mandated by the Eighth Amendment." *Post*, at 614 (opinion concurring in judgment). While I am, as always, pleased to travel in JUSTICE BREYER's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or,

more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, JUSTICE BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.

JUSTICE KENNEDY, concurring.

Though it is still my view that *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of *Apprendi* would allow *Walton* v. *Arizona*, 497 U. S. 639 (1990), to stand. It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes "the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, *supra*, at 494. When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.

This is not to say *Apprendi* should be extended without caution, for the States' settled expectations deserve our respect. A sound understanding of the Sixth Amendment will allow States to respond to the needs and realities of criminal justice administration, and *Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing. I agree with the Court, however, that *Apprendi* and *Walton* cannot stand together as the law.

With these observations I join the opinion of the Court.

JUSTICE BREYER, concurring in the judgment.

I

Given my views in *Apprendi* v. *New Jersey*, 530 U. S. 466, 555 (2000) (dissenting opinion), and *Harris* v. *United States*,

ante, at 569 (opinion concurring in part and concurring in judgment), I cannot join the Court's opinion. I concur in the judgment, however, because I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.

II

This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. *Gregg* v. *Georgia*, 428 U. S. 153 (1976). Otherwise, the constitutional prohibition against "cruel and unusual punishments" would forbid its use. *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*. JUSTICE STEVENS has written that those safeguards include a requirement that a *jury* impose any sentence of death. *Harris* v. *Alabama*, 513 U. S. 504, 515–526 (1995) (dissenting opinion); *Spaziano* v. *Florida*, 468 U. S. 447, 467–490 (1984) (STEVENS, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). Although I joined the majority in *Harris* v. *Alabama*, I have come to agree with the dissenting view, and with the related views of others upon which it in part relies, see *Gregg*, *supra*, at 190 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Cf. *Henslee* v. *Union Planters Nat. Bank & Trust Co.*, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late"). I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.

I am convinced by the reasons that JUSTICE STEVENS has given. These include (1) his belief that retribution provides the main justification for capital punishment, and (2) his assessment of the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end.

As to the first, I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to

incapacitate offenders, or to rehabilitate criminals. Studies of deterrence are, at most, inconclusive. See, *e. g.*, Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates, N. Y. Times, Sept. 22, 2000, p. A1 (during last 20 years, homicide rate in death penalty States has been 48% to 101% higher than in non-death-penalty States); see also Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification).

As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes. See, *e. g.*, Sorensen & Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. Crim. L. & C. 1251, 1256 (2000) (studies find average repeat murder rate of .002% among murderers whose death sentences were commuted); Marquart & Sorensen, A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L. Rev. 5, 26 (1989) (98% did not kill again either in prison or in free society). But see *Roberts* v. *Louisiana*, 428 U. S. 325, 354 (1976) (White, J., dissenting) ("[D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not"). And rehabilitation, obviously, is beside the point.

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility," *Spaziano*, 468 U. S., at 481 (STEVENS, J., concurring in part and dissenting in part), because they "reflect more accurately the composition and experiences of the community as a whole," *id.*, at 486. Hence they are more likely to "express the con-

science of the community on the ultimate question of life or death," *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968), and better able to determine in the particular case the need for retribution, namely, "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, *supra*, at 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

Nor is the fact that some judges are democratically elected likely to change the jury's comparative advantage in this respect. Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand. See *Harris*, 513 U. S., at 518–519 (STEVENS, J., dissenting); see also J. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It 405–406 (Feb. 11, 2002) (hereinafter A Broken System) (finding that judges who override jury verdicts for life are especially likely to commit serious errors); cf. Epstein & King, The Rules of Inference, 69 U. Chi. L. Rev. 1 (2002) (noting dangers in much scholarly research but generally approving of Liebman).

The importance of trying to translate a community's sense of capital punishment's appropriateness in a particular case is underscored by the continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, "cruel and unusual." Those who make this claim point, among other things, to the fact that death is not reversible, and to death sentences imposed upon those whose convictions proved unreliable. See, *e. g.*, Weinstein, The Nation's Death Penalty Foes Mark a Milestone Crime: Arizona convict freed on DNA tests is said to be the 100th known condemned U. S. prisoner to be exonerated since executions resumed, Los Angeles Times, Apr. 10, 2002, p. A16; G. Ryan, Governor of Illinois, Report of Governor's Commis-

sion on Capital Punishment 7–10 (Apr. 15, 2002) (imposing moratorium on Illinois executions because, post-*Furman*, 13 people have been exonerated and 12 executed); see generally Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 27 (1987).

They point to the potentially arbitrary application of the death penalty, adding that the race of the victim and socio-economic factors seem to matter. See, *e. g.*, U. S. General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (Feb. 1990) (synthesis of 28 studies shows "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty"); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638, 1661 (1998) (evidence of race-of-victim disparities in 90% of States studied and of race-of-defendant disparities in 55%); *McCleskey* v. *Kemp*, 481 U. S. 279, 320–345 (1987) (Brennan, J., dissenting); see also, *e. g.*, D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973–1999): A Legal and Empirical Analysis 95–100 (Oct. 10, 2001) (death sentences almost five times more likely when victim is of a high socio-economic status).

They argue that the delays that increasingly accompany sentences of death make those sentences unconstitutional because of "the suffering inherent in a prolonged wait for execution." *Knight* v. *Florida*, 528 U. S. 990, 994 (1999) (BREYER, J., dissenting from denial of certiorari) (arguing that the Court should consider the question); see, *e. g.*, *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari); Bureau of Justice Statistics, Capital Punishment 2000, pp. 12, 14 (rev. 2002) (average delay is 12 years, with 52 people waiting more than 20 years and some more than 25).

They point to the inadequacy of representation in capital cases, a fact that aggravates the other failings. See, *e. g.*, Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835 (1994) (describing many studies discussing deficient capital representation).

And they note that other nations have increasingly abandoned capital punishment. See, *e. g.*, San Martin, U. S. Taken to Task Over Death Penalty, Miami Herald, May 31, 2001, p. 1 (United States is only Western industrialized Nation that authorizes the death penalty); Amnesty International Website Against the Death Penalty, Facts and Figures on the Death Penalty (2002), http://www.web.amnesty.org/rmp/dplibrary.nsf (since *Gregg*, 111 countries have either abandoned the penalty altogether, reserved it only for exceptional crimes like wartime crimes, or not carried out executions for at least the past 10 years); DeYoung, Group Criticizes U. S. on Detainee Policy; Amnesty Warns of Human Rights Fallout, Washington Post, May 28, 2002, p. A4 (the United States rates fourth in number of executions, after China, Iran, and Saudi Arabia).

Many communities may have accepted some or all of these claims, for they do not impose capital sentences. See A Broken System, App. B, Table 11A (more than two-thirds of American counties have never imposed the death penalty since *Gregg* (2,064 out of 3,066), and only 3% of the Nation's counties account for 50% of the Nation's death sentences (92 out of 3,066)). Leaving questions of arbitrariness aside, this diversity argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not "cruel," "unusual," or otherwise unwarranted.

For these reasons, the danger of unwarranted imposition of the penalty cannot be avoided unless "the decision to impose the death penalty is made by a jury rather than by a single governmental official." *Spaziano*, 468 U. S., at 469

(Stevens, J., concurring in part and dissenting in part); see *Solem* v. *Helm*, 463 U. S. 277, 284 (1983) (Eighth Amendment prohibits excessive or disproportionate punishment). And I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.

Justice O'Connor, with whom The Chief Justice joins, dissenting.

I understand why the Court holds that the reasoning of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), is irreconcilable with *Walton* v. *Arizona*, 497 U. S. 639 (1990). Yet in choosing which to overrule, I would choose *Apprendi*, not *Walton*.

I continue to believe, for the reasons I articulated in my dissent in *Apprendi*, that the decision in *Apprendi* was a serious mistake. As I argued in that dissent, *Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases. See 530 U. S., at 524–552. Indeed, the rule directly contradicts several of our prior cases. See *id.*, at 531–539 (explaining that the rule conflicts with *Patterson* v. *New York*, 432 U. S. 197 (1977), *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), and *Walton*, *supra*). And it ignores the "significant history in this country of . . . discretionary sentencing by judges." 530 U. S., at 544 (O'Connor, J., dissenting). The Court has failed, both in *Apprendi* and in the decision announced today, 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." *Id.*, at 539.

Not only was the decision in *Apprendi* unjustified in my view, but it has also had a severely destabilizing effect on our criminal justice system. I predicted in my dissent that the decision would "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or

in part on the authority of *[Apprendi]*." *Id.*, at 551. As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*.[1] These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide. See *ibid.* (O'CONNOR, J., dissenting) ("In 1998 . . . federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts"). The number of second or successive habeas corpus petitions filed in the federal courts also increased by 77% in 2001, a phenomenon the Administrative Office of the United States Courts attributes to prisoners bringing *Apprendi* claims. Administrative Office of the U. S. Courts, 2001 Judicial Business 17. This Court has been similarly overwhelmed by the aftershocks of *Apprendi*. A survey of the petitions for certiorari we received in the past year indicates that 18% raised *Apprendi*-related claims.[2] It is simply beyond dispute that *Apprendi* threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary.

The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. See *ante*, at 608, n. 6 (identifying Colorado, Idaho, Montana, and Nebraska as having sentencing schemes like Arizona's). There are 168 prisoners on death row in these States, Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. (Spring 2002), each of whom

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[1] This data was obtained from a Westlaw search conducted May 31, 2002, in the United States Courts of Appeals database using the following search terms: "'Apprendi v. New Jersey' & Title['U.S.' or 'United States']."

[2] Specific counts are on file with the Clerk of the Court.

is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review. See 28 U. S. C. §§ 2244(b)(2)(A), 2254(d)(1); *Teague* v. *Lane*, 489 U. S. 288 (1989). Nonetheless, the need to evaluate these claims will greatly burden the courts in these five States. In addition, I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination, see *ante*, at 608, n. 6, may also seize on today's decision to challenge their sentences. There are 629 prisoners on death row in these States. Criminal Justice Project, *supra*.

By expanding on *Apprendi*, the Court today exacerbates the harm done in that case. Consistent with my dissent, I would overrule *Apprendi* rather than *Walton*.

Syllabus

UNITED STATES *v.* RUIZ

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

No. 01–595. Argued April 24, 2002—Decided June 24, 2002

After immigration agents found marijuana in respondent Ruiz's luggage, federal prosecutors offered her a "fast track" plea bargain, whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. Among other things, the prosecutors' standard "fast track" plea agreement acknowledges the Government's continuing duty to turn over information establishing the defendant's factual innocence, but requires that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defense she raises if the case goes to trial. Because Ruiz would not agree to the latter waiver, the prosecutors withdrew their bargaining offer, and she was indicted for unlawful drug possession. Despite the absence of a plea agreement, Ruiz ultimately pleaded guilty. At sentencing, she asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. In vacating the sentence, the Ninth Circuit took jurisdiction under 18 U. S. C. § 3742; noted that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial; decided that this obligation entitles defendants to the information before they enter into a plea agreement; ruled that the Constitution prohibits defendants from waiving their right to the information; and held that the "fast track" agreement was unlawful because it insisted upon such a waiver.

Held:

1. Appellate jurisdiction was proper under § 3742(a)(1), which permits appellate review of a sentence "imposed in violation of law." Respondent's sentence would have been so imposed if her constitutional claim were sound. Thus, if she had prevailed on the merits, her victory would also have confirmed the Ninth Circuit's jurisdiction. Although this Court ultimately concludes that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers,* 330 U. S. 258, 291. In order to make that deter-

mination, it was necessary for the Ninth Circuit to address the merits. Pp. 626–628.

2. The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the Fifth and Sixth Amendments provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, *e. g.*, *Brady* v. *Maryland*, 373 U. S. 83, 87, a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees, *Boykin* v. *Alabama*, 395 U. S. 238, 243. As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e. g.*, *id.*, at 242. The Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that they would have had to make had the defendant insisted upon a trial. Several considerations, taken together, demonstrate that holding's error. First, impeachment information is special in relation to *a trial's fairness*, not in respect to whether a plea is *voluntary.* It is particularly difficult to characterize such information as critical, given the random way in which it may, or may not, help a particular defendant. The degree of help will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose. Second, there is no legal authority that provides significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See, *e. g.*, *Brady* v. *United States*, 397 U. S. 742, 757. Third, the very due process considerations that have led the Court to find trial-related rights to exculpatory and impeachment information—*e. g.*, the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests, *Ake* v. *Oklahoma*, 470 U. S. 68, 77—argue against the existence of the "right" the Ninth Circuit found. Here, that right's added value to the defendant is often limited, given that the Government will provide information establishing factual innocence under the proposed plea agreement, and that the defendant has other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11. Moreover, the Ninth Circuit's rule could se-

Syllabus

riously interfere with the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm, thereby forcing the Government to modify its current practice, devote substantially more resources to preplea trial preparation, or abandon its heavy reliance on plea bargaining. Due process cannot demand so radical a change in order to achieve so comparatively small a constitutional benefit. Pp. 628–633.

3. Although the "fast track" plea agreement requires a defendant to waive her right to affirmative defense information, the Court does not believe, for most of the foregoing reasons, that the Constitution requires provision of this information to the defendant prior to plea bargaining. P. 633.

241 F. 3d 1157, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 633.

Solicitor General Olson argued the cause for the United States. With him on the brief were *Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben, Irving L. Gornstein*, and *Jonathan L. Marcus.*

Steven F. Hubachek, by appointment of the Court, 534 U. S. 1126, argued the cause for respondent. With him on the brief was *Benjamin L. Coleman.**

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*A brief of *amici curiae* urging reversal was filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *David M. Gormley*, State Solicitor, *Stephen P. Carney*, Associate Solicitor, *Diane M. Welsh*, and *Dan Schweitzer*, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Carla J. Stovall* of Kansas, *Thomas F. Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Anabelle Rodriquez* of Puerto Rico, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Hoke MacMillan* of Wyoming.

John T. Philipsborn and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae.*

JUSTICE BREYER delivered the opinion of the Court.

In this case we primarily consider whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose "impeachment information relating to any informants or other witnesses." App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure.

I

After immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain—standard in that district—asks a defendant to waive indictment, trial, and an appeal. In return, the Government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence. In Ruiz's case, a two-level departure downward would have shortened the ordinary Guidelines-specified 18-to-24-month sentencing range by 6 months, to 12-to-18 months. 241 F. 3d 1157, 1161 (2001).

The prosecutors' proposed plea agreement contains a set of detailed terms. Among other things, it specifies that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the defendant," and it acknowledges the Government's "continuing duty to provide such information." App. to Pet. for Cert. 45a–46a. At the same time it requires that the defendant "waiv[e] the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. *Id.*, at 46a. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite

the absence of any agreement, Ruiz ultimately pleaded guilty.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the Government would have recommended had she accepted the "fast track" agreement. The Government opposed her request, and the District Court denied it, imposing a standard Guideline sentence instead. 241 F. 3d, at 1161.

Relying on 18 U. S. C. § 3742, see *infra*, at 627, 628–629, Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. 241 F. 3d, at 1166. It decided that this obligation entitles defendants to receive that same information before they enter into a plea agreement. *Id.*, at 1164. The Ninth Circuit also decided that the Constitution prohibits defendants from waiving their right to that information. *Id.*, at 1165–1166. And it held that the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. *Id.*, at 1167. The Ninth Circuit remanded the case so that the District Court could decide any related factual disputes and determine an appropriate remedy. *Id.*, at 1169.

The Government sought certiorari. It stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding. And it added that the holding is unique among courts of appeals. Pet. for Cert. 8. We granted the Government's petition. 534 U. S. 1074 (2002).

II

At the outset, we note that a question of statutory jurisdiction potentially blocks our consideration of the Ninth Circuit's constitutional holding. The relevant statute says that a

"defendant may file a notice of appeal . . . for review . . . if the sentence

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

"(3) is greater than [the Guideline] specified [sentence] . . . ; or

"(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U. S. C. § 3742(a).

Every Circuit has held that this statute does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart. See, *e. g., United States* v. *Conway*, 81 F. 3d 15, 16 (CA1 1996); *United States* v. *Lawal*, 17 F. 3d 560, 562 (CA2 1994); *United States* v. *Powell*, 269 F. 3d 175, 179 (CA3 2001); *United States* v. *Ivester*, 75 F. 3d 182, 183 (CA4 1996); *United States* v. *Cooper*, 274 F. 3d 230, 248 (CA5 2001); *United States* v. *Scott*, 74 F. 3d 107, 112 (CA6 1996); *United States* v. *Byrd*, 263 F. 3d 705, 707 (CA7 2001); *United States* v. *Mora-Higuera*, 269 F. 3d 905, 913 (CA8 2001); *United States* v. *Garcia-Garcia*, 927 F. 2d 489, 490 (CA9 1991); *United States* v. *Coddington*, 118 F. 3d 1439, 1441 (CA10 1997); *United States* v. *Calderon*, 127 F. 3d 1314, 1342 (CA11 1997); *In re Sealed Case No. 98–3116*, 199 F. 3d 488, 491–492 (CADC 1999).

The statute does, however, authorize an appeal from a sentence that "was imposed in violation of law." Two quite different theories might support appellate jurisdiction pursuant to that provision. First, as the Court of Appeals recognized, if the District Court's sentencing decision rested on a mistaken belief that it lacked the legal power to grant a departure, the quoted provision would apply. 241 F. 3d, at 1162, n. 2. Our reading of the record, however, convinces us that the District Judge correctly understood that he had such discretion but decided not to exercise it. We therefore reject

that basis for finding appellate jurisdiction. Second, if respondent's constitutional claim, discussed in Part III, *infra*, were sound, her sentence would have been "imposed in violation of law." Thus, if she had prevailed on the merits, her victory would also have confirmed the jurisdiction of the Court of Appeals.

Although we ultimately conclude that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers*, 330 U. S. 258, 291 (1947). In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper.

III

The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material—a right that the Constitution provides as part of its basic "fair trial" guarantee. See U. S. Const., Amdts. 5, 6. See also *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) (Due process requires prosecutors to "avoi[d] . . . an unfair trial" by making available "upon request" evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment"); *United States* v. *Agurs*, 427 U. S. 97, 112–113 (1976) (defense request unnecessary); *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio* v. *United States*, 405 U. S. 150, 154 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").

When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying consti-

tutional guarantees. *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U. S. 742, 748 (1970); see also *Boykin*, *supra*, at 242.

In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficient[ly] aware"). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. *Weatherford* v. *Bursey*, 429 U. S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case"). And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his

right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. Cf. *Colorado* v. *Spring*, 479 U. S. 564, 573–575 (1987) (Fifth Amendment privilege against self-incrimination waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose.

Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provides significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady* v. *United States*, 397 U. S., at 757 (defendant "misapprehended the quality of the State's case"); *ibid.* (defendant misapprehended "the likely penalties"); *ibid.* (defendant failed to "anticipate" a change in the law regarding relevant "punishments"); *McMann* v. *Richardson*, 397 U. S. 759, 770 (1970) (counsel "misjudged the admissibility" of a "confession"); *United States* v. *Broce*, 488 U. S. 563, 573 (1989) (counsel failed to point out a potential defense); *Tollett* v. *Henderson*, 411 U. S. 258, 267

(1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Third, due process considerations, the very considerations that led this Court to find trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*, argue against the existence of the "right" that the Ninth Circuit found here. This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests. *Ake* v. *Oklahoma*, 470 U. S. 68, 77 (1985). Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a defendant is often limited, for it depends upon the defendant's independent awareness of the details of the Government's case. And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual innocence of the defendant" regardless. That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy* v. *United States*, 394 U. S. 459, 465–467 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights).

At the same time, a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could "disrupt ongoing

investigations" and expose prospective witnesses to serious harm. Brief for United States 25. Cf. Amendments to Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 92 (1975) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Div., Dept. of Justice) (opposing mandated witness disclosure three days before trial because of documented instances of witness intimidation). And the careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns are valid. See, *e. g.*, 18 U. S. C. § 3432 (witness list disclosure required in capital cases three days before trial with exceptions); § 3500 (Government witness statements ordinarily subject to discovery only after testimony given); Fed. Rule Crim. Proc. 16(a)(2) (embodies limitations of 18 U. S. C. § 3500). Compare 156 F. R. D. 460, 461–462 (1994) (congressional proposal to significantly broaden § 3500) with 167 F. R. D. 221, 223, n. (judicial conference opposing congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

In addition, we note that the "fast track" plea agreement requires a defendant to waive her right to receive information the Government has regarding any "affirmative defense" she raises at trial. App. to Pet. for Cert. 46a. We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining—for most (though not all) of the reasons previously stated. That is to say, in the context of this agreement, the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea; the value in terms of the defendant's added awareness of relevant circumstances is ordinarily limited; yet the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process.

For these reasons the judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Constitution does not require the Government to disclose either affirmative defense information or impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant. The Court, however, suggests that the constitutional analysis turns in some part on the "degree of help" such information would provide to the defendant at the plea stage, see *ante*, at 630, 631, a distinction that is neither necessary nor accurate. To the extent that the Court is implicitly drawing a line based on a

flawed characterization about the usefulness of certain types of information, I can only concur in the judgment. The principle supporting *Brady* was "avoidance of an unfair trial to the accused." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). That concern is not implicated at the plea stage regardless.

Per Curiam

KIRK *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

No. 01–8419. Decided June 24, 2002

After observing what appeared to be several drug purchases made out of petitioner's apartment and stopping one of the buyers on the street outside petitioner's residence, the police entered petitioner's home and arrested and searched him before obtaining an arrest or a search warrant. Petitioner was charged in Louisiana state court with possession of cocaine with intent to distribute. The trial court denied his motion to suppress the evidence obtained during the warrantless entry, arrest, and search, and petitioner was convicted. In holding that the officers' conduct did not violate the Fourth Amendment because they had probable cause to arrest petitioner, the State Court of Appeal declined to decide whether exigent circumstances were present. The State Supreme Court denied review.

Held: The Court of Appeal erred in finding that exigent circumstances were not required to justify the officers' conduct. Its reasoning plainly violates the holding in *Payton* v. *New York*, 445 U. S. 573, 590, that the firm line at the entrance to a house may not be crossed without a warrant, absent exigent circumstances. Here, police had neither an arrest nor a search warrant. Although the officers testified at the suppression hearing that they took action out of fear that evidence would be destroyed, the Louisiana Court of Appeal did not determine that such exigent circumstances were present.

Certiorari granted; 773 So. 2d 259, reversed and remanded.

PER CURIAM.

Police officers entered petitioner's home, where they arrested and searched him. The officers had neither an arrest warrant nor a search warrant. Without deciding whether exigent circumstances had been present, the Louisiana Court of Appeal concluded that the warrantless entry, arrest, and search did not violate the Fourth Amendment of the Federal Constitution because there had been probable cause to arrest petitioner. 00–0190 (La. App. 11/15/00), 773 So. 2d 259. The court's reasoning plainly violates our holding in *Payton*

v. *New York*, 445 U. S. 573, 590 (1980), that "[a]bsent exigent circumstances," the "firm line at the entrance to the house . . . may not reasonably be crossed without a warrant." We thus grant the petition for a writ of certiorari and reverse the Court of Appeal's conclusion that the officers' actions were lawful, absent exigent circumstances.*

On an evening in March 1998, police officers observed petitioner's apartment based on an anonymous citizen complaint that drug sales were occurring there. After witnessing what appeared to be several drug purchases and allowing the buyers to leave the scene, the officers stopped one of the buyers on the street outside petitioner's residence. The officers later testified that "[b]ecause the stop took place within a block of the apartment, [they] feared that evidence would be destroyed and ordered that the apartment be entered." 00–0190, at 2, 773 So. 2d, at 261. Thus, "[t]hey immediately knocked on the door of the apartment, arrested the defendant, searched him thereto and discovered the cocaine and the money." *Id.*, at 4, 773 So. 2d, at 263. Although the officers sought and obtained a search warrant while they detained petitioner in his home, they only obtained this warrant after they had entered his home, arrested him, frisked him, found a drug vial in his underwear, and observed contraband in plain view in the apartment.

Based on these events, petitioner was charged in a Louisiana court with possession of cocaine with intent to distribute. He filed a pretrial motion to suppress evidence obtained by the police as a result of their warrantless entry, arrest, and search. After holding a suppression hearing, the trial court denied this motion. Petitioner was convicted and sentenced to 15 years at hard labor.

On direct review to the Louisiana Court of Appeal, petitioner challenged the trial court's suppression ruling. He argued that the police were not justified in entering his home

*We also grant petitioner's motion for leave to proceed *in forma pauperis*.

without a warrant absent exigent circumstances. The Court of Appeal acknowledged petitioner's argument: "[Petitioner] makes a long argument that there were not exigent circumstances for entering the apartment without a warrant." *Id.*, at 2, 773 So. 2d, at 261. The court, however, declined to decide whether exigent circumstances had been present, because "the evidence required to prove that the defendant possessed cocaine with the intent to distribute, namely the cocaine and the money, was not found in the apartment, but on his person." *Ibid.* The court concluded that because "[t]he officers had probable cause to arrest and properly searched the defendant incident thereto . . . [, t]he trial court properly denied the motion to suppress." *Id.*, at 4, 773 So. 2d, at 263.

The Louisiana Supreme Court denied review by a vote of 4 to 3. In a written dissent, Chief Justice Calogero explained:

> "The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home, and thus, the police need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises. . . . Here, the defendant was arrested inside an apartment, without a warrant, and the state has not demonstrated that exigent circumstances were present. Consequently, defendant's arrest was unconstitutional, and his motion to suppress should have been granted." App. to Pet. for Cert. 1–2.

We agree with Chief Justice Calogero that the Court of Appeal clearly erred by concluding that petitioner's arrest and the search "incident thereto," 00–0190, at 4, 773 So. 2d, at 263, were constitutionally permissible. In *Payton*, we examined whether the Fourth Amendment was violated by a state statute that authorized officers to "enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." 445 U. S., at 574. We deter-

mined that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." *Id.*, at 576. We held that because "the Fourth Amendment has drawn a firm line at the entrance to the house . . . [, a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.*, at 590. And we noted that an arrest warrant founded on probable cause, as well as a search warrant, would suffice for entry. *Id.*, at 603.

Here, the police had neither an arrest warrant for petitioner, nor a search warrant for petitioner's apartment, when they entered his home, arrested him, and searched him. The officers testified at the suppression hearing that the reason for their actions was a fear that evidence would be destroyed, but the Louisiana Court of Appeal did not determine that such exigent circumstances were present. Rather, the court, in respondent's own words, determined "that the defendant's argument that there were no exigent circumstances to justify the warrantless entry of the apartment was irrelevant" to the constitutionality of the officers' actions. Brief in Opposition 2–3. As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether exigent circumstances were present in this case, violated *Payton.*

Petitioner and respondent both dispute at length whether exigent circumstances were, in fact, present. We express no opinion on that question, nor on respondent's argument that any Fourth Amendment violation was cured because the police had an "independent source" for the recovered evidence. Brief in Opposition 8. Rather, we reverse the Court of Appeal's judgment that exigent circumstances were not required to justify the officers' conduct, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL. *v.* SIMMONS-HARRIS ET AL.

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

No. 00–1751. Argued February 20, 2002—Decided June 27, 2002*

Ohio's Pilot Project Scholarship Program gives educational choices to families in any Ohio school district that is under state control pursuant to a federal-court order. The program provides tuition aid for certain students in the Cleveland City School District, the only covered district, to attend participating public or private schools of their parent's choosing and tutorial aid for students who choose to remain enrolled in public school. Both religious and nonreligious schools in the district may participate, as may public schools in adjacent school districts. Tuition aid is distributed to parents according to financial need, and where the aid is spent depends solely upon where parents choose to enroll their children. The number of tutorial assistance grants provided to students remaining in public school must equal the number of tuition aid scholarships. In the 1999–2000 school year, 82% of the participating private schools had a religious affiliation, none of the adjacent public schools participated, and 96% of the students participating in the scholarship program were enrolled in religiously affiliated schools. Sixty percent of the students were from families at or below the poverty line. Cleveland schoolchildren also have the option of enrolling in community schools, which are funded under state law but run by their own school boards and receive twice the per-student funding as participating private schools, or magnet schools, which are public schools emphasizing a particular subject area, teaching method, or service, and for which the school district receives the same amount per student as it does for a student enrolled at a traditional public school. Respondents, Ohio taxpayers, sought to enjoin the program on the ground that it violated the Establishment Clause. The Federal District Court granted them summary judgment, and the Sixth Circuit affirmed.

Held: The program does not offend the Establishment Clause. Pp. 648–663.

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*Together with No. 00–1777, *Hanna Perkins School et al.* v. *Simmons-Harris et al.*, and No. 00–1779, *Taylor et al.* v. *Simmons-Harris et al.*, also on certiorari to the same court.

Syllabus

(a) Because the program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, the question is whether the program nonetheless has the forbidden effect of advancing or inhibiting religion. See *Agostini* v. *Felton,* 521 U. S. 203, 222–223. This Court's jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice. See, *e. g.*, *Mueller* v. *Allen,* 463 U. S. 388. Under such a program, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients, not the government, whose role ends with the disbursement of benefits. Pp. 648–653.

(b) The instant program is one of true private choice, consistent with the *Mueller* line of cases, and thus constitutional. It is neutral in all respects toward religion, and is part of Ohio's general and multifaceted undertaking to provide educational opportunities to children in a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion and permits participation of all district schools—religious or nonreligious—and adjacent public schools. The only preference in the program is for low-income families, who receive greater assistance and have priority for admission. Rather than creating financial incentives that skew it toward religious schools, the program creates financial disincentives: Private schools receive only half the government assistance given to community schools and one-third that given to magnet schools, and adjacent public schools would receive two to three times that given to private schools. Families too have a financial disincentive, for they have to copay a portion of private school tuition, but pay nothing at a community, magnet, or traditional public school. No reasonable observer would think that such a neutral private choice program carries with it the *imprimatur* of government endorsement. Nor is there evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options: Their children may remain in public school as before, remain in public school with funded tutoring aid, obtain a scholarship and choose to attend a religious school, obtain a scholarship and choose to attend a nonreligious private school, enroll in a community school, or enroll in a magnet school. The Establishment Clause question whether Ohio is coercing parents into sending their children to religious schools must be answered by evaluating *all* options

Syllabus

Ohio provides Cleveland schoolchildren, only one of which is to obtain a scholarship and then choose a religious school. Cleveland's preponderance of religiously affiliated schools did not result from the program, but is a phenomenon common to many American cities. Eighty-two percent of Cleveland's private schools are religious, as are 81% of Ohio's private schools. To attribute constitutional significance to the 82% figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed. Likewise, an identical private choice program might be constitutional only in States with a lower percentage of religious private schools. Respondents' additional argument that constitutional significance should be attached to the fact that 96% of the scholarship recipients have enrolled in religious schools was flatly rejected in *Mueller*. The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school. Finally, contrary to respondents' argument, *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756—a case that expressly reserved judgment on the sort of program challenged here—does not govern neutral educational assistance programs that offer aid directly to a broad class of individuals defined without regard to religion. Pp. 653–663.

234 F. 3d 945, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 663, and THOMAS, J., *post*, p. 676, filed concurring opinions. STEVENS, J., filed a dissenting opinion, *post*, p. 684. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 686. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 717.

Judith L. French, Assistant Attorney General of Ohio, argued the cause for petitioners in No. 00–1751. With her on the briefs were *Betty D. Montgomery*, Attorney General, *David M. Gormley*, State Solicitor, *Karen L. Lazorishak*, *James G. Tassie*, and *Robert L. Strayer*, Assistant Attorneys General, *Kenneth W. Starr*, and *Robert R. Gasaway*. *David J. Young* argued the cause for petitioners in No. 00–1777. With him on the briefs were *Michael R. Reed* and *David*

J. Hessler. *Clint Bolick*, *William H. Mellor*, *Richard D. Komer*, *Robert Freedman*, *David Tryon*, and *Charles Fried* filed briefs for petitioners in No. 00–1779.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *Gregory G. Garre*, *Robert M. Loeb*, and *Lowell V. Sturgill, Jr.*

Robert H. Chanin argued the cause for respondents Simmons-Harris et al. in all cases. With him on the brief were *Andrew D. Roth*, *Laurence Gold*, *Steven R. Shapiro*, *Raymond Vasvari*, *Elliot M. Mincberg*, and *Judith E. Schaeffer*. *Marvin E. Frankel* argued the cause for respondents Gatton et al. in all cases. With him on the brief were *David J. Strom*, *Donald J. Mooney, Jr.*, and *Marc D. Stern.*†

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†Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, *Thomas E. Warner*, Solicitor General, and *Matthew J. Conigliaro*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Don Stenberg* of Nebraska, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, and *Randolph A. Beales* of Virginia; for the State of Wisconsin by *Stephen P. Hurley*, *Gordon P. Giampietro*, and *Donald A. Daugherty, Jr.;* for Gary E. Johnson, Governor of New Mexico, by *Jeffrey S. Bucholtz;* for Mayor Rudolph W. Giuliani et al. by *Michael D. Hess*, Corporation Counsel of the City of New York, *Leonard J. Koerner*, and *Edward F. X. Hart;* for Councilwoman Fannie Lewis by *Steffen N. Johnson*, *Stephen M. Shapiro*, *Robert M. Dow, Jr.*, and *Richard P. Hutchison;* for the American Education Reform Council by *Louis R. Cohen*, *C. Boyden Gray*, and *Todd Zubler;* for the American Civil Rights Union by *Peter J. Ferrara;* for the American Center for Law and Justice, Inc., et al. by *Jay Alan Sekulow*, *James M. Henderson, Sr.*, *Colby M. May*, *Vincent McCarthy*, and *Walter M. Weber;* for the Association of Christian Schools International et al. by *Edward McGlynn Gaffney, Jr.*, and *Richard A. Epstein;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson*, *Eric W. Treene*, *Roman P. Storzer*, *Anthony R. Picarello, Jr.*, and *Richard Garnett;* for the Black Alliance for Educational Options by *Samuel Estreicher;* for the Catholic League for Religious and Civil Rights by *Robert P. George;* for the Center for Education Reform et al. by *Robert A. Destro*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who

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and *Joseph E. Schmitz;* for the Center for Individual Freedom et al. by *Erik S. Jaffe;* for Children First America et al. by *Harold J. (Tex) Lezar, Jr.*, and *Stephen G. Gilles;* for the Christian Legal Society et al. by *Stuart J. Lark* and *Gregory S. Baylor;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Coalition for Local Sovereignty by *Kenneth B. Clark;* for the National Association of Independent Schools by *Allen G. Siegel;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin*, *Dennis Rapps*, *Nathan Diament*, and *David Zwiebel;* for the REACH Alliance by *Philip J. Murren;* for the Rutherford Institute by *John W. Whitehead*, *Steven H. Aden*, *Robert R. Melnick*, and *James J. Knicely;* for the Solidarity Center for Law and Justice, P. C., by *James P. Kelly III;* for the United States Conference of Catholic Bishops by *Mark E. Chopko*, *John Liekweg*, and *Jeffrey Hunter Moon;* and for *Hugh Calkins, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Howard G. Kristol*, *Erwin Chemerinsky*, *Jeffrey P. Sinensky*, *Kara H. Stein*, *Arthur H. Bryant*, and *Victoria W. Ni;* for the Anti-Defamation League by *Martin E. Karlinsky*, *Daniel J. Beller*, *Steven M. Freeman*, and *Frederick M. Lawrence;* for the Council on Religious Freedom et al. by *Lee Boothby* and *Alan J. Reinach;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Norman J. Chachkin*, *Elaine R. Jones*, *Theodore M. Shaw*, *James L. Cott*, *Dennis D. Parker*, and *Dennis Courtland Hayes;* for the National Committee for Public Education and Religious Liberty by *Geoffrey F. Aronow* and *Stanley Geller;* for the National School Boards Association et al. by *Julie K. Underwood*, *Scott Bales*, and *James Martin;* for the Ohio Association for Public Education and Religious Liberty by *Patrick Farrell Timmins, Jr.;* and for the Ohio School Boards Association et al. by *Kimball H. Carey* and *Susan B. Greenberger.*

Briefs of *amici curiae* were filed for the California Alliance for Public Schools by *Robin B. Johansen* and *Joseph Remcho;* for Vermonters for Better Education by *Michael D. Dean;* for John E. Coons et al. by *Mr. Coons, pro se*, and *Stephen D. Sugarman, pro se;* for Jesse H. Choper et al. by *Mr. Choper, pro se*, *William Bassett*, *Teresa Collett*, *David Forte*, *Richard Garnett*, *Lino Graglia*, *Michael Heise*, *Gail Heriot*, *Roderick Hills*, *Grant Nelson*, *Michael Perry*, *David Post*, *Charles Rice*, *Rosemary Salomone*, *Gregory Sisk*, *Steve Smith*, and *Harry Tepker;* and for Ira J. Paul et al. by *Sharon L. Browne.*

reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See *Reed* v. *Rhodes*, No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995). Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." Cleveland City School District Performance Audit 2–1 (Mar. 1996). The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974–3313.979 (Anderson 1999 and Supp. 2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and opera-

tional management of the district by the state superintendent." § 3313.975(A). Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. §§ 3313.975(B) and (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. § 3313.975(A).

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. § 313.976(A)(3). Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." § 3313.976(A)(6). Any public school located in a school district adjacent to the covered district may also participate in the program. § 3313.976(C). Adjacent public schools are eligible to receive a $2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. §§ 3313.976(C), 3317.03(I)(1).[1] All participating schools,

[1] Although the parties dispute the precise amount of state funding received by suburban school districts adjacent to the Cleveland City School District, there is no dispute that any suburban district agreeing to participate in the program would receive a $2,250 tuition grant *plus* the ordinary allotment of per-pupil state funding for each program student enrolled in a suburban public school. See Brief for Respondents Simmons-Harris

whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. §§ 3313.977(A)(1)(a)–(c).

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. §§ 3313.978(A) and (C)(1). For these lowest income families, participating private schools may not charge a parental copayment greater than $250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap. §§ 3313.976(A)(8), 3313.978(A). These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate.[2] Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. § 3313.979.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those services to the State for payment. §§ 3313.976(D), 3313.979(C). Students from low-income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. § 3313.978(B). The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to stu-

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et al. 30, n. 11 (suburban schools would receive "on average, approximately, $4,750" per program student); Brief for Petitioners in No. 00–1779, p. 39 (suburban schools would receive "about $6,544" per program student).

[2] The number of available scholarships per covered district is determined annually by the Ohio Superintendent for Public Instruction. §§ 3313.978(A)–(B).

dents enrolled at participating private or adjacent public schools. § 3313.975(A).

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999–2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. §§ 3314.01(B), 3314.04. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999–2000 school year, there were 10 startup community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives $7,746, including state funding of $4,167, the same amount received

per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. *Simmons-Harris* v. *Goff*, 86 Ohio St. 3d 1, 8–9, 711 N. E. 2d 203, 211 (1999). The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, 54 F. Supp. 2d 725 (ND Ohio), which we stayed pending review by the Court of Appeals, 528 U. S. 983 (1999). In December 1999, the District Court granted summary judgment for respondents. 72 F. Supp. 2d 834. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. 234 F. 3d 945 (CA6). The Court of Appeals stayed its mandate pending disposition in this Court. App. to Pet. for Cert. in No. 00–1779, p. 151. We granted certiorari, 533 U. S. 976 (2001), and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose"

or "effect" of advancing or inhibiting religion. *Agostini* v. *Felton*, 521 U. S. 203, 222–223 (1997) ("[W]e continue to 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" (citations omitted)). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms*, 530 U. S. 793, 810–814 (2000) (plurality opinion); *id.*, at 841–844 (O'Connor, J., concurring in judgment); *Agostini*, *supra*, at 225–227; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993). While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, *Agostini*, *supra*, at 236, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tu-

ition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included "*all* parents," including parents with "children [who] attend nonsectarian private schools or sectarian private schools," 463 U. S., at 397 (emphasis in original), the program was "not readily subject to challenge under the Establishment Clause," *id.*, at 399 (citing *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect")). Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U. S., at 399–400. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*, at 399 (quoting *Widmar*, *supra*, at 274)). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools, saying:

> "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U. S., at 401.

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid . . . that ulti-

mately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U. S., at 487. We further remarked that, as in *Mueller*, "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U. S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.*, at 488–489.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U. S., at 490–491 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller*, *supra*, at 398–399); 474 U. S., at 493 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." 509 U. S., at 8. Looking once again to the challenged program as a whole, we observed that the program "distributes benefits neutrally to any child qualifying as 'disabled.'" *Id.*, at 10. Its "primary beneficiaries," we said, were "disabled children, not sectarian schools." *Id.*, at 12.

We further observed that "[b]y 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." *Id.*, at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.*, at 10–11. See, *e. g.*, *Agostini*, 521 U. S., at 229 ("*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school"). Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Mueller, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. As a plurality of this Court recently observed:

> "[I]f 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." *Mitchell*, 530 U. S., at 810.

See also *id.*, at 843 (O'CONNOR, J., concurring in judgment) ("[W]hen 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, 'no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief' " (quoting *Witters*, 474 U. S., at 493 (O'CONNOR, J., concurring in part and concurring in judgment))). It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i. e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. *Witters*, *supra*, at 487–488. Such incentives "[are] 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 reli-

gious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, *supra*, at 231. The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school." *Zobrest*, 509 U. S., at 10.[3]

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." Brief for Respondents Simmons-Harris et al. 37–38. But we have repeatedly rec-

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[3] JUSTICE SOUTER suggests the program is not "neutral" because program students cannot spend scholarship vouchers at traditional public schools. *Post*, at 697–698 (dissenting opinion). This objection is mistaken: Public schools in Cleveland already receive $7,097 in public funding per pupil—$4,167 of which is attributable to the State. App. 56a. Program students who receive tutoring aid and remain enrolled in traditional public schools therefore direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school. *Ibid.* JUSTICE SOUTER does not seriously claim that the program differentiates based on the religious status of beneficiaries or providers of services, the touchstone of neutrality under the Establishment Clause. *Mitchell* v. *Helms*, 530 U. S. 793, 809 (2000) (plurality opinion); *id.*, at 838 (O'CONNOR, J., concurring in judgment).

ognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. *Mueller*, 463 U. S., at 399; *Witters*, *supra*, at 488–489; *Zobrest*, *supra*, at 10–11; *e. g.*, *Mitchell*, *supra*, at 842–843 (O'Connor, J., concurring in judgment) ("In terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools"). The argument is particularly misplaced here since "the reasonable observer in the endorsement inquiry must be deemed aware" of the "history and context" underlying a challenged program. *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119 (2001) (internal quotation marks omitted). See also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment). Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coerc-

ing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

JUSTICE SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. *Post,* at 703–705 (dissenting opinion).[4] But Cleveland's preponderance of religiously af-

[4] JUSTICE SOUTER appears to base this claim on the unfounded assumption that capping the amount of tuition charged to low-income students (at $2,500) favors participation by religious schools. *Post,* at 704–705 (dissenting opinion). But elsewhere he claims that the program spends *too much* money on private schools and chides the state legislature for even proposing to raise the scholarship amount for low-income recipients. *Post,* at 697–698, 710–711, 714–715. His assumption also finds no support in the record, which shows that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions. App. 194a–195a; App. to Pet. for Cert. in No. 00–1777, p. 119a. Indeed, the actual operation of the program refutes JUSTICE SOUTER's argument that few but religious schools can afford to participate: Ten secular private schools operated within the Cleveland City School District when the program was adopted. Reply Brief for Petitioners in No. 00–1777, p. 4 (citing Ohio Educational Directory, 1999–2000 School Year, Alphabetic List of Nonpublic Schools, Ohio Dept. of Ed.). All 10 chose to participate in the program and have continued to participate to this day. App. 281a– 286a. And while no religious schools have been created in response to the program, several *nonreligious* schools have been created, *id.*, at 144a–148a, 224a–225a, in spite of the fact that a principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception, *post,* at 672 (O'CONNOR, J., concurring) (citing App. 225a, 227a). See also 234 F. 3d 945, 970 (CA6 2000) (Ryan, J., concurring in part and dissenting in part) ("There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot 'afford' to do so"). Similarly mistaken is JUSTICE SOUTER's reliance on the low enrollment of scholarship students in nonreligious schools

filiated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. See U. S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey: 1999–2000, pp. 2–4 (NCES 2001–330, 2001) (hereinafter Private School Universe Survey) (cited in Brief for United States as *Amicus Curiae* 24). Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as *Amici Curiae* 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, see Ohio Educational Directory (Lodging of Respondents Gatton et al., available in Clerk of Court's case file), and Reply Brief for Petitioners in No. 00–1751, p. 12, n. 1, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Cf. Brief for State of Florida et al. as *Amici Curiae* 17 ("[T]he percentages of sectarian to nonsectarian private schools within Florida's 67 school districts . . . vary from zero to 100 percent"). Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less

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during the 1999–2000 school year. *Post,* at 704 (citing Brief for California Alliance for Public Schools as *Amicus Curiae* 15). These figures ignore the fact that the number of program students enrolled in nonreligious schools has widely varied from year to year, *infra,* at 659; *e. g.,* n. 5, *infra,* underscoring why the constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients, *infra,* at 659 (citing *Mueller* v. *Allen,* 463 U. S. 388, 401 (1983)).

than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools. *Id.*, at 15–16 (citing Private School Universe Survey).

Respondents and JUSTICE SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. See *Agostini*, 521 U. S., at 229 ("Nor are we 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" (citing *Mueller*, 463 U. S., at 401)); see also *Mitchell*, 530 U. S., at 812, n. 6 (plurality opinion) ("*[Agostini]* 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 848 (O'CONNOR, J., concurring in judgment) (same) (quoting *Agostini*, *supra*, at 229). The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 463 U. S., at 401.

This point is aptly illustrated here. The 96% figure upon which respondents and JUSTICE SOUTER rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. See *supra*, at 647–648. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999–2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. See also J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting that only 16.5% of nontraditional schoolchildren in Cleveland choose religious schools). The 96% figure also represents but a snapshot of one particular school year. In the 1997–1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. See App. to Pet. for Cert. in No. 00–1751, p. 5a. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. See App. 59a–62a, 209a, 223a–227a.[5] Many of the students enrolled in these schools

[5] The fluctuations seen in the Cleveland program are hardly atypical. Experience in Milwaukee, which since 1991 has operated an educational choice program similar to the Ohio program, demonstrates that the mix of participating schools fluctuates significantly from year to year based on a number of factors, one of which is the uncertainty caused by persistent litigation. See App. 218a, 229a–236a; Brief for State of Wisconsin as *Amicus Curiae* 10–13 (hereinafter Brief for Wisconsin) (citing Wisconsin Dept. of Public Instruction, Milwaukee Parental Choice Program Facts and Figures for 2001–2002). Since the Wisconsin Supreme Court declared the Milwaukee program constitutional in 1998, *Jackson* v. *Benson*, 218 Wis. 2d 835, 578 N. W. 2d 602, several nonreligious private schools have entered the Milwaukee market, and now represent 32% of all participating

as scholarship students remained enrolled as community school students, *id.*, at 145a–146a, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect, *e. g.*, Ohio Rev. Code Ann. § 3314.11 (Anderson 1999) (establishing a single "office of school options" to "provide services that facilitate the management of the community schools program and the pilot project scholarship program"). In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications. Tr. of Oral Arg. 52–60.[6]

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schools. Brief for Wisconsin 11–12. Similarly, the number of program students attending nonreligious private schools increased from 2,048 to 3,582; these students now represent 33% of all program students. *Id.*, at 12–13. There are currently 34 nonreligious private schools participating in the Milwaukee program, a nearly five-fold increase from the 7 nonreligious schools that participated when the program began in 1990. See App. 218a; Brief for Wisconsin 12. And the total number of students enrolled in nonreligious schools has grown from 337 when the program began to 3,582 in the most recent school year. See App. 218a, 234a–236a; Brief for Wisconsin 12–13. These numbers further demonstrate the wisdom of our refusal in *Mueller* v. *Allen*, 463 U. S., at 401, to make the constitutionality of such a program depend on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

[6] JUSTICE SOUTER and JUSTICE STEVENS claim that community schools and magnet schools are separate and distinct from program schools, simply because the program itself does not include community and magnet school options. *Post*, at 698–701 (SOUTER, J., dissenting); *post*, at 685 (STEVENS, J., dissenting). But none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the State precisely what parents who choose a community or magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school. See, *e. g.*, App. 147a, 168a–169a; App. in Nos. 00–3055, etc. (CA6), pp. 1635–1645 and 1657–1673 (Cleveland parents who enroll their children in schools other than local public schools typically explore all state-funded options before choosing an alternative school).

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, *id.*, at 773–774, we found that its "function" was "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions," *id.*, at 783 (emphasis added). Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." *Id.*, at 795. The program thus provided direct money grants to religious schools. *Id.*, at 762–764. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. *Id.*, at 790. It similarly provided tuition reimbursements designed explicitly to "offe[r] . . . an incentive to parents to send their children to sectarian schools." *Id.*, at 786. Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. *Id.*, at 763–765. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.*, at 782–783, n. 38. That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, 463 U. S., at 398–399 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause" (citing *Nyquist*, *supra*, at 782–783, n. 38)),

then in *Witters*, 474 U. S., at 487 ("Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited' " (quoting *Nyquist*, *supra*, at 782–783, n. 38)), and again in *Zobrest*, 509 U. S., at 12–13 ("[T]he function of the [program] is hardly 'to provide desired financial support for nonpublic, sectarian institutions' " (quoting *Nyquist*, *supra*, at 782–783, n. 38)). To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.[7]

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of

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[7] JUSTICE BREYER would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. *Post*, at 719, 725–728 (dissenting opinion). It is unclear exactly what sort of principle JUSTICE BREYER has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where JUSTICE BREYER would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs. *Mitchell* v. *Helms*, 530 U. S., at 825 (plurality opinion) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded") (citing cases); *id.*, at 825–826 (" '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 prosecuting a lawsuit' " (quoting *Aguilar* v. *Felton*, 473 U. S. 402, 429 (1985) (O'CONNOR, J., dissenting))).

decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'Connor, concurring.

The Court holds that Ohio's Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974–3313.979 (Anderson 1999 and Supp. 2000) (voucher program), survives respondents' Establishment Clause challenge. While I join the Court's opinion, I write separately for two reasons. First, although the Court takes an important step, I do not believe that today's decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the Court places on verifying that parents of voucher students in religious schools have exercised "true private choice," I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

I

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. See, *e. g.*, Brief for Respondents Simmons-Harris et al. 1–2. Data from the 1999–2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious

schools, see App. in Nos. 00–3055, etc. (CA6), p. 1679 (46 of 56 private schools in the program are religiously affiliated; 3,637 of 3,765 voucher students attend religious private schools), but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. See J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting 2,087 students in community schools and 16,184 students in magnet schools).

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from low-income families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. §§ 3313.976(A)(8), 3313.978(A) and (C)(1). In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil. Affidavit of Caroline M. Hoxby ¶¶ 4b, 4c, App. 56a. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999–2000. Although just over one-half as many students attended community schools as religious private schools on the state fisc, the State spent over $1 million more—$9.4 million—on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools.

Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, see 26 U. S. C. § 501(c)(3); the corporate income tax in many States, see, *e. g.*, Cal. Rev. & Tax. Code Ann. § 23701d (West 1992); and property taxes in all 50 States, see Turner, Property Tax Exemptions for Nonprofits, 12 Probate & Property 25 (Sept./Oct. 1998); and clergy qualify for a federal tax break on income used for housing expenses, 26 U. S. C. § 1402(a)(8). In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. See §§ 170, 642(c). Finally, the Federal Government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools. See, *e. g.*, § 25A (Hope tax credit); Minn. Stat. § 290.0674 (Supp. 2001).

Most of these tax policies are well established, see, *e. g.*, *Mueller* v. *Allen*, 463 U. S. 388 (1983) (upholding Minnesota tax deduction for educational expenses); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970) (upholding an exemption for religious organizations from New York property tax), yet confer a significant relative benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggest that Colorado's exemption lowers that State's tax revenues by more than $40 million annually, see Rabey, Exemptions a Matter of Faith: No Proof Required of Tax-Free Churches, Colorado Springs Gazette Telegraph, Oct. 26, 1992, p. B1; Colorado Debates Church, Nonprofit Tax-Exempt Status, Philadelphia Enquirer, Oct. 4, 1996, p. 8; Maryland's exemption lowers revenues by more than $60 million, see Maryland Dept. of Assessment and Taxation, 2001 SDAT Annual Report (Apr. 25, 2002), http://www.dat.state.md.us/sdatweb/stats/

01ar_rpt.html (Internet sources available in Clerk of Court's case file); Wisconsin's exemption lowers revenues by approximately $122 million, see Wisconsin Dept. of Revenue, Division of Research and Analysis, Summary of Tax Exemption Devices 2001, Property Tax (Apr. 25, 2002), http://www.dor.state.wi.us/ra/sum00pro.html ($5.688 billion in exempt religious property; statewide average property tax rate of $21.46 per $1,000 of property); and Louisiana's exemption, looking just at the city of New Orleans, lowers revenues by over $36 million, see Bureau of Governmental Research, Property Tax Exemptions and Assessment Administration in Orleans Parish: Summary and Recommendations 2 (Dec. 1999) ($22.6 million for houses of worship and $14.1 million for religious schools). As for the Federal Government, the tax deduction for charitable contributions reduces federal tax revenues by nearly $25 billion annually, see U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 344 (2000) (hereinafter Statistical Abstract), and it is reported that over 60 percent of household charitable contributions go to religious charities, *id.*, at 397. Even the relatively minor exemptions lower federal tax receipts by substantial amounts. The parsonage exemption, for example, lowers revenues by around $500 million. See Diaz, Ramstad Prepares Bill to Retain Tax Break for Clergy's Housing, Star Tribune (Minneapolis-St. Paul), Mar. 30, 2002, p. 4A.

These tax exemptions, which have "much the same effect as [cash grants] . . . of the amount of tax [avoided]," *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 544 (1983); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 859–860, esp. n. 4 (1995) (THOMAS, J., concurring), are just part of the picture. Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare, 42 U. S. C. §§ 1395–1395ggg, and Medicaid, § 1396 *et seq.*, through educational programs such as the Pell Grant program, 20 U. S. C. § 1070a, and the G. I. Bill of Rights, 38 U. S. C. §§ 3451, 3698; and

through childcare programs such as the Child Care and Development Block Grant Program (CCDBG), 42 U. S. C. § 9858 (1994 ed., Supp. V). Medicare and Medicaid provide federal funds to pay for the healthcare of the elderly and the poor, respectively, see 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law 545–546 (2d ed. 2000); 2 *id.*, at 2; the Pell Grant program and the G. I. Bill subsidize higher education of low-income individuals and veterans, respectively, see Mulleneaux, The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals, 14 Akron Tax J. 27, 31 (1999); and the CCDBG program finances child care for low-income parents, see Pitegoff, Child Care Policy and the Welfare Reform Act, 6 J. Affordable Housing & Community Dev. L. 113, 121–122 (1997). These programs are well-established parts of our social welfare system, see, *e. g.*, *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782–783, n. 38 (1973), and can be quite substantial, see Statistical Abstract 92 (Table 120) ($211.4 billion spent on Medicare and nearly $176.9 billion on Medicaid in 1998), *id.*, at 135 (Table 208) ($9.1 billion in financial aid provided by the Department of Education and $280.5 million by the Department of Defense in 1999); Bush On Welfare: Tougher Work Rules, More State Control, Congress Daily, Feb. 26, 2002, p. 8 ($4.8 billion for the CCDBG program in 2001).

A significant portion of the funds appropriated for these programs reach religiously affiliated institutions, typically without restrictions on its subsequent use. For example, it has been reported that religious hospitals, which account for 18 percent of all hospital beds nationwide, rely on Medicare funds for 36 percent of their revenue. MergerWatch, New Study Details Public Funding of Religious Hospitals (Jan. 2002), http://www.mergerwatch.org/inthenews/publicfunding.html. Moreover, taking into account both Medicare and Medicaid, religious hospitals received nearly $45 billion from the federal fisc in 1998. *Ibid.* Federal aid

to religious schools is also substantial. Although data for all States are not available, data from Minnesota, for example, suggest that a substantial share of Pell Grant and other federal funds for college tuition reach religious schools. Roughly one-third or $27.1 million of the federal tuition dollars spent on students at schools in Minnesota were used at private 4-year colleges. Minnesota Higher Education Services Office, Financial Aid Awarded, Fiscal Year 1999: Grants, Loans, and Student Earning from Institution Jobs (Jan. 24, 2001). The vast majority of these funds—$23.5 million—flowed to religiously affiliated institutions. *Ibid.*

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause, see *post*, at 709–710, n. 19 (SOUTER, J., dissenting), it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases. See *post*, at 685–686 (STEVENS, J., dissenting); *post*, at 715–716 (SOUTER, J., dissenting); *post*, p. 717 (BREYER, J., dissenting).

II

Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had "a secular legislative purpose," if its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and if it did "not foster an excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (internal quotation marks omitted). In *Agostini* v. *Felton*, 521 U. S. 203, 218, 232–233 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid.*, and the degree of entangle-

ment has implications for whether a statute advances or inhibits religion, see *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring). The test today is basically the same as that set forth in *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 222 (1963) (citing *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947); *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961)), over 40 years ago.

The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, *Lemon* v. *Kurtzman*, *supra*, at 613–614, or, as I have put it, of "endors[ing] or disapprov[ing] . . . religion," *Lynch* v. *Donnelly*, *supra*, at 691–692 (concurring opinion); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 69–70 (1985) (O'Connor, J., concurring in judgment). See also *ante*, at 652. Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause. See *ante*, at 652–653.

Justice Souter portrays this inquiry as a departure from *Everson*. See *post*, at 687–688 (dissenting opinion). A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." *Everson*, *supra*, at 18; see also *Schempp*, *supra*, at 218, 222.

How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test surely does not betray *Everson*.

III

There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools. See *ante*, at 653–654. JUSTICE SOUTER rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects. In particular, a "neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction." *Post*, at 697 (dissenting opinion). JUSTICE SOUTER doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private voucher schools. See *post*, at 704–705. But JUSTICE SOUTER's notion of neutrality is inconsistent with that in our case law. As we put it in *Agostini*, government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U. S., at 231.

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents. The District Court record demonstrates that nonreligious schools were able to compete effectively

with Catholic and other religious schools in the Cleveland voucher program. See *ante*, at 656–657, n. 4. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community and magnet schools rather than seeking vouchers at all. *Supra*, at 663–664. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school. See 234 F. 3d 945, 969 (CA6 2000) (Ryan, J., concurring in part and dissenting in part); Affidavit of David L. Brennan ¶ 8, App. 147a.

To support his hunch about the effect of the cap on tuition under the voucher program, Justice Souter cites national data to suggest that, on average, Catholic schools have a cost advantage over other types of schools. See *post*, at 705–706, n. 15 (dissenting opinion). Even if national statistics were relevant for evaluating the Cleveland program, Justice Souter ignores evidence which suggests that, at a national level, nonreligious private schools may target a market for a different, if not a higher, quality of education. For example, nonreligious private schools are smaller, see U. S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey, 1997–1998 (Oct. 1999) (Table 60) (87 and 269 students per private nonreligious and Catholic elementary school, respectively); have smaller class sizes, see *ibid.* (9.4 and 18.8 students per teacher at private nonreligious and Catholic elementary schools, respectively); have more highly educated teachers, see U. S. Dept. of Ed., National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–1994 (NCES 97–459, July 1997) (Table 3.4) (37.9 percent of nonreligious private school teachers but only 29.9 percent of Catholic school teachers have Master's degrees); and have principals with longer job tenure than Catholic schools, see *ibid.* (Table 3.7) (average ten-

ure of principals at private nonreligious and Catholic schools is 8.2 and 4.7 years, respectively).

Additionally, JUSTICE SOUTER's theory that the Cleveland voucher program's cap on the tuition encourages low-income students to attend religious schools ignores that these students receive nearly double the amount of tuition assistance under the community schools program than under the voucher program and that none of the community schools is religious. See *ante*, at 647.

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. *Ante*, at 656–660. Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own, see *post*, at 704 (SOUTER, J., dissenting), says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. *Supra* this page. This is impressive given evidence in the record that the present litigation has discouraged the entry of some nonreligious private schools into the voucher program. Declaration of David P. Zanotti ¶¶ 5, 10, App. 225a, 227a. Finally, as demonstrated above, the Cleveland program does not establish financial incentives to undertake a religious education.

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered. In these cases, parents who were eligible to

apply for a voucher also had the option, at a minimum, to send their children to community schools. Yet the Court of Appeals chose not to look at community schools, let alone magnet schools, when evaluating the Cleveland voucher program. See 234 F. 3d, at 958. That decision was incorrect. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions. The record indicates that, in 1999, two nonreligious private schools that had previously served 15 percent of the students in the voucher program were prompted to convert to community schools because parents were concerned about the litigation surrounding the program, and because a new community schools program provided more per-pupil financial aid. Many of the students that enrolled in the two schools under the voucher program transferred to the community schools program and continued to attend these schools. See Affidavit of David L. Brennan ¶¶ 3, 10, App. 145a, 147a; Declaration of David P. Zanotti ¶¶ 4–10, *id.*, at 225a–227a. This incident provides strong evidence that both parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options. *Ante*, at 655. Not surprisingly, respondents present no evidence that any students who were candidates for a voucher were denied slots in a community school or a magnet school. Indeed, the record suggests the opposite with respect to community schools. See Affidavit of David L. Brennan ¶ 8, App. 147a.

Justice Souter nonetheless claims that, of the 10 community schools operating in Cleveland during the 1999–2000 school year, 4 were unavailable to students with vouchers and 4 others reported poor test scores. See *post*, at 702–

703, n. 10 (dissenting opinion). But that analysis unreasonably limits the choices available to Cleveland parents. It is undisputed that Cleveland's 24 magnet schools are reasonable alternatives to voucher schools. See *post*, at 701–702, n. 9 (SOUTER, J., dissenting); http://www.cmsdnet.net/administration/EducationalServices/magnet.htm (June 20, 2002). And of the four community schools JUSTICE SOUTER claims are unavailable to voucher students, he is correct only about one (Life Skills Center of Cleveland). Affidavit of Steven M. Puckett ¶ 12, App. 162a. JUSTICE SOUTER rejects the three other community schools (Horizon Science Academy, Cleveland Alternative Learning, and International Preparatory School) because they did not offer primary school classes, were targeted toward poor students or students with disciplinary or academic problems, or were not in operation for a year. See *post*, at 702–703, n. 10. But a community school need not offer primary school classes to be an alternative to religious middle schools, and catering to impoverished or otherwise challenged students may make a school more attractive to certain inner-city parents. Moreover, the one community school that was closed in 1999–2000 was merely looking for a new location and was operational in other years. See Affidavit of Steven M. Puckett ¶ 12, App. 162a; Ohio Dept. of Ed., Office of School Options, Community Schools, Ohio's Community School Directory (June 22, 2002), http://www.ode.state.oh.us/community_schools/community_school_directory/default.asp. Two more community schools were scheduled to open after the 1999–2000 school year. See Affidavit of Steven M. Puckett ¶ 13, App. 163a.

Of the six community schools that JUSTICE SOUTER admits as alternatives to the voucher program in 1999–2000, he notes that four (the Broadway, Cathedral, Chapelside, and Lincoln Park campuses of the Hope Academy) reported lower test scores than public schools during the school year *after* the District Court's grant of summary judgment to re-

spondents, according to report cards prepared by the Ohio Department of Education. See *post*, at 702–703, n. 10 (dissenting opinion). (One, Old Brooklyn Montessori School, performed better than public schools. *Ibid.;* see also Ohio Dept. of Ed., 2001 Community School Report Card, Old Brooklyn Montessori School 5 (community school scored higher than public schools in four of five subjects in 1999–2000).) These report cards underestimate the value of the four Hope Academy schools. Before they entered the community school program, two of them participated in the voucher program. Although they received far less state funding in that capacity, they had among the highest rates of parental satisfaction of all voucher schools, religious or nonreligious. See P. Peterson, W. Howell, & J. Greene, An Evaluation of the Cleveland Voucher Program after Two Years 6, Table 4 (June 1999) (hereinafter Peterson). This is particularly impressive given that a Harvard University study found that the Hope Academy schools attracted the "poorest and most educationally disadvantaged students." J. Greene, W. Howell, P. Peterson, Lessons from the Cleveland Scholarship Program 22, 24 (Oct. 15, 1997). Moreover, Justice Souter's evaluation of the Hope Academy schools assumes that the only relevant measure of school quality is academic performance. It is reasonable to suppose, however, that parents in the inner city also choose schools that provide discipline and a safe environment for their children. On these dimensions some of the schools that Justice Souter derides have performed quite ably. See Peterson, Table 7.

Ultimately, Justice Souter relies on very narrow data to draw rather broad conclusions. One year of poor test scores at four community schools targeted at the most challenged students from the inner city says little about the value of those schools, let alone the quality of the 6 other community schools and 24 magnet schools in Cleveland. Justice Souter's use of statistics confirms the Court's wisdom in refus-

ing to consider them when assessing the Cleveland program's constitutionality. See *ante*, at 658. What appears to motivate JUSTICE SOUTER's analysis is a desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. See *post*, at 700, 701–702, n. 9 (dissenting opinion). But the goal of the Court's Establishment Clause jurisprudence is to determine whether, after the Cleveland voucher program was enacted, parents were free to direct state educational aid in either a nonreligious or religious direction. See *ante*, at 655–656. That inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program.

Based on the reasoning in the Court's opinion, which is consistent with the realities of the Cleveland educational system, I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.

JUSTICE THOMAS, concurring.

Frederick Douglass once said that "[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."[1] Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an

[1] The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894, in 5 The Frederick Douglass Papers 623 (J. Blassingame & J. McKivigan eds. 1992) (hereinafter Douglass Papers).

example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.

The dissents and respondents wish to invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State's neutral efforts to provide greater educational opportunity for underprivileged minority students. Today's decision properly upholds the program as constitutional, and I join it in full.

I

This Court has often considered whether efforts to provide children with the best educational resources conflict with constitutional limitations. Attempts to provide aid to religious schools or to allow some degree of religious involvement in public schools have generated significant controversy and litigation as States try to navigate the line between the secular and the religious in education. See generally *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203, 237–238 (1948) (Jackson, J., concurring) (noting that the Constitution does not tell judges "where the secular ends and the sectarian begins in education"). We have recently decided several cases challenging federal aid programs that include religious schools. See, *e. g.*, *Mitchell* v. *Helms*, 530 U. S. 793 (2000); *Agostini* v. *Felton*, 521 U. S. 203 (1997). To determine whether a federal program survives scrutiny under the Establishment Clause, we have considered whether it has a secular purpose and whether it has the primary effect of advancing or inhibiting religion. See *Mitchell*, *supra*, at 807–808. I agree with the Court that Ohio's program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the States.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." On its face, this provision places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government.[2] Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.

The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law. It guarantees citizenship to all individuals born or naturalized in the United States and provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As Justice Harlan noted, the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty." *Plessy* v. *Ferguson*, 163 U. S. 537, 555 (1896) (dissenting opinion). When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.

Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neu-

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[2] See, *e. g.*, *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 309–310 (1963) (Stewart, J., dissenting) ("[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments"); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 113 (1985) (REHNQUIST, J., dissenting).

tral basis—than the Federal Government." *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 699 (1970) (Harlan, J., concurring). Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.[3]

Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights.[4] But I

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[3] Several Justices have suggested that rights incorporated through the Fourteenth Amendment apply in a different manner to the States than they do to the Federal Government. For instance, Justice Jackson stated, "[t]he inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms." *Beauharnais* v. *Illinois*, 343 U. S. 250, 294 (1952) (dissenting opinion). Justice Harlan noted: "The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal." *Roth* v. *United States*, 354 U. S. 476, 503–504 (1957) (dissenting opinion). See also *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting).

[4] In particular, these rights inhere in the Free Exercise Clause, which unlike the Establishment Clause protects individual liberties of religious worship. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized." *Schempp*, *supra*, at 312 (Stewart, J., dissenting). See also Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1159 (1991) ("[T]he free exercise clause was paradigmatically about citizen rights, not state rights; it thus invites incor-

cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

II

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children.[5] This is a choice that those with greater means have routinely exercised.

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poration. Indeed, this clause was specially concerned with the plight of minority religions, and thus meshes especially well with the minority-rights thrust of the Fourteenth Amendment"); Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DePaul L. Rev. 1191, 1206–1207 (1990).

[5] This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children. "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." *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925). But see *Troxel* v. *Granville,* 530 U. S. 57, 80 (2000) (THOMAS, J., concurring in judgment).

Cleveland parents now have a variety of educational choices. There are traditional public schools, magnet schools, and privately run community schools, in addition to the scholarship program. Currently, 46 of the 56 private schools participating in the scholarship program are church affiliated (35 are Catholic), and 96 percent of students in the program attend religious schools. See App. 281a–286a; 234 F. 3d 945, 949 (CA6 2000). Thus, were the Court to disallow the inclusion of religious schools, Cleveland children could use their scholarships at only 10 private schools.

In addition to expanding the reach of the scholarship program, the inclusion of religious schools makes sense given Ohio's purpose of increasing educational performance and opportunities. Religious schools, like other private schools, achieve far better educational results than their public counterparts. For example, the students at Cleveland's Catholic schools score significantly higher on Ohio proficiency tests than students at Cleveland public schools. Of Cleveland eighth graders taking the 1999 Ohio proficiency test, 95 percent in Catholic schools passed the reading test, whereas only 57 percent in public schools passed. And 75 percent of Catholic school students passed the math proficiency test, compared to only 22 percent of public school students. See Brief for Petitioners in No. 00–1777, p. 10. But the success of religious and private schools is in the end beside the point, because the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can in fact provide improved education to underprivileged urban children.

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture,[6] failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time

[6] See, *e. g.*, N. Edwards, School in the American Social Order: The Dynamics of American Education 360–362 (1947).

of Reconstruction, blacks considered public education "a matter of personal liberation and a necessary function of a free society." J. Anderson, Education of Blacks in the South, 1860–1935, p. 18 (1988). Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.[7] Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." Black Education: Myths and Tragedies 228 (1972). The same is true today. An individual's life prospects increase dramatically with each successfully completed phase of education. For instance, a black high

[7] Minority and low-income parents express the greatest support for parental choice and are most interested in placing their children in private schools. "[T]he appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system." T. Moe, Schools, Vouchers, and the American Public 164 (2001). Nearly three-fourths of all public school parents with an annual income less than $20,000 support vouchers, compared to 57 percent of public school parents with an annual income of over $60,000. See *id.*, at 214 (Table 7–3). In addition, 75 percent of black public school parents support vouchers, as do 71 percent of Hispanic public school parents. *Ibid.*

school dropout earns just over $13,500, but with a high school degree the average income is almost $21,000. Blacks with a bachelor's degree have an average annual income of about $37,500, and $75,500 with a professional degree. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 140 (2001) (Table 218). Staying in school and earning a degree generates real and tangible financial benefits, whereas failure to obtain even a high school degree essentially relegates students to a life of poverty and, all too often, of crime.[8] The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

* * *

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children.[9] These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society's other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment's prohibition against distinctions based on race. See *Plessy*, 163 U. S., at 555 (Harlan, J., dissenting). By contrast, school choice programs that involve religious schools

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[8] In 1997, approximately 68 percent of prisoners in state correctional institutions did not have a high school degree. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics-2000, p. 519 (Table 6.38).

[9] These programs include tax credits for such schooling. In addition, 37 States have some type of charter school law. See School Choice 2001: What's Happening in the States xxv (R. Moffitt, J. Garrett, & J. Smith eds. 2001) (Table 1).

appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.

As Frederick Douglass poignantly noted, "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."[10]

JUSTICE STEVENS, dissenting.

Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a "law respecting an establishment of religion" within the meaning of the First Amendment? In answering that question, I think we should ignore three factual matters that are discussed at length by my colleagues.

First, the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality. In the 1999–2000 school year, that program provided relief to less than five percent of the students enrolled in the district's schools. The solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program.[1] Of course, the emergency may have

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[10] Douglass Papers 623.

[1] Ohio is currently undergoing a major overhaul of its public school financing pursuant to an order of the Ohio Supreme Court in *DeRolph* v. *State*, 93 Ohio St. 3d 309, 754 N. E. 2d 1184 (2001). The Court ought, at least, to allow that reform effort and the district's experimentation with alternative public schools to take effect before relying on Cleveland's educational crisis as a reason for state financed religious education.

given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason for upholding the program.

Second, the wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion." The State may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the State is still required to provide a public education and it is the State's decision to fund private school education over and above its traditional obligation that is at issue in these cases.[2]

Third, the voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds.

For the reasons stated by JUSTICE SOUTER and JUSTICE BREYER, I am convinced that the Court's decision is profoundly misguided. Admittedly, in reaching that conclusion

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[2] The Court suggests that an education at one of the district's community or magnet schools is provided "largely at state expense." *Ante*, at 660, n. 6. But a public education at either of these schools is provided *entirely* at state expense—as the State is required to do.

I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

I respectfully dissent.

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

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini* v. *Felton*, 521 U. S. 203, 254 (1997) (SOUTER, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause[1] to public funding of benefits to religious schools was settled in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), which inau-

[1] "Congress shall make no law respecting an establishment of religion," U. S. Const., Amdt. 1.

gurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent:

> "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." *Id.*, at 16.

The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson.*

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.[2] Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

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[2] See, *e. g.,* App. 319a (Saint Jerome School Parent and Student Handbook 1999–2000, p. 1) ("FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian life"); *id.,* at 347a (Westside Baptist Christian School Parent-Student Handbook, p. 7) ("Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth").

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition of the cases, which I tried to classify in some detail in an earlier opinion, see *Mitchell* v. *Helms*, 530 U. S. 793, 873–899 (2000) (dissenting opinion), but to set out the broad doctrinal stages covered in the modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria

of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

A

Everson v. *Board of Ed. of Ewing* inaugurated the modern development of Establishment Clause doctrine at the behest of a taxpayer challenging state provision of "tax-raised funds to pay the bus fares of parochial school pupils" on regular city buses as part of a general scheme to reimburse the public-transportation costs of children attending both public and private nonprofit schools. 330 U. S., at 17. Although the Court split, no Justice disagreed with the basic doctrinal principle already quoted, that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach . . . religion." *Id.*, at 16. Nor did any Member of the Court deny the tension between the New Jersey program and the aims of the Establishment Clause. The majority upheld the state law on the strength of rights of religious-school students under the Free Exercise Clause, *id.*, at 17–18, which was thought to entitle them to free public transportation when offered as a "general government servic[e]" to all schoolchildren, *id.*, at 17. Despite the indirect benefit to religious education, the transportation was simply treated like "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.*, at 17–18, and, most significantly, "state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic," *id.*, at 17. The dissenters, however, found the benefit to religion too pronounced to survive the general principle of no establishment, no aid, and they described it as running counter to every objective served by the establishment ban: New Jersey's use of tax-raised funds forced a taxpayer to "contribut[e] to the propagation of opinions which he disbelieves in so far as . . . religions differ," *id.*, at 45 (internal quotation marks omitted); it exposed religious

liberty to the threat of dependence on state money, *id.*, at 53; and it had already sparked political conflicts with opponents of public funding, *id.*, at 54.[3]

The difficulty of drawing a line that preserved the basic principle of no aid was no less obvious some 20 years later in *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), which upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools, a result not self-evident from *Everson*'s "general government services" rationale. The Court relied instead on the theory that the in-kind aid could only be used for secular educational purposes, 392 U. S., at 243, and found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools," *id.*, at 243–244.[4] Justice Black, who wrote *Everson*, led the dissenters. Textbooks, even when "'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect," 392 U. S., at 252, he wrote, and Justice Douglas raised other objections underlying the establishment ban, *id.*, at 254–266. Religious schools would request those books most in keeping with their faiths, and public boards would have final approval power: "If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church

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[3] See *Everson*, 330 U. S., at 54, n. 47 (noting that similar programs had been struck down in six States, upheld in eight, and *amicus curiae* briefs filed by "three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York").

[4] The Court noted that "the record contains no evidence that any of the private schools . . . previously provided textbooks for their students," and "[t]here is some evidence that at least some of the schools did not." *Allen*, 392 U. S., at 244, n. 6. This was a significant distinction: if the parochial schools provided secular textbooks to their students, then the State's provision of the same in their stead might have freed up church resources for allocation to other uses, including, potentially, religious indoctrination.

and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn . . . ." *Id.*, at 256 (Douglas, J., dissenting). The scheme was sure to fuel strife among religions as well: "we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church." *Id.*, at 265.

Transcending even the sharp disagreement, however, was

> "the consistency in the way the Justices went about deciding the case . . . . Neither side rested on any facile application of the 'test' or any simplistic reliance on the generality or evenhandedness 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. . . . [T]he stress was on the practical significance of the actual benefits received by the schools." *Mitchell*, 530 U. S., at 876 (SOUTER, J., dissenting).

B

Allen recognized the reality that "religious schools pursue two goals, religious instruction and secular education," 392 U. S., at 245; if state aid could be restricted to serve the second, it might be permissible under the Establishment Clause. But in the retrenchment that followed, the Court saw that the two educational functions were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 620 (1971) (striking down program supplementing salaries for teachers of secular subjects in private schools). To avoid

the entanglement, the Court's focus in the post-*Allen* cases was on the principle of divertibility, on discerning when ostensibly secular government aid to religious schools was susceptible to religious uses. The greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was under the no-aid principle. On the one hand, the Court tried to be practical, and when the aid recipients were not so "pervasively sectarian" that their secular and religious functions were inextricably intertwined, the Court generally upheld aid earmarked for secular use. See, *e. g.*, *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736 (1976); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *Tilton* v. *Richardson*, 403 U. S. 672 (1971). But otherwise the principle of nondivertibility was enforced strictly, with its violation being presumed in most cases, even when state aid seemed secular on its face. Compare, *e. g.*, *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472, 480 (1973) (striking down state program reimbursing private schools' administrative costs for teacher-prepared tests in compulsory secular subjects), with *Wolman* v. *Walter*, 433 U. S. 229, 255 (1977) (upholding similar program using standardized tests); and *Meek* v. *Pittenger*, 421 U. S. 349, 369–372 (1975) (no public funding for staff and materials for "auxiliary services" like guidance counseling and speech and hearing services), with *Wolman*, *supra*, at 244 (permitting state aid for diagnostic speech, hearing, and psychological testing).

The fact that the Court's suspicion of divertibility reflected a concern with the substance of the no-aid principle is apparent in its rejection of stratagems invented to dodge it. In *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), for example, the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. The *Nyquist* Court dismissed warranties of a "statistical guarantee," that the scheme provided at most 15% of the total cost of an education at a religious school,

id., at 787–788, which could presumably be matched to a secular 15% of a child's education at the school. And it rejected the idea that the path of state aid to religious schools might be dispositive: "far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.*, at 781. The point was that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783.[5] *Nyquist* thus held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses. The focus remained on what the public money bought when it reached the end point of its disbursement.

C

Like all criteria requiring judicial assessment of risk, divertibility is an invitation to argument, but the object of the arguments provoked has always been a realistic assessment of facts aimed at respecting the principle of no aid. In *Mueller* v. *Allen*, 463 U. S. 388 (1983), however, that object began to fade, for *Mueller* started down the road from realism to formalism.

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[5] The Court similarly rejected a path argument in *Wolman* v. *Walter*, 433 U. S. 229 (1977), overruled by *Mitchell* v. *Helms*, 530 U. S. 793 (2000), where the State sought to distinguish *Meek* v. *Pittenger*, 421 U. S. 349 (1975), overruled by *Mitchell*, *supra*, based on the fact that, in *Meek*, the State had lent educational materials to individuals rather than to schools. "Despite the technical change in legal bailee," the Court explained, "the program in substance is the same as before," and "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Wolman*, *supra*, at 250. Conversely, the Court upheld a law reimbursing private schools for state-mandated testing, dismissing a proffered distinction based on the indirect path of aid in an earlier case as "a formalistic dichotomy that bears . . . little relationship either to common sense or to the realities of school finance." *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 658 (1980).

The aid in *Mueller* was in substance indistinguishable from that in *Nyquist*, see 463 U. S., at 396–397, n. 6, and both were substantively difficult to distinguish from aid directly to religious schools, *id.*, at 399. But the Court upheld the Minnesota tax deductions in *Mueller*, emphasizing their neutral availability for religious and secular educational expenses and the role of private choice in taking them. *Id.*, at 397–398. The Court relied on the same two principles in *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), approving one student's use of a vocational training subsidy for the blind at a religious college, characterizing it as aid to individuals from which religious schools could derive no "large" benefit: "the full benefits of the program [are not] limited, in large part or in whole, to students at sectarian institutions." *Id.*, at 488.

School Dist. of Grand Rapids v. *Ball*, 473 U. S. 373, 395–396, and n. 13 (1985), overruled in part by *Agostini* v. *Felton*, 521 U. S. 203 (1997), clarified that the notions of evenhandedness neutrality and private choice in *Mueller* did not apply to cases involving direct aid to religious schools, which were still subject to the divertibility test. But in *Agostini*, where the substance of the aid was identical to that in *Ball*, public employees teaching remedial secular classes in private schools, the Court rejected the 30-year-old presumption of divertibility, and instead found it sufficient that the aid "supplement[ed]" but did not "supplant" existing educational services, 521 U. S., at 210, 230. The Court, contrary to *Ball*, viewed the aid as aid "directly to the eligible students . . . no matter where they choose to attend school." 521 U. S., at 229.

In the 12 years between *Ball* and *Agostini*, the Court decided not only *Witters*, but two other cases emphasizing the form of neutrality and private choice over the substance of aid to religious uses, but always in circumstances where any aid to religion was isolated and insubstantial. *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993), like *Wit-*

ters, involved one student's choice to spend funds from a general public program at a religious school (to pay for a sign-language interpreter). As in *Witters*, the Court reasoned that "[d]isabled children, not sectarian schools, [were] the primary beneficiaries . . . ; to the extent sectarian schools benefit at all . . . , they are only incidental beneficiaries." 509 U. S., at 12. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), like *Zobrest* and *Witters*, involved an individual and insubstantial use of neutrally available public funds for a religious purpose (to print an evangelical magazine).

To be sure, the aid in *Agostini* was systemic and arguably substantial, but, as I have said, the majority there chose to view it as a bare "supplement." 521 U. S., at 229. And this was how the controlling opinion described the systemic aid in our most recent case, *Mitchell* v. *Helms*, 530 U. S. 793 (2000), as aid going merely to a "portion" of the religious schools' budgets, *id.*, at 860 (O'CONNOR, J., concurring in judgment). The plurality in that case did not feel so uncomfortable about jettisoning substance entirely in favor of form, finding it sufficient that the aid was neutral and that there was virtual private choice, since any aid "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.*, at 816. But that was only the plurality view.

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.

II

Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and

free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

A

Consider first the criterion of neutrality. As recently as two Terms ago, a majority of the Court recognized that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause, *Mitchell*, 530 U. S., at 838–839 (O'CONNOR, J., concurring in judgment); *id.*, at 884 (SOUTER, J., dissenting). But at least in its limited significance, formal neutrality seemed to serve some purpose. Today, however, the majority employs the neutrality criterion in a way that renders it impossible to understand.

Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. *Id.*, at 809–810 (plurality opinion); *id.*, at 878–884 (SOUTER, J., dissenting) (three senses of "neutrality").[6] Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools, 474 U. S., at 488; it did not tend to provide more or less aid depending on which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular

[6] JUSTICE O'CONNOR apparently no longer distinguishes between this notion of evenhandedness neutrality and the free-exercise neutrality in *Everson*. Compare *ante*, at 669 (concurring opinion), with *Mitchell*, 530 U. S., at 839 (opinion concurring in judgment) ("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").

schools. Neither did any condition of Zobrest's interpreter's subsidy favor religious education. See 509 U. S., at 10.

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as $2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, Ohio Rev. Code Ann. §3313.976 (West Supp. 2002), but to every provision for educational opportunity: "The program permits the participation of *all* schools within the district, [as well as public schools in adjacent districts], religious or nonreligious." *Ante,* at 653 (emphasis in original). The majority then finds confirmation that "participation of *all* schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, *ante,* at 654, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "*all* schools": public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), App. 166a, whereas the tuition voucher schools (which

turn out to be mostly religious) can receive up to $2,250, *id.*, at 56a.[7]

Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the immediate recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of "*all* schools" is ostensibly helpful to the majority position.

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of

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[7] The majority's argument that public school students within the program "direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school," *ante*, at 654, n. 3, was decisively rejected in *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782–783, n. 38 (1973): "We do not agree with the suggestion . . . that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. . . . The grants to parents of private school children are given in addition to the right that they have to send their children to public schools 'totally at state expense.' And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause."

possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," *ante*, at 655–656, ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents.[8] The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

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[8] In some earlier cases, "private choice" was sensibly understood to go beyond the mere formalism of path, to ensure that aid was neither systemic nor predestined to go to religious uses. Witters, for example, had a virtually unlimited choice among professional training schools, only a few of which were religious; and Zobrest was simply one recipient who chose to use a government-funded interpreter at a religious school over a secular school, either of which was open to him. But recent decisions seem to have stripped away any substantive bite, as "private choice" apparently means only that government aid follows individuals to religious schools. See, *e. g.*, *Agostini* v. *Felton*, 521 U. S. 203, 229 (1997) (state aid for remedial instruction at a religious school goes "directly to the eligible students . . . no matter where they choose to attend school").

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. See *supra*, at 697 (noting the same result under the majority's formulation of the neutrality criterion). And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. In addition to secular private schools (129 students), the majority considers public schools with tuition assistance (roughly 1,400 students), magnet schools (13,000 students), and community schools (1,900 students), and concludes that fewer than 20% of pupils receive state vouchers to attend religious schools. *Ante*, at 659. (In fact, the numbers would seem even more favorable to the majority's argument if enrollment in traditional public schools without tutoring were considered, an alternative the majority thinks relevant to the private choice enquiry, *ante*, at 655.) JUSTICE O'CONNOR focuses on how much money is spent on each educational option and notes that at most $8.2 million is spent on vouchers for students attending religious schools, *ante*, at 664 (concurring opinion), which is only 6% of the State's expenditure if one includes separate funding for Cleveland's community ($9.4 million) and magnet ($114.8 million) public schools. The variations show how results may shift when a judge can pick and choose the alternatives to use in the comparisons, and they also show what dependably comfortable results the choice crite-

rion will yield if the identification of relevant choices is wide open. If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Confining the relevant choices to spending choices, on the other hand, is not vulnerable to comparable criticism. Although leaving the selection of alternatives for choice wide open, as the majority would, virtually guarantees the availability of a "choice" that will satisfy the criterion, limiting the choices to spending choices will not guarantee a negative result in every case. There may, after all, be cases in which a voucher recipient will have a real choice, with enough secular private school desks in relation to the number of religious ones, and a voucher amount high enough to meet secular private school tuition levels. See *infra*, at 704–707. But, even to the extent that choice-to-spend does tend to limit the number of religious funding options that pass muster, the choice criterion has to be understood this way in order, as I have said, for it to function as a limiting principle.[9] Otherwise

[9] The need for a limit is one answer to JUSTICE O'CONNOR, who argues at length that community schools should factor in the "private choice" calculus. *Ante*, at 672–673 (concurring opinion). To be fair, community schools do exhibit some features of private schools: they are autonomously managed without any interference from the school district or State and two have prior histories as private schools. It may be, then, that community schools might arguably count as choices because they are not like other public schools run by the State or municipality, but in substance merely private schools with state funding outside the voucher program.

But once any public school is deemed a relevant object of choice, there is no stopping this progression. For example, both the majority and JUSTICE O'CONNOR characterize public magnet schools as an independent category of genuine educational options, simply because they are "nontraditional" public schools. But they do not share the "private school" features of community schools, and the only thing that distinguishes them

there is surely no point in requiring the choice to be a true or real or genuine one.[10]

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from "traditional" public schools is their thematic focus, which in some cases appears to be nothing more than creative marketing. See, *e. g.*, Cleveland Municipal School District, Magnet and Thematic Programs/Schools (including, as magnet schools, "[f]undamental [e]ducation [c]enters," which employ "[t]raditional classrooms and teaching methods with an emphasis on basic skills"; and "[a]ccelerated [l]earning" schools, which rely on "[i]nstructional strategies [that] provide opportunities for students to build on individual strengths, interests and talents").

[10] And how should we decide which "choices" are "genuine" if the range of relevant choices is theoretically wide open? The showcase educational options that the majority and JUSTICE O'CONNOR trumpet are Cleveland's 10 community schools, but they are hardly genuine choices. Two do not even enroll students in kindergarten through third grade, App. 162a, and thus parents contemplating participation in the voucher program cannot select those schools. See Ohio Rev. Code Ann. §3313.975(C)(1) (West Supp. 2002) ("[N]o new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three"). One school was not "in operation" as of 1999, and in any event targeted students below the federal poverty line, App. 162a, not all voucher-eligible students, see n. 21, *infra.* Another school was a special population school for students with "numerous suspensions, behavioral problems and who are a grade level below their peers," App. 162a, which, as JUSTICE O'CONNOR points out, may be "more attractive to certain inner-city parents," *ante,* at 674, but is probably not an attractive "choice" for most parents.

Of the six remaining schools, the most recent statistics on fourth-grade student performance (unavailable for one school) indicate: three scored well below the Cleveland average in each of five tested subjects on state proficiency examinations, one scored above in one subject, and only one community school, Old Brooklyn Montessori School, was even an arguable competitor, scoring slightly better than traditional public schools in three subjects, and somewhat below in two. See Ohio Dept. of Ed., 2002 Community School Report Card, Hope Academy, Lincoln Park, p. 5; *id.*, Hope Academy, Cathedral Campus, at 5; *id.*, Hope Academy, Chapelside Campus, at 5; *id.*, Hope Academy, Broadway Campus, at 5; *id.*, Old Brooklyn Montessori School, at 5; 2002 District Report Card, Cleveland Municipal School District, p. 1. These statistics are consistent with 1999 test results, which were only available for three of the schools. Brief for Ohio School Boards Association et al. as *Amici Curiae* 26–28 (for example, 34.3% of students

It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III, *infra*, shows that it is not. The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999–2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. See App. 281a–286a. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents. One answer to these statistics, for example, which would be consistent with the genuine choice claimed to be operating, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion. This would not, in my view, render the scheme constitutional, but it would speak to the majority's choice criterion.

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in the Cleveland City School District were proficient in math, as compared with 3.3% in Hope Chapelside and 0% in Hope Cathedral).

I think that objective academic excellence should be the benchmark in comparing schools under the majority's test; JUSTICE O'CONNOR prefers comparing educational options on the basis of subjective "parental satisfaction," *ante*, at 675, and I am sure there are other plausible ways to evaluate "genuine choices." Until now, our cases have never talked about the quality of educational options by whatever standard, but now that every educational option is a relevant "choice," this is what the "genuine and independent private choice" enquiry, *ante*, at 652 (opinion of the Court), would seem to require if it is to have any meaning at all. But if that is what genuine choice means, what does this enquiry have to do with the Establishment Clause?

Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. App. to Pet. for Cert. in No. 00–1777, p. 147a.[11] The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.[12]

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions, App. 281a–286a, might be consistent with true choice if the students "chose" their religious schools over a wide array of private nonreligious options, or if it could be shown generally that Ohio's program had no effect on educational choices and thus no impermissible effect of advancing religious education. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, see Brief for California Alliance for Public Schools as *Amicus Curiae* 15, and there is no indication that these schools have many open seats.[13] Second, the

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[11] For example, 40% of families who sent their children to private schools for the first time under the voucher program were Baptist, App. 118a, but only one school, enrolling 44 voucher students, is Baptist, *id.*, at 284a.

[12] When parents were surveyed as to their motives for enrolling their children in the voucher program, 96.4% cited a better education than available in the public schools, and 95% said their children's safety. *Id.*, at 69a–70a. When asked specifically in one study to identify the most important factor in selecting among participating private schools, 60% of parents mentioned academic quality, teacher quality, or the substance of what is taught (presumably secular); only 15% mentioned the religious affiliation of the school as even a consideration. *Id.*, at 119a.

[13] JUSTICE O'CONNOR points out that "there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program." *Ante*, at 671. But there is equally no

$2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students."[14] By comparison, the average tuition at participating Catholic schools in Cleveland in 1999–2000 was $1,592, almost $1,000 below the cap.[15]

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evidence to support her assertion that "many parents with vouchers selected nonreligious private schools over religious alternatives," *ibid.*, and in fact the evidence is to the contrary, as only 129 students used vouchers at private nonreligious schools.

[14] General Accounting Office Report No. 01–914, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee 25 (Aug. 2001) (GAO Report). Of the 10 nonreligious private schools that "participate" in the Cleveland voucher program, 3 currently enroll no voucher students. And of the remaining seven schools, one enrolls over half of the 129 students that attend these nonreligious schools, while only two others enroll more than 8 voucher students. App. 281a–286a. Such schools can charge full tuition to students whose families do not qualify as "low income," but unless the number of vouchers are drastically increased, it is unlikely that these students will constitute a large fraction of voucher recipients, as the program gives preference in the allocation of vouchers to low-income children. See Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2002).

[15] GAO Report 25. A 1993–1994 national study reported a similar average tuition for Catholic elementary schools ($1,572), but higher tuition for other religious schools ($2,213), and nonreligious schools ($3,773). U. S. Dept. of Ed., Office of Educational Research and Improvement, National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–94 (NCES 1997–459 June 1997) (Table 1.5). The figures are explained in part by the lower teaching expenses of the religious schools and general support by the parishes that run them. Catholic schools, for example, received 24.1% of their revenue from parish subsidies in the 2000–2001 school year. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001). Catholic schools also often rely on priests or members of religious communities to serve as principals, 32% of 550 reporting schools in one study, *id.*, at 21; at the elementary school level, the average salary of religious sisters serving as principals in 2000–2001 was $28,876, as compared to lay principals, who received on average $45,154,

Of course, the obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist. Private choice, if as robust as that available to the seminarian in *Witters*, would then be "true private choice" under the majority's criterion. But it is simply unrealistic to presume that parents of elementary and middle school students in Cleveland will have a range of secular and religious choices even arguably comparable to the statewide program for vocational and higher education in *Witters*. And to get to that hypothetical point would require that such massive financial support be made available to religion as to disserve every objective of the Establishment Clause even more than the present scheme does. See Part III–B, *infra*.[16]

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and public school principals who reported an average salary of $72,587. *Ibid.*

JUSTICE O'CONNOR argues that nonreligious private schools can compete with Catholic and other religious schools below the $2,500 tuition cap. See *ante*, at 670–671. The record does not support this assertion, as only three secular private schools in Cleveland enroll more than eight voucher students. See n. 14, *supra*. Nor is it true, as she suggests, that our national statistics are spurious because secular schools cater to a different market from Catholic or other religious schools: while there is a spectrum of nonreligious private schools, there is likely a commensurate range of low-end and high-end religious schools. My point is that at each level, the religious schools have a comparative cost advantage due to church subsidies, donations of the faithful, and the like. The majority says that nonreligious private schools in Cleveland derive similar benefits from "third-party contributions," *ante*, at 656, n. 4, but the one affidavit in the record that backs up this assertion with data concerns a private school for "emotionally disabled and developmentally delayed children" that received 11% of its budget from the United Way organization, App. 194a–195a, a large proportion to be sure, but not even half of the 24.1% of budget that Catholic schools on average receive in parish subsidies alone, see *supra* this note.

[16] The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as

There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, *ante*, at 654, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has.[17] For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed *arguendo* that the

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well. *Ante*, at 656–657, n. 4. The majority is dead right about this, and there is no inconsistency here: any voucher program that satisfied the majority's requirement of "true private choice" would be even more egregiously unconstitutional than the current scheme due to the substantial amount of aid to religious teaching that would be required.

[17] As the Court points out, *ante*, at 645–646, n. 1, an out-of-district public school that participates will receive a $2,250 voucher for each Cleveland student on top of its normal state funding. The basic state funding, though, is a drop in the bucket as compared to the cost of educating that student, as much of the cost (at least in relatively affluent areas with presumptively better academic standards) is paid by local income and property taxes. See Brief for Ohio School Boards Association et al. as *Amici Curiae* 19–21. The only adjacent district in which the voucher amount is close enough to cover the local contribution is East Cleveland City (local contribution, $2,019, see Ohio Dept. of Ed., 2002 Community School Report Card, East Cleveland City School District, p. 2), but its public-school system hardly provides an attractive alternative for Cleveland parents, as it too has been classified by Ohio as an "academic emergency" district. See *ibid.*

majority's formal criteria were satisfied on the facts, today's conclusion would be profoundly at odds with the Constitution. Proof of this is clear on two levels. The first is circumstantial, in the now discarded symptom of violation, the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. Each measure has received attention in previous cases. On one hand, the sheer quantity of aid, when delivered to a class of religious primary and secondary schools, was suspect on the theory that the greater the aid, the greater its proportion to a religious school's existing expenditures, and the greater the likelihood that public money was supporting religious as well as secular instruction. As we said in *Meek*, "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role" as the object of aid that comes in "substantial amounts." 421 U. S., at 365. Cf. *Nyquist*, 413 U. S., at 787–788 (rejecting argument that tuition assistance covered only 15% of education costs, presumably secular, at religious schools). Conversely, the more "attenuated [the] financial benefit . . . that eventually flows to parochial schools," the more the Court has been willing to find a form of state aid permissible. *Mueller*, 463 U. S., at 400.[18]

[18] The majority relies on *Mueller*, *Agostini*, and *Mitchell* to dispute the relevance of the large number of students that use vouchers to attend religious schools, *ante*, at 658, but the reliance is inapt because each of those cases involved insubstantial benefits to the religious schools, regardless of the number of students that benefited. See, *e. g.*, *Mueller*, 463 U. S., at 391 ($112 in tax benefit to the highest bracket taxpayer, see Brief for Respondents Becker et al. in *Mueller* v. *Allen*, O. T. 1982, No. 82–195, p. 5); *Agostini*, 521 U. S., at 210 (aid "must 'supplement, and in no case supplant' "); *Mitchell*, 530 U. S., at 866 (O'CONNOR, J., concurring in judgment) *("de minimis")*. See also *supra*, at 694–695.

On the other hand, the Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual chose to spend the State's money. See *Witters*, 474 U. S., at 488; cf. *Zobrest*, 509 U. S., at 12. When neither the design nor the implementation of an aid scheme channels a series of individual students' subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to be implicated. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case, see *ante*, at 651, is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious elementary and middle schools in the city of Cleveland.[19]

[19] No less irrelevant, and lacking even arguable support in our cases, is JUSTICE O'CONNOR's argument that the $8.2 million in tax-raised funds distributed under the Ohio program to religious schools is permissible under the Establishment Clause because it "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions," *ante*, at 665. Our cases have consistently held that state benefits at some level can go to religious institutions when the recipients are not pervasively sectarian, see, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672 (1971) (aid to church-related colleges and universities); *Bradfield* v. *Roberts*, 175 U. S. 291 (1899) (religious hospitals); when the benefit comes in the form of tax exemption or deduction, see, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970) (property-tax exemptions); *Mueller* v. *Allen*, 463 U. S. 388 (1983) (tax deductions for educational expenses); or when the aid can plausibly be said to go to individual university students, see, *e. g.*, *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986) (state scholarship programs for higher education, and by extension federal programs such as the G. I. Bill). The fact that those cases often allow for large amounts of aid says nothing about direct aid to pervasively sectarian schools for religious teaching. This "greater justifies the lesser" argument not only ignores the aforementioned cases, it would completely swallow up our aid-to-school cases from *Everson* onward: if $8.2 million in vouchers is acceptable, for example,

The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996 ($28 million in voucher payments, $5 million in administrative costs), and its cost was expected to exceed $8 million in the 2001–2002 school year. People for the American Way Foundation, Five Years and Counting: A Closer Look at the Cleveland Voucher Program 1–2 (Sept. 25, 2001) (hereinafter Cleveland Voucher Program) (cited in Brief for National School Boards Association et al. as *Amici Curiae* 9). These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly $600 per child. Cleveland Voucher Program 2.[20]

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands of qualifying students,[21] cf. *Nyquist*, *supra*, at 781–783 (state aid amounting to 50% of tuition was unconstitutional), the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The conse-

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why is there any requirement against greater than *de minimis* diversion to religious uses? See *Mitchell*, *supra*, at 866 (O'CONNOR, J., concurring in judgment).

[20] The amount of federal aid that may go to religious education after today's decision is startling: according to one estimate, the cost of a national voucher program would be $73 billion, 25% more than the current national public-education budget. People for the American Way Foundation, Community Voice or Captive of the Right? 10 (Dec. 2001).

[21] Most, if not all, participating students come from families with incomes below 200% of the poverty line (at least 60% are below the poverty line, App. in Nos. 00–3055, etc. (CA6), p. 1679), and are therefore eligible for vouchers covering 90% of tuition, Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2002); they may make up the 10% shortfall by "in-kind contributions or services," which the recipient school "shall permit," § 3313.976(A)(8). Any higher income students in the program receive vouchers paying 75% of tuition costs. § 3313.978(A).

quences of "substantial" aid hypothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

B

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. I anticipated these objectives earlier, *supra*, at 689–690, in discussing *Everson*, which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever," A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), even a "teacher of his own religious persuasion," *ibid.*, and Madison thought it violated by any "'authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.'" Memorial and Remonstrance ¶ 3, reprinted in *Everson*, 330 U. S., at 65–66. "Any tax to establish religion is antithetical to the command that the minds of men always be wholly free," *Mitchell*, 530 U. S., at 871 (SOUTER, J., dissenting) (internal quotation marks and citations omitted).[22] Madison's objection to three pence has simply been lost in the majority's formalism.

As for the second objective, to save religion from its own corruption, Madison wrote of the "'experience . . . that eccle-

[22] As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause. See Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 398 (May 2002) ("In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience").

siastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'" Memorial and Remonstrance ¶ 7, reprinted in *Everson*, 330 U. S., at 67. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," *ibid.;* in the 21st century, the risk is one of "corrosive secularism" to religious schools, *Ball*, 473 U. S., at 385, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee* v. *Weisman*, 505 U. S. 577, 608 (1992) (Blackmun, J., concurring).

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of . . . religion," Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002), which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as nonbelievers, §§ 3313.977(A)(1)(c)–(d). This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for "[c]hildren . . . whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school." § 3313.977(A)(1)(d) (West 1999). Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming

equal qualification for the job.[23] Cf. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001) ("31% of [reporting Catholic elementary and middle] schools had at least one full-time teacher who was a religious sister"). Indeed, a separate condition that "[t]he school . . . not . . . teach hatred of any person or group on the basis of . . . religion," § 3313.976(A)(6) (West Supp. 2002), could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others,[24] if they want government money for their schools.

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[23] And the courts will, of course, be drawn into disputes about whether a religious school's employment practices violated the Ohio statute. In part precisely to avoid this sort of involvement, some Courts of Appeals have held that religious groups enjoy a First Amendment exemption for clergy from state and federal laws prohibiting discrimination on the basis of race or ethnic origin. See, *e. g.*, *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F. 2d 1164, 1170 (CA4 1985) ("The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level"); *EEOC* v. *Catholic Univ. of America*, 83 F. 3d 455, 470 (CADC 1996); *Young* v. *Northern Ill. Conference of United Methodist Church*, 21 F. 3d 184, 187 (CA7 1994). This approach would seem to be blocked in Ohio by the same antidiscrimination provision, which also covers "race . . . or ethnic background." Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002).

[24] See, *e. g.*, Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormon (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:19) (The New Jewish Publication Society Translation) (for one who converts to another faith, "[t]he LORD will never forgive him; rather will the LORD's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the LORD blots out his name from under heaven");

For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. Prior examples of aid, whether grants through individuals or in-kind assistance, were never significant enough to alter the basic fiscal structure of religious schools; state aid was welcome, but not indispensable. See, *e. g.*, *Mitchell*, 530 U. S., at 802 (federal funds could only supplement funds from nonfederal sources); *Agostini*, 521 U. S., at 210 (federally funded services could "'supplement, and in no case supplant, the level of services'" already provided). But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. See, *e. g.*, People for the American Way Foundation, A Painful Price 5, 9, 11 (Feb. 14, 2002) (of 91 schools participating in the Milwaukee program, 75 received voucher payments in excess of tuition, 61 of those were religious and averaged $185,000 worth of overpayment per school, justified in part to "raise low salaries"). The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $2,250 to the base amount of current state spending on each public school student ($4,814 for the 2001 fiscal year). See Bloedel, Bill Analysis of S. B. No. 89, 124th Ohio Gen. Assembly, regular session 2001–2002 (Ohio Legislative Service Commission). Ohio, in fact, is merely replicating the experience in Wisconsin, where a similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, Public Policy Forum, Research Brief, vol. 90, no. 1, p. 3 (Jan. 23, 2002), some of which, we may safely surmise, are religious. New schools have presumably

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The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them").

pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, 392 U. S., at 265 (dissenting opinion), how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. See *Mitchell*, *supra*, at 872 (SOUTER, J., dissenting); *Everson*, 330 U. S., at 8–11. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another." *Id.*, at 53. (Rutledge, J., dissenting).

JUSTICE BREYER has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer

expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty.[25] Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element.[26] Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes,[27] or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention.[28] Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

* * *

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action

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[25] See R. Martino, Abolition of the Death Penalty (Nov. 2, 1999) ("The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment") (citing John Paul II, *Evangelium Vitae*, n. 56).

[26] H. Donin, To Be a Jew 15 (1972).

[27] See R. Martin, Islamic Studies 224 (2d ed. 1996) (interpreting the Koran to mean that "[m]en are responsible to earn a living and provide for their families; women bear children and run the household").

[28] See The Baptist Faith and Message, Art. XVIII, available at www.sbc.net/bfm/bfm2000.asp#xviii (available in Clerk of Court's case file) ("A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ").

of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson*'s statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.

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

I join JUSTICE SOUTER's opinion, and I agree substantially with JUSTICE STEVENS. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot significantly alleviate the constitutional problem. See Part IV, *infra.*

I

The First Amendment begins with a prohibition, that "Congress shall make no law respecting an establishment of

religion," and a guarantee, that the government shall not prohibit "the free exercise thereof." These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to "worship God in their own way," and allows all families to "teach their children and to form their characters" as they wish. C. Radcliffe, The Law & Its Compass 71 (1960). The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe. See, *e. g.*, Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969) (religious strife was "one of the principal evils that the first amendment sought to forestall"); B. Kosmin & S. Lachman, One Nation Under God: Religion in Contemporary American Society 24 (1993) (First Amendment designed in "part to prevent the religious wars of Europe from entering the United States"). Whatever the Framers might have thought about particular 18th-century school funding practices, they undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective.

In part for this reason, the Court's 20th-century Establishment Clause cases—both those limiting the practice of religion in public schools and those limiting the public funding of private religious education—focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval . . . ." *Id.*, at 429. And it added:

> "The history of governmentally established religion, both in England and in this country, showed that when-

> ever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.*, at 431.

See also *Lee* v. *Weisman*, 505 U. S. 577, 588 (1992) (striking down school-sanctioned prayer at high school graduation ceremony because "potential for divisiveness" has "particular relevance" in school environment); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 307 (1963) (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children").

In *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process." *Id.*, at 622. The Court explained:

> "[P]olitical debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment's religious clauses were] . . . intended to protect." *Ibid.*

And in *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 794 (1973), the Court struck down a state statute that, much like voucher programs, provided aid for parents whose children attended religious schools, explaining that the "assistance of the sort here involved carries grave potential for . . . continuing political strife over aid to religion."

When it decided these 20th-century Establishment Clause cases, the Court did not deny that an earlier American soci-

ety might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. See, *e. g.*, D. Tyack, Onward Christian Soldiers: Religion in the American Common School, in History and Education 217–226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. See Kosmin & Lachman, *supra*, at 45 (Catholics constituted less than 2% of American church-affiliated population at time of founding).

The 20th-century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 299–300 (Nov. 2001). There were similar percentage increases in the Jewish population. Kosmin & Lachman, *supra*, at 45–46. Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, *supra*, at 300. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, Separation of Church and State 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be

released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

The 20th-century Court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.*, at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i. e.*, Catholic) schooling for children. *Id.*, at 301–305. See also Hamburger, *supra*, at 287.

These historical circumstances suggest that the Court, applying the Establishment Clause through the Fourteenth Amendment to 20th-century American society, faced an interpretive dilemma that was in part practical. The Court appreciated the religious diversity of contemporary American society. See *Schempp*, *supra*, at 240 (Brennan, J., concurring). It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit (among other things) any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools—a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation"—that the government achieve

equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

In both areas the Court concluded that the Establishment Clause required "separation," in part because an "equal opportunity" approach was not workable. With respect to religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife? As Justice Rutledge recognized:

> "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect] by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups." *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 53–54 (1947) (dissenting opinion).

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public

schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

II

The principle underlying these cases—avoiding religiously based social conflict—remains of great concern. As religiously diverse as America had become when the Court decided its major 20th-century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Graduate Center of the City University of New York, B. Kosmin, E. Mayer, & A. Keysar, American Religious Identification Survey 12–13 (2001). Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. *Ibid.* And several of these major religions contain different subsidiary sects with different religious beliefs. See Lester, Oh, Gods!, The Atlantic Monthly 37 (Feb. 2002). Newer Christian immigrant groups are "expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often controversial, for European-ancestry Catholics and Protestants." H. Ebaugh & J. Chafetz, Religion and the New Immigrants: Continuities and Adaptations in Immigrant Congregations 4 (abridged student ed. 2002).

Under these modern-day circumstances, how is the "equal opportunity" principle to work—without risking the "struggle of sect against sect" against which Justice Rutledge warned? School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for ex-

ample, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Ohio Rev. Code Ann. §3313.976(A)(6) (West Supp. 2002). And it requires the State to "revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation" of the program's rules. §3313.976(B). As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particular religious doctrine "teaches hatred or advocates lawlessness." Brief for National Committee for Public Education and Religious Liberty as *Amicus Curiae* 23.

How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest—say, the conflict in the Middle East or the war on terrorism? Yet any major funding program

for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, see *Lemon*, 403 U. S., at 622, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.

I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous—and it bears noting that recent waves of immigration have begun to create problems of social division there as well. See, *e. g.*, The Muslims of France, 75 Foreign Affairs 78 (1996) (describing increased religious strife in France, as exemplified by expulsion of teenage girls from school for wearing traditional Muslim scarves); Ahmed, Extreme Prejudice; Muslims in Britain, The Times of London, May 2, 1992, p. 10 (describing religious strife in connection with increased Muslim immigration in Great Britain).

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits. See, *e. g.*, Webster, On the Education of Youth in America (1790), in Essays on Education in the Early Republic 43, 53, 59 (F. Rudolph ed. 1965) ("[E]ducation of youth" is "of more consequence than making laws and preaching the gospel, because it lays the foundation on which both law and gospel rest for success"); Pope Paul VI, Declaration on Christian Education (1965) ("[T]he Catholic school can be such an aid to the fulfillment of the mission of the People of God and to the fostering of dialogue between

the Church and mankind, to the benefit of both, it retains even in our present circumstances the utmost importance").

III

I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947); *Mitchell* v. *Helms*, 530 U. S. 793 (2000). States now certify the nonsectarian educational content of religious school education. See, *e. g.*, *New Life Baptist Church Academy* v. *East Longmeadow*, 885 F. 2d 940 (CA1 1989). Yet the consequence has not been great turmoil. But see, *e. g.*, May, Charter School's Religious Tone; Operation of South Bay Academy Raises Church-State Questions, San Francisco Chronicle, Dec. 17, 2001, p. A1 (describing increased government supervision of charter schools after complaints that students were "studying Islam in class and praying with their teachers," and Muslim educators complaining of " 'post-Sept. 11 anti-Muslim sentiment' ").

School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern. See, *e. g.*, *Weisman*, 505 U. S., at 592 ("heightened concerns" in context of primary education); *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987) ("Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").

Private schools that participate in Ohio's program, for example, recognize the importance of primary religious education, for they pronounce that their goals are to "communicate the gospel," "provide opportunities to . . . experience a faith community," "provide . . . for growth in prayer," and "pro-

vide instruction in religious truths and values." App. 408a, 487a. History suggests, not that such private school teaching of religion is undesirable, but that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university. See *supra*, at 720–722. Contrary to JUSTICE O'CONNOR's opinion, *ante*, at 665–666 (concurring opinion), history also shows that government involvement in religious primary education is far more divisive than state property tax exemptions for religious institutions or tax deductions for charitable contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other. Federal aid to religiously based hospitals, *ante*, at 666 (O'CONNOR, J., concurring), is even further removed from education, which lies at the heartland of religious belief.

Vouchers also differ in *degree*. The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. In this respect as well, the secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have, contrary to the statute, found their way to the religious activities of the recipients, see 530 U. S., at 864 (O'CONNOR, J., concurring in judgment), that case is at worst the camel's nose, while the litigation before us is the camel itself.

IV

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division that Part II, *supra*, describes. Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.

V

The Court, in effect, turns the clock back. It adopts, under the name of "neutrality," an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause concern for social concord. An earlier Court found that "equal opportunity" principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. See *Nyquist*, 413 U. S., at 783. In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of reli-

giously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, and for reasons set forth by JUSTICE SOUTER and JUSTICE STEVENS, I respectfully dissent.

Syllabus

HOPE *v.* PELZER ET AL.

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

No. 01–309. Argued April 17, 2002—Decided June 27, 2002

In 1995, petitioner Hope, then an Alabama prison inmate, was twice handcuffed to a hitching post for disruptive conduct. During a 2-hour period in May, he was offered drinking water and a bathroom break every 15 minutes, and his responses were recorded on an activity log. He was handcuffed above shoulder height, and when he tried moving his arms to improve circulation, the handcuffs cut into his wrists, causing pain and discomfort. After an altercation with a guard at his chain gang's worksite in June, Hope was subdued, handcuffed, placed in leg irons, and transported back to the prison, where he was ordered to take off his shirt, thus exposing himself to the sun, and spent seven hours on the hitching post. While there, he was given one or two water breaks but no bathroom breaks, and a guard taunted him about his thirst. Hope filed a 42 U. S. C. § 1983 suit against three guards. Without deciding whether placing Hope on the hitching post as punishment violated the Eighth Amendment, the Magistrate Judge found that the guards were entitled to qualified immunity. The District Court entered summary judgment for respondents, and the Eleventh Circuit affirmed. The latter court answered the constitutional question, finding that the hitching post's use for punitive purposes violated the Eighth Amendment. In finding the guards nevertheless entitled to qualified immunity, it concluded that Hope could not show, as required by Circuit precedent, that the federal law by which the guards' conduct should be evaluated was established by cases that were "materially similar" to the facts in his own case.

Held: The defense of qualified immunity was precluded at the summary judgment phase. Pp. 736–748.

(a) Hope's allegations, if true, establish an Eighth Amendment violation. Among the "'unnecessary and wanton' inflictions of pain [constituting cruel and unusual punishment forbidden by the Amendment] are those that are 'totally without penological justification.'" *Rhodes* v. *Chapman*, 452 U. S. 337, 346. This determination is made in the context of prison conditions by ascertaining whether an official acted with "deliberate indifference" to the inmates' health or safety, *Hudson* v. *McMillian*, 503 U. S. 1, 8, a state of mind that can be inferred from the fact that the risk of harm is obvious, *Farmer* v. *Brennan*, 511 U. S. 825.

Syllabus

The Eighth Amendment violation here is obvious on the facts alleged. Any safety concerns had long since abated by the time Hope was handcuffed to the hitching post, because he had already been subdued, handcuffed, placed in leg irons, and transported back to prison. He was separated from his work squad and not given the opportunity to return. Despite the clear lack of emergency, respondents knowingly subjected him to a substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun, prolonged thirst and taunting, and a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. Pp. 736–738.

(b) Respondents may nevertheless be shielded from liability for their constitutionally impermissible conduct if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818. In its assessment, the Eleventh Circuit erred in requiring that the facts of previous cases and Hope's case be "materially similar." Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. Officers sued in a § 1983 civil action have the same fair notice right as do defendants charged under 18 U. S. C. § 242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of constitutional rights. This Court's opinion in *United States* v. *Lanier*, 520 U. S. 259, a § 242 case, makes clear that officials can be on notice that their conduct violates established law even in novel factual situations. Indeed, the Court expressly rejected a requirement that previous cases be "fundamentally similar." Accordingly, the salient question that the Eleventh Circuit should have asked is whether the state of the law in 1995 gave respondents fair warning that Hope's alleged treatment was unconstitutional. Pp. 739–741.

(c) A reasonable officer would have known that using a hitching post as Hope alleged was unlawful. The obvious cruelty inherent in the practice should have provided respondents with some notice that their conduct was unconstitutional. In addition, binding Circuit precedent should have given them notice. *Gates* v. *Collier*, 501 F. 2d 1291, found several forms of corporal punishment impermissible, including handcuffing inmates to fences or cells for long periods, and *Ort* v. *White*, 813 F. 2d 318, 324, warned that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." Relevant to the question whether *Ort* provided fair notice is a subsequent Alabama Department of Corrections (ADOC) regulation specifying procedures for using a hitching post, which included allowing an inmate to rejoin his squad when he tells an officer that he is ready to work. If regularly observed, that provision

would have made Hope's case less like the kind of punishment *Ort* described as impermissible. But conduct showing that the provision was a sham, or that respondents could ignore it with impunity, provides equally strong support for the conclusion that they were fully aware of their wrongful conduct. The conclusion here is also buttressed by the fact that the Justice Department specifically advised the ADOC of the constitutional infirmity of its practices before the incidents in this case took place. Pp. 741–746.

240 F. 3d 975, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 748.

Craig T. Jones argued the cause for petitioner. With him on the brief were *James Mendelsohn*, *J. Richard Cohen*, and *Rhonda Brownstein*.

Austin C. Schlick argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorneys General McCallum* and *Boyd*, *Deputy Solicitor General Clement*, *Barbara L. Herwig*, and *Richard A. Olderman*.

Nathan A. Forrester, Solicitor General of Alabama, argued the cause for respondents. With him on the brief were *Bill Pryor*, Attorney General, *Alyce S. Robertson*, Deputy Solicitor General, and *Margaret Fleming* and *Ellen Leonard-Thomas*, Assistant Attorneys General.

Gene C. Schaerr argued the cause for the State of Missouri et al. as *amici curiae* urging affirmance. With him on the brief were *Jeremiah W. Nixon*, Attorney General of Missouri, and *James R. Layton*, State Solicitor, *Robert H. Kono*, Acting Attorney General of Guam, and *Carter G. Phillips*, joined by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Earl I. Anzai* of Hawaii, *Steve Carter* of Indiana, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Mi-*

chael Fisher of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.*, of West Virginia.*

JUSTICE STEVENS delivered the opinion of the Court.

The Court of Appeals for the Eleventh Circuit concluded that petitioner Larry Hope, a former prison inmate at the Limestone Prison in Alabama, was subjected to cruel and unusual punishment when prison guards twice handcuffed him to a hitching post to sanction him for disruptive conduct. Because that conclusion was not supported by earlier cases with "materially similar" facts, the court held that the respondents were entitled to qualified immunity, and therefore affirmed summary judgment in their favor. We granted certiorari to determine whether the Court of Appeals' qualified immunity holding comports with our decision in *United States* v. *Lanier*, 520 U. S. 259 (1997).

I

In 1995, Alabama was the only State that followed the practice of chaining inmates to one another in work squads. It was also the only State that handcuffed prisoners to "hitching posts" if they either refused to work or otherwise disrupted work squads.[1] Hope was handcuffed to a hitching

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Mark R. Brown, James K. Green, and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[1] In its review of the summary judgment, the Court of Appeals viewed the facts in the light most favorable to Hope, the nonmoving party. 240 F. 3d 975, 977 (CA11 2001) (case below). We do the same. *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). The Court of Appeals also referenced facts established in *Austin* v. *Hopper*, 15 F. Supp. 2d 1210 (MD Ala. 1998). 240 F. 3d, at 978, n. 6. This was appropriate because *Austin* is a class-action suit brought by Alabama prisoners, including Hope, and the District Court opinion in that case discusses Hope's allegations at some length. 15 F. Supp. 2d, at 1247–1248. In their summary judgment papers, both Hope and respondents referenced the findings in *Austin*, and thus those

post on two occasions. On May 11, 1995, while Hope was working in a chain gang near an interstate highway, he got into an argument with another inmate. Both men were taken back to the Limestone prison and handcuffed to a hitching post. Hope was released two hours later, after the guard captain determined that the altercation had been caused by the other inmate. During his two hours on the post, Hope was offered drinking water and a bathroom break every 15 minutes, and his responses to these offers were recorded on an activity log. Because he was only slightly taller than the hitching post, his arms were above shoulder height and grew tired from being handcuffed so high. Whenever he tried moving his arms to improve his circulation, the handcuffs cut into his wrists, causing pain and discomfort.

On June 7, 1995, Hope was punished more severely. He took a nap during the morning bus ride to the chain gang's worksite, and when it arrived he was less than prompt in responding to an order to get off the bus. An exchange of vulgar remarks led to a wrestling match with a guard. Four other guards intervened, subdued Hope, handcuffed him, placed him in leg irons and transported him back to the prison where he was put on the hitching post. The guards made him take off his shirt, and he remained shirtless all

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findings are part of the record in this case. See, *e. g.*, Plaintiff's Preliminary Response to Defendants' Special Report, Record 30; Defendants' Response to Court Order, App. 61. Accordingly, for purposes of our review of the grant of summary judgment, the *Austin* findings may also be assumed true, and we reference them when appropriate.

As *Austin* explained, the hitching post is a horizontal bar "'made of sturdy, nonflexible material,'" placed between 45 and 57 inches from the ground. Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Most inmates are shackled to the hitching post with their two hands relatively close together and at face level. 15 F. Supp. 2d, at 1241–1242.

day while the sun burned his skin.[2] He remained attached to the post for approximately seven hours. During this 7-hour period, he was given water only once or twice and was given no bathroom breaks.[3] At one point, a guard taunted Hope about his thirst. According to Hope's affidavit: "[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground." App. 11.

Hope filed suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Northern District of Alabama against three guards involved in the May incident, one of whom also handcuffed him to the hitching post in June. The case was referred to a Magistrate Judge who treated the responsive affidavits filed by the defendants as a motion for summary judgment. Without deciding whether "the very act of placing him on a restraining bar for a period of hours as a form of punishment" had violated the Eighth Amendment, the Magistrate concluded that the guards were entitled to qualified immunity.[4] Supplemental App. to Pet. for Cert. 21. The District Court agreed, and entered judgment for respondents.

The United States Court of Appeals for the Eleventh Circuit affirmed. 240 F. 3d 975 (2001). Before reaching the

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[2] "The most repeated complaint of the hitching post, however, was the strain it produced on inmates' muscles by forcing them to remain in a standing position with their arms raised in a stationary position for a long period of time. In addition to their exposure to sunburn, dehydration, and muscle aches, the inmates are also placed in substantial pain when the sun heats the handcuffs that shackle them to the hitching post, or heats the hitching post itself. Several of the inmates described the way in which the handcuffs burned and chafed their skin during their placement on the post." *Id.*, at 1248.

[3] The Court of Appeals noted that respondents had not produced any activity log for this incident, despite the policy that required that such a log be maintained. 240 F. 3d, at 977, n. 1.

[4] Supplemental App. to Pet. for Cert. 21–27.

qualified immunity issue, however, it answered the constitutional question that the District Court had bypassed. The court found that the use of the hitching post for punitive purposes violated the Eighth Amendment. Nevertheless, applying Circuit precedent concerning qualified immunity, the court stated that "'the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory,'" and established, not by "'abstractions,'" but by cases that are "'materially similar'" to the facts in the case in front of us." *Id.*, at 981. The court then concluded that the facts in the two precedents on which Hope primarily relied—*Ort* v. *White*, 813 F. 2d 318 (CA11 1987), and *Gates* v. *Collier*, 501 F. 2d 1291 (CA5 1974)—"[t]hough analogous," were not "'materially similar' to Hope's situation.'" 240 F. 3d, at 981. We granted certiorari to review the Eleventh Circuit's qualified immunity holding. 534 U. S. 1073 (2002).

II

The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). The Court of Appeals held that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment." 240 F. 3d, at 980–981. The court rejected respondents' submission that Hope could have ended his shackling by offering to return to work, finding instead that the purpose of the practice was punitive,[5] and that the circumstances of his confinement created

[5] In reaching this conclusion, the Court of Appeals stated: "While the DOC claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests this is not the case. First, Hope never refused to work. During the May incident, he was the victim in an altercation on the work site, but he never refused to do his

a substantial risk of harm of which the officers were aware. Moreover, the court relied on Circuit precedent condemning similar practices[6] and the results of a United States Department of Justice (DOJ) report that found Alabama's systematic use of the hitching post to be improper corporal punishment.[7] We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment.

"'[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Whitley* v. *Albers*, 475 U. S. 312, 319 (1986) (some internal quotation marks omitted). We have said that "[a]mong 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes* v. *Chapman*, 452 U. S. 337, 346 (1981). In making this determination in the context of prison condi-

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job. During the June incident, Hope was involved in an altercation with prison guards. There is nothing in the record, however, claiming that he refused to work or encouraged other inmates to refuse to work. Therefore, it is not clear that the solution to his hitching post problem was to ask to return to work. Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, 'I want to go back to work,' a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson." 240 F. 3d, at 980.

[6] "Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In *Gates v. Collier*, 501 F. 2d 1291 (5th Cir. 1974), in regard to 'handcuffing inmates to the fence and to cells for long periods of time' and other such punishments, we stated that '[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.' *Gates*, 501 F. 2d at 1306." *Id.*, at 979.

[7] The DOJ report apparently was not before the District Court in this case, but the Court of Appeals took judicial notice of the report and referenced it throughout the decision below. *Id.*, at 979, n. 8.

tions, we must ascertain whether the officials involved acted with "deliberate indifference" to the inmates' health or safety. *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992). We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious. *Farmer* v. *Brennan*, 511 U. S. 825, 842 (1994).

As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.[8] The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man." *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958). This punitive treatment amounts to gratuitous infliction of "wanton and unnecessary" pain that our precedent clearly prohibits.

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[8] The awareness of the risk of harm attributable to any individual respondent may be evaluated in part by considering the pattern of treatment that inmates generally received when attached to the hitching post. In *Austin* v. *Hopper*, the District Court cited examples of humiliating incidents resulting from the denial of bathroom breaks. One inmate "was not permitted to use the restroom or to change his clothing for four and one-half hours after he had defecated on himself." 15 F. Supp. 2d, at 1246. "Moreover, certain corrections officers not only ignored or denied inmates' requests for water or access to toilet facilities, but taunted them while they were clearly suffering from dehydration . . . ." *Id.*, at 1247.

III

Despite their participation in this constitutionally impermissible conduct, respondents may nevertheless be shielded from liability for civil damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). In assessing whether the Eighth Amendment violation here met the *Harlow* test, the Court of Appeals required that the facts of previous cases be "'materially similar' to Hope's situation." 240 F. 3d, at 981. This rigid gloss on the qualified immunity standard, though supported by Circuit precedent,[9] is not consistent with our cases.

As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier* v. *Katz*, 533 U. S., at 206. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [v. *Forsyth*, 472 U. S. 511,] 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

Officers sued in a civil action for damages under 42 U. S. C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U. S. C. § 242. Section 242 makes it a crime for a state official to act "willfully" and under color of law to deprive a person of rights protected by the Constitution. In *United States* v. *Lanier*, 520 U. S. 259 (1997), we held that the defendant was entitled

[9] See, *e. g.*, *Suissa* v. *Fulton County*, 74 F. 3d 266–270 (CA11 1996); *Lassiter* v. *Alabama A&M Univ. Bd. of Trustees*, 28 F. 3d 1146, 1150 (CA11 1994); *Hill* v. *Dekalb Regional Youth Detention Center*, 40 F. 3d 1176, 1185 (CA11 1994).

to "fair warning" that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was "clearly established" in civil litigation under § 1983.[10]

In *Lanier*, the Court of Appeals had held that the indictment did not charge an offense under § 242 because the constitutional right allegedly violated had not been identified in any earlier case involving a factual situation "'fundamentally similar'" to the one in issue. *Id.*, at 263 (citing *United States* v. *Lanier*, 73 F. 3d 1380, 1393 (CA6 1996)). The Court of Appeals had assumed that the defendant in a criminal case was entitled to a degree of notice "'substantially higher than the "clearly established" standard used to judge qualified immunity'" in civil cases under § 1983. 520 U. S., at 263. We reversed, explaining that the "fair warning" requirement is identical under § 242 and the qualified immunity standard. We pointed out that we had "upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.*, at 269. We explained:

> "This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an

[10] "[T]he object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'" 520 U. S., at 270–271.

> earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,' *Anderson*, *supra*, at 640." *Id.*, at 270–271 (citation omitted).

Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional. It is to this question that we now turn.

IV

The use of the hitching post as alleged by Hope "unnecessar[ily] and wanton[ly] inflicted pain," *Whitley*, 475 U. S., at 319 (internal quotation marks omitted), and thus was a clear violation of the Eighth Amendment. See Part II, *supra*. Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report

informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U. S., at 818.

Cases decided by the Court of Appeals for the Fifth Circuit before 1981 are binding precedent in the Eleventh Circuit today. See *Bonner* v. *Prichard*, 661 F. 2d 1206 (CA11 1981). In one of those cases, decided in 1974, the Court of Appeals reviewed a District Court decision finding a number of constitutional violations in the administration of Mississippi's prisons. *Gates* v. *Collier*, 501 F. 2d 1291. That opinion squarely held that several of those "forms of corporal punishment run afoul of the Eighth Amendment [and] offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Id.*, at 1306. Among those forms of punishment were "handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods." *Ibid.* The fact that *Gates* found several forms of punishment impermissible does not, as respondents suggest, lessen the force of its holding with respect to handcuffing inmates to cells or fences for long periods of time. Nor, for the purpose of providing fair notice to reasonable officers administering punishment for past misconduct, is there any reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours. The Court of Appeals' conclusion to the contrary exposes the danger of a rigid, overreliance on factual similarity. As the Government submits in its brief *amicus curiae:* "No reasonable officer could have concluded that the constitutional holding of *Gates* turned on the fact that inmates were handcuffed to fences or the bars of cells, rather than a specially designed metal bar designated for shackling. If anything, the use of

a designated hitching post highlights the constitutional problem." Brief for United States as *Amicus Curiae* 22. In light of *Gates*, the unlawfulness of the alleged conduct should have been apparent to respondents.

The reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit. In *Ort* v. *White*, 813 F. 2d 318, the Court of Appeals held that an officer's temporary denials of drinking water to an inmate who repeatedly refused to do his share of the work assigned to a farm squad "should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, *i. e.*, the requirement that all inmates perform their assigned farm squad duties." *Id.*, at 325. "The officer's clear motive was to encourage Ort to comply with the rules and to do the work required of him, after which he would receive the water like everyone else." *Ibid.* The court cautioned, however, that a constitutional violation might have been present "if later, once back at the prison, officials had decided to deny [Ort] water as punishment for his refusal to work." *Id.*, at 326. So too would a violation have occurred if the method of coercion reached a point of severity such that the recalcitrant prisoner's health was at risk. *Ibid.* Although the facts of the case are not identical, *Ort*'s premise is that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." *Id.*, at 324. This premise has clear applicability in this case. Hope was not restrained at the worksite until he was willing to return to work. Rather, he was removed back to the prison and placed under conditions that threatened his health. *Ort* therefore gave fair warning to respondents that their conduct crossed the line of what is constitutionally permissible.

Relevant to the question whether *Ort* provided fair warning to respondents that their conduct violated the Constitu-

tion is a regulation promulgated by ADOC in 1993.[11] The regulation authorizes the use of the hitching post when an inmate refuses to work or is otherwise disruptive to a work squad. It provides that an activity log should be completed for each such inmate, detailing his responses to offers of water and bathroom breaks every 15 minutes. Such a log was completed and maintained for petitioner's shackling in May, but the record contains no such log for the 7-hour shackling in June and the record indicates that the periodic offers contemplated by the regulation were not made. App. 43–48. The regulation also states that an inmate "will be allowed to join his assigned squad" whenever he tells an officer "that he is ready to go to work." *Id.*, at 103. The findings in *Austin* v. *Hopper,* 15 F. Supp. 2d 1210, 1244–1246 (MD Ala. 1998), as well as the record in this case, indicate that this important provision of the regulation was frequently ignored by corrections officers. If regularly observed, a requirement that would effectively give the inmate the keys to the handcuffs that attached him to the hitching post would have made this case more analogous to the practice upheld in *Ort,* rather than the kind of punishment *Ort* described as impermissible. A course of conduct that tends to prove that the requirement was merely a sham, or that respondents could ignore it with impunity, provides equally strong support for the conclusion that they were fully aware of the wrongful character of their conduct.

Respondents violated clearly established law. Our conclusion that "a reasonable person would have known," *Harlow,* 457 U. S., at 818, of the violation is buttressed by the fact that the DOJ specifically advised the ADOC of the unconstitutionality of its practices before the incidents in this case took place. The DOJ had conducted a study in 1994 of Alabama's use of the hitching post. 240 F. 3d, at 979.

[11] The regulation was not provided to the District Court, but it was added to the record at the request of the Court of Appeals. See App. 100–106.

Among other findings, the DOJ report noted that ADOC's officers consistently failed to comply with the policy of immediately releasing any inmate from the hitching post who agrees to return to work. The DOJ concluded that the systematic use of the restraining bar in Alabama constituted improper corporal punishment. *Ibid.* Accordingly, the DOJ advised the ADOC to cease use of the hitching post in order to meet constitutional standards. The ADOC replied that it thought the post could permissibly be used "'to preserve prison security and discipline.'" *Ibid.* In response, the DOJ informed the ADOC that, "'[a]lthough an emergency situation may warrant drastic action by corrections staff, our experts found that the "rail" is being used systematically as an improper punishment for relatively trivial offenses. Therefore, we have concluded that the use of the "rail" is without penological justification.'" *Ibid.* Although there is nothing in the record indicating that the DOJ's views were communicated to respondents, this exchange lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment.

The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct. Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort,* as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching

post under the circumstances alleged by Hope was unlawful. The "fair and clear warning," *Lanier*, 520 U. S., at 271, that these cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage.

V

In response to JUSTICE THOMAS' thoughtful dissent, we make the following three observations. The first is that in granting certiorari to review the summary judgment entered in favor of the officers, we did not take any question about the sufficiency of pleadings and affidavits to raise a genuine possibility that the three named officers were responsible for the punitive acts of shackling alleged. All questions raised by petitioner (the plaintiff against whom summary judgment was entered) go to the application of the standard that no immunity is available for official acts when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S., at 202. The officers' brief in opposition to certiorari likewise addressed only the legal standard of what is clearly established. The resulting focus in the case was the Eleventh Circuit's position that a violation is not clearly established unless it is the subject of a prior case of liability on facts "'materially similar'" to those charged. 240 F. 3d, at 981. We did not take, and do not pass upon, the questions whether or to what extent the three named officers may be held responsible for the acts charged, if proved. Nothing in our decision forecloses any defense other than qualified immunity on the ground relied upon by the Court of Appeals.

Second, we may address the immunity question on the assumption that the act of field discipline charged on each occasion was handcuffing Hope to a hitching post for an extended period apparently to inflict gratuitous pain or discomfort, with no justification in threatened harm or a continuing refusal to work. *Id.*, at 980 (on neither occasion did Hope "refus[e] to work or encourag[e] other inmates to refuse to

work"). The Court of Appeals clearly held the act of cuffing petitioner to the hitching post itself to suffice as an unconstitutional act: "We find that cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment." *Ibid.* Although the court continued that "[t]his violation is exacerbated by the lack of proper clothing, water, or bathroom breaks," *ibid.*, this embellishment was not the basis of its decision, and our own decision adequately rests on the same assumption that sufficed for the Court of Appeals.

Third, in applying the objective immunity test of what a reasonable officer would understand, the significance of federal judicial precedent is a function in part of the Judiciary's structure. The unreported District Court opinions cited by the officers are distinguishable on their own terms.[12] But regardless, they would be no match for the Circuit precedents[13] in *Gates* v. *Collier*, 501 F. 2d, at 1306, which held that "handcuffing inmates to the fence and to cells for long periods of time" was unconstitutional, and *Ort* v. *White*, 813 F. 2d, at 326, which suggested that it would be unconstitutional to inflict gratuitous pain on an inmate (by refusing him water) when punishment was unnecessary to enforce

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[12] In three of the decisions, the inmates were given the choice between working or being restrained. See *Whitson* v. *Gillikin*, No. CV–93–H–1517–NE (ND Ala., Jan. 24, 1994), p. 4, App. 84; *Dale* v. *Murphy*, No. CV–85–1091–H–S (SD Ala., Feb. 4, 1986), p. 2; *Ashby* v. *Dees*, No. CV–94–U–0605–NE (ND Ala., Dec. 27, 1994), p. 6. In others, the inmates were offered regular water and bathroom breaks. See *Lane* v. *Findley*, No. CV–93–C–1741–S (ND Ala., Aug. 4, 1994), p. 9; *Williamson* v. *Anderson*, No. CV–92–H–675–N (MD Ala., Aug. 18, 1993), p. 2; *Hollis* v. *Folsom*, No. CV–94–T–0052–N (MD Ala., Nov. 4, 1994), p. 9. Finally, in *Vinson* v. *Thompson*, No. CV–94–A–268–N (MD Ala., Dec. 9, 1994), the inmate was restrained for approximately 45 minutes. *Id.*, at 2.

[13] There are apparently no decisions on similar facts from other Circuits, presumably because Alabama is the only State to authorize the use of the hitching post in its prison system.

on-the-spot discipline. The vitality of *Gates* and *Ort* could not seriously be questioned in light of our own decisions holding that gratuitous infliction of punishment is unconstitutional, even in the prison context, see *supra*, at 737 (citing *Whitley* v. *Albers*, 475 U. S., at 319; *Rhodes* v. *Chapman*, 452 U. S., at 346).

The judgment of the Court of Appeals is reversed.

It is so ordered.

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

The Court today subjects three prison guards to suit based on facts not alleged, law not clearly established, and its own subjective views on appropriate methods of prison discipline. Qualified immunity jurisprudence has been turned on its head.

I

Petitioner Larry Hope did not file this action against the State of Alabama. Nor did he sue all of the Alabama prison guards responsible for looking after him in the two instances that he was handcuffed to the restraining bar.[1] He chose instead to maintain this lawsuit against only three prison guards: Officer Gene McClaran, Sergeant Mark Pelzer, and Lieutenant Jim Gates. See 240 F. 3d 975, 977, n. 2 (CA11 2001).[2] It is therefore strange that in the course of deciding that none of the three respondents is entitled to qualified

[1] Despite the Court's consistent use of the term "hitching post," the apparatus to which petitioner was handcuffed is a "restraining bar." See Ala. Dept. of Corrections Admin. Reg. No. 429, p. 1 (Oct. 26, 1993), reprinted in App. 102.

[2] While petitioner also sued five other guards in connection with the fight that occurred before he was affixed to the restraining bar on June 7, 1995, he later withdrew his claims against them and asked that they be dismissed from the case. See 240 F. 3d, at 977, n. 2; Plaintiff's Special Report and Brief in Response to Defendants' Motion for Summary Judgment (ND Ala.), pp. 1–2, 5–6, Record, Doc. No. 33.

immunity the Court does not even bother to mention the nature of petitioner's specific allegations against McClaran, Pelzer, and Gates. The omission is both glaring and telling. When one examines the alleged conduct of the prison guards who are parties to this action, as opposed to the alleged conduct of *other* guards, who are *not* parties to this action, petitioner's case becomes far less compelling.

The Court's imprecise account of the facts requires that the specific nature of petitioner's allegations against the three respondents be recounted. Petitioner claims that: (1) on May 11, 1995, Officer McClaran ordered that petitioner be affixed to the restraining bar;[3] (2) Sergeant Pelzer, on that same date, affixed him to the restraining bar;[4] and (3) Lieutenant Gates, on May 11 and June 7, 1995, affixed petitioner to the bar.[5] That is the sum and substance of petitioner's allegations against respondents.[6]

With respect to McClaran and Pelzer, petitioner has *never* alleged that they participated in the June 7 incident that so

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[3] See Second Affidavit of Larry Hope (ND Ala.), at 2–3, Record, Doc. No. 32.

[4] *Id.*, at 3.

[5] *Id.*, at 3–4.

[6] There is some confusion as to who actually affixed petitioner to the restraining bar on May 11. While petitioner "believe[s]" that Sergeant Pelzer did so, *id.*, at 3, the "Institutional Incident Report" produced by respondents and written by Officer McClaran indicates that Officers Keith Gates and Mark Dempsey placed petitioner on the bar, see *id.*, Exh. 2. Petitioner acknowledged that fact and attached the report to his second affidavit. See *id.*, at 3. Consequently, interpreting petitioner's pleadings in the light most favorable to him, I will assume that petitioner has alleged that Pelzer, Gates, and Dempsey cuffed him to the bar on May 11. Additionally, I will assume that the "Officer Keith Gates" mentioned in Officer McClaran's report is the same person as the Lieutenant Jim Gates who is a respondent in this case. It is worth noting, however, that respondents vigorously dispute petitioner's assertion that Lieutenant Jim Gates and Officer Keith Gates are one and the same, see Brief for Respondents i, and petitioner has yet to produce any evidence to support this somewhat incredible claim.

appalls the Court.[7] And with respect to Lieutenant Gates, petitioner has never alleged that Gates either participated in or was responsible for any of the June 7 events recounted by the Court other than attaching petitioner to the bar. Petitioner has never contended that Gates looked after or otherwise supervised him while he was on the bar. See Second Affidavit of Larry Hope (ND Ala.), Record, Doc. No. 32. Nor has petitioner ever claimed that Gates was responsible for keeping him on the bar for seven hours, removing his shirt,[8] denying him water, taunting him about his thirst, or giving water to dogs in petitioner's plain view. See *ibid.* The relevance of these facts, repeatedly referenced by the Court during the course of its legal analysis, see, *e. g.*, *ante*, at 738, 744, therefore escapes me.

Then there are the events referenced in the Court's opinion that cannot even arguably be gleaned from the record. For instance, while the Court claims that on June 7 petitioner "was given no bathroom breaks," *ante*, at 735, during his time on the bar, petitioner has never alleged that Gates or any other prison guard refused him bathroom breaks on that date. See Second Affidavit of Larry Hope, Record, Doc. No. 32. As a matter of fact, the District Court expressly found below that petitioner "was not denied restroom

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[7] See, *e. g.*, Plaintiff's Special Report and Brief in Response to Defendant's Motion for Summary Judgment 1–2, Record, Doc. No. 33 ("[T]he only remaining claims are those against Defendants McClaran, Pelzer, and Gates in connection with the May 11, 1997 hitching post incident, and Defendant Gates in connection with the June 7 hitching post incident"); Second Affidavit of Larry Hope, Record, Doc. No. 32.

[8] It is important to note that petitioner has never maintained that Gates placed him on the bar without a shirt. Rather, petitioner's first affidavit, see Affidavit of Larry Hope 2, Record, Doc. No. 1, as well as photographs appended as exhibits to petitioner's second affidavit, see Second Affidavit of Larry Hope, Exhs. 3–5, Record, Doc. No. 32, which were verified by petitioner as "taken while [he] was on the hitching post on June 7," *id.*, at 5, indicate that petitioner's shirt was removed, if at all, after he was attached to the bar.

breaks." Supplemental App. to Pet. for Cert. 2. In addition, photographs taken of petitioner attached to the restraining bar on June 7 show him wearing a t-shirt, revealing at a minimum that petitioner was not shirtless "all day." See Second Affidavit of Larry Hope, Exhs. 3–5, Record, Doc. No. 32; *id.*, at 5 (verifying that the photographs were "taken while [he] was on the hitching post on June 7").

Once one understands petitioner's specific allegations against respondents, the Eighth Amendment violation in this case is far from "obvious." *Ante*, at 738. What is "obvious," however, is that the Court's explanation of how respondents violated the Eighth Amendment is woefully incomplete. The Court merely recounts petitioner's allegations regarding the events of June 7 and concludes that "[t]he use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment[,] [which] is nothing less than the dignity of man.'" *Ibid.* (quoting *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958)). The Court, however, fails to explain how respondents McClaran and Pelzer violated the Eighth Amendment, given that they had no involvement whatsoever in affixing petitioner to the restraining bar on June 7. The Court's reasoning as applied to respondent Gates is similarly inadequate since petitioner has never alleged that Gates bore any responsibility for most of the conduct on June 7 that supposedly renders the Eighth Amendment violation "obvious."[9]

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[9] In an effort to rehabilitate the Court's opinion, JUSTICE STEVENS argues that the specific nature of respondents' connection to the events of May 11 and June 7 falls outside the scope of the questions presented. See *ante*, at 746. In conducting qualified immunity analysis, however, courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct. Sim-

II

Once petitioner's allegations regarding respondents' conduct are separated from his other grievances and the mistreatment invented by the Court, this case presents one simple question: Was it clearly established in 1995 that the mere act of cuffing petitioner to the restraining bar (or, in the case of Officer McClaran, ordering petitioner's attachment to the restraining bar) violated the Eighth Amendment? The answer to this question is also simple: Obviously not.

A

The Court correctly states that respondents are entitled to qualified immunity unless their conduct violated " 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Ante*, at 739 (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)). But the Court then fails either to discuss or to apply the following important principles. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). If "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," then qualified immunity does not apply. *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001). But if, on the other hand, "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley*, *supra*, at 341.

In evaluating whether it was clearly established in 1995 that respondents' conduct violated the Eighth Amendment, the Court of Appeals properly noted that "[i]t is important to analyze the facts in [the prior cases relied upon by petitioner where courts found Eighth Amendment violations],

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ilarly here, in the absence of any allegation by petitioner that respondents were in any way responsible for the behavior of other prison guards on May 11 and June 7, the conduct of those other guards should not be considered in analyzing whether respondents are entitled to qualified immunity.

and determine if they are materially similar to the facts in the case in front of us." 240 F. 3d, at 981 (internal quotation marks omitted). The right not to suffer from "cruel and unusual punishments," U. S. Const., Amdt. 8, is an extremely abstract and general right. In the vast majority of cases, the text of the Eighth Amendment does not, in and of itself, give a government official sufficient notice of the clearly established Eighth Amendment law applicable to a particular situation.[10] Rather, one must look to case law to see whether "the right the official is alleged to have violated [has] been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

In conducting this inquiry, it is crucial to look at precedent applying the relevant legal rule in similar factual circumstances. Such cases give government officials the best indication of what conduct is unlawful in a given situation. If, for instance, "various courts have agreed that certain conduct [constitutes an Eighth Amendment violation] under facts not distinguishable in a fair way from the facts presented in the case at hand," *Saucier*, *supra*, at 202, then a plaintiff would have a compelling argument that a defendant is not entitled to qualified immunity.

That is not to say, of course, that conduct can be "clearly established" as unlawful only if a court has already passed on the legality of that behavior under materially similar circumstances. Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address "materially similar" conduct. Or, as the Court puts it, "officials can still

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[10] Cf. *Saucier* v. *Katz*, 533 U. S. 194, 201–202 (2001) (discounting as too general the principle that a police officer's use of force violates the Fourth Amendment if it is excessive under objective standards of reasonableness).

be on notice that their conduct violates established law even in novel factual circumstances." *Ante*, at 741.

Although the Court argues that the Court of Appeals has improperly imposed a "rigid gloss on the qualified immunity standard," *ante*, at 739, and n. 9, requiring that the facts of a previous case be materially similar to a plaintiff's circumstances for qualified immunity to be overcome, this suggestion is plainly wrong. Rather, this Court of Appeals has repeatedly made clear that it imposes no such requirement on plaintiffs seeking to defeat an assertion of qualified immunity. See, *e. g.*, *Priester* v. *Riviera Beach*, 208 F. 3d 919, 926 (CA11 2000) (stating that qualified immunity does not apply if an official's conduct "was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point" (internal quotation marks omitted)); *Smith* v. *Mattox*, 127 F. 3d 1416, 1419 (CA11 1997) (noting that a plaintiff can overcome an assertion of qualified immunity by demonstrating "that the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw"); *Lassiter* v. *Alabama A&M Univ.*, 28 F. 3d 1146, 1150, n. 4 (CA11 1994) ("[O]ccasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law").

Similarly, it is unfair to read the Court of Appeals' decision as adopting such a "rigid gloss" here. Nowhere did the Court of Appeals state that petitioner, in order to overcome respondents' assertion of qualified immunity, was required to produce precedent addressing "materially similar" facts. Rather, the Court of Appeals merely (and sensibly) evaluated the cases relied upon by petitioner to determine whether they involved facts "materially similar" to those

present in this case. See 240 F. 3d, at 981 ("It is important to analyze the facts in these cases, and determine if they are 'materially similar' to the facts in the case in front of us").

To be sure, the Court of Appeals did not also ask whether respondents' conduct so obviously violated the Eighth Amendment that respondents' assertion of qualified immunity could be overcome in the absence of case law involving "materially similar" facts. The majority must believe that the Court of Appeals, therefore, has implicitly abandoned its prior qualified immunity jurisprudence. I, on the other hand, believe it is far more likely that the Court of Appeals omitted such a discussion from its opinion for a much simpler reason: Given petitioner's allegations, it thought that the argument was so weak, and the alleged actions of respondents so far removed from "'the hazy border between excessive and acceptable force,'" *Priester*, *supra*, at 926 (quoting *Smith*, *supra*, at 1419), that it was not worth mentioning.

B

Turning to the merits of respondents' assertion that they are entitled to qualified immunity, the relevant question is whether it should have been clear to McClaran, Pelzer, and Gates in 1995 that attaching petitioner to a restraining bar violated the Eighth Amendment. As the Court notes, at that time Alabama was the only State that used this particular disciplinary method when prisoners refused to work or disrupted work squads. See *ante*, at 733. Previous litigation over Alabama's use of the restraining bar, however, did nothing to warn reasonable Alabama prison guards that attaching a prisoner to a restraining bar was unlawful, let alone that the illegality of such conduct was clearly established. In fact, the outcome of those cases effectively forecloses petitioner's claim that it should have been clear to respondents in 1995 that handcuffing petitioner to a restraining bar violated the Eighth Amendment.

For example, a year before the conduct at issue in this case took place, the United States District Court for the Northern District of Alabama rejected the Eighth Amendment claim of an Alabama prisoner who was attached to a restraining bar for five hours after he refused to work and scuffled with guards. See *Lane* v. *Findley*, No. CV–93–C–1741–S (Aug. 4, 1994). The District Court reasoned that attaching the prisoner to a restraining bar "was a measured response to a potentially volatile situation and a clear warning to other inmates that refusal to work would result in immediate discipline subjecting the offending inmate to similar conditions experienced by work detail inmates rather than a return to inside the institution." *Id.*, at 9. The District Court therefore concluded that there was a "substantial penological justification" for attaching the plaintiff to the restraining bar. *Ibid.*

Both the Court and petitioner attempt to distinguish this case from *Lane* on the grounds that the prisoner in *Lane* was "offered regular water and bathroom breaks" while on the restraining bar. See *ante*, at 747, n. 12; Reply Brief for Petitioner 16, n. 5. But this argument fails for two reasons: (1) Respondents McClaran and Pelzer were involved only in the May 11 incident, and it is undisputed that petitioner was offered water and a bathroom break every 15 minutes during his 2 hours on the bar that day; and (2) petitioner, as previously mentioned, has never alleged that respondent Gates was responsible for denying him water or bathroom breaks on June 7.

The same year that it decided *Lane*, the United States District Court for the Northern District of Alabama dismissed another complaint filed by an Alabama prisoner who was handcuffed to a restraining bar. In that case, the prisoner, after refusing to leave prison grounds with his work squad, was handcuffed to a restraining bar for eight hours. Temperatures allegedly reached 95 degrees while the prisoner was attached to the bar, and he was allegedly denied

food, water, and any opportunities to use bathroom facilities. See *Whitson* v. *Gillikin*, No. CV–93–H–1517–NE (Jan. 24, 1994), p. 7, App. 81. As a result of being handcuffed to the bar, the prisoner "suffered lacerations, pain, and swelling in his arms." *Id.*, at 85. The District Court, without deciding whether the defendants' conduct violated the Eighth Amendment, held that "there was no clearly established law identifying [their behavior] as unconstitutional." *Id.*, at 88.

Federal District Courts in five other Alabama cases decided before 1995 similarly rejected claims that handcuffing a prisoner to a restraining bar or other stationary object violated the Eighth Amendment. See, *e. g.*, *Ashby* v. *Dees*, No. CV–94–U–0605–NE (ND Ala., Dec. 27, 1994) (fence); *Vinson* v. *Thompson*, No. CV–94–A–268–N (MD Ala., Dec. 9, 1994) (restraining bar); *Hollis* v. *Folsom*, No. CV–94–T–0052–N (MD Ala., Nov. 4, 1994) (fence); *Williamson* v. *Anderson*, No. CV–92–H–675–N (MD Ala., Aug. 18, 1993) (fence); *Dale* v. *Murphy*, No. CV–85–1091–H–S (SD Ala., Feb. 4, 1986) (light pole).[11] By contrast, petitioner is unable to point to any Alabama decision issued before respondents

[11] The Court's attempt to distinguish away all of these decisions only serves to undermine further its qualified immunity analysis. The Court appears to suggest that affixing a prisoner to a restraining bar is not clearly unlawful so long as (1) guards provide the prisoner with water and regular bathroom breaks, or (2) the prisoner is placed on the restraining bar as a result of his refusal to work. See *ante*, at 747, n. 12. But as previously explained, see *supra*, at 756, petitioner was offered water and bathroom breaks every 15 minutes during his May 11 stay on the bar, and there has never been any allegation either that respondents McClaran and Pelzer were involved at all in the June 7 incident or that respondent Gates was responsible for denying petitioner water or bathroom breaks on that date. As a result, even under the Court's own view of the law, respondents are entitled to qualified immunity. Moreover, the Court nowhere explains how respondents were supposed to figure out in 1995 that it was permissible to affix prisoners to a restraining bar if they refused to work but it was unlawful to do so if they were disruptive while on work duty. The claim that such a distinction was clearly established in Eighth Amendment jurisprudence at that time is nothing short of incredible.

affixed him to the restraining bar holding that a prison guard engaging in such conduct violated the Eighth Amendment.

In the face of these decisions, and the absence of contrary authority, I find it impossible to conclude that respondents either were "plainly incompetent" or "knowingly violat[ing] the law" when they affixed petitioner to the restraining bar. *Malley*, 475 U. S., at 341. A reasonably competent prison guard attempting to obey the law is not only entitled to look at how courts have recently evaluated his colleagues' prior conduct, such judicial decisions are often the only place that a guard can look for guidance, especially in a situation where a State stands alone in adopting a particular policy.

C

In concluding that respondents are not entitled to qualified immunity, the Court is understandably unwilling to hold that our Eighth Amendment jurisprudence clearly established in 1995 that attaching petitioner to a restraining bar violated the Eighth Amendment.[12] *Ante*, at 742. It is far from "obvious," *ante*, at 738, 741, that respondents, by attaching petitioner to a restraining bar, acted with "deliberate indifference" to his health and safety. *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992). Petitioner's allegations do not come close to suggesting that respondents knew that the mere act of at-

[12] I continue to believe that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence." *Farmer* v. *Brennan*, 511 U. S. 825, 859 (1994) (THOMAS, J., concurring in judgment). As a result, I do not think, as an original matter, that attaching petitioner to the restraining bar constituted "punishment" under the Eighth Amendment. See *ibid.* Nevertheless, I recognize that this Court has embraced the opposite view—that the Eighth Amendment does regulate prison conditions not imposed as part of a sentence, see, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976)—so I will apply that jurisprudence in evaluating whether respondents' conduct violated clearly established law. I note, however, that I remain open to overruling our dubious expansion of the Eighth Amendment in an appropriate case. See *Farmer*, *supra*, at 861–862 (THOMAS, J., concurring in judgment).

taching petitioner to the restraining bar imposed "a substantial risk of serious harm" upon him. See *Farmer* v. *Brennan*, 511 U. S. 825, 847 (1994). If, for instance, attaching petitioner to a restraining bar amounted to the "gratuitous infliction of 'wanton and unnecessary' pain," *ante*, at 738, it is curious that petitioner, while handcuffed to the bar on May 11, chose to decline most of the bathroom breaks offered to him. Respondents also affixed petitioner to the restraining bar for a legitimate penological purpose: encouraging his compliance with prison rules while out on work duty.

Moreover, if the application of this Court's general Eighth Amendment jurisprudence to the use of a restraining bar was as "obvious" as the Court claims, *ante*, at 738, 741, one wonders how Federal District Courts in Alabama could have repeatedly arrived at the opposite conclusion, and how respondents, in turn, were to realize that these courts had failed to grasp the "obvious."

D

Unable to base its holding that respondents' conduct violated "'clearly established . . . rights of which a reasonable person would have known,'" *ante*, at 742 (quoting *Harlow*, 457 U. S., at 818), on this Court's precedents, the Court instead relies upon "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a [Department of Justice] report informing the ADOC of the constitutional infirmity in its use of the hitching post," *ante*, at 741–742. I will address these sources in reverse order.

The Department of Justice report referenced by the Court does nothing to demonstrate that it should have been clear to respondents that attaching petitioner to a restraining bar violated his Eighth Amendment rights. To begin with, the Court concedes that there is no indication the Justice Department's recommendation that the ADOC stop using the restraining bar was ever communicated to respondents, prison guards in the small town of Capshaw, Alabama. See

ante, at 745. In any event, an extraordinarily well-informed prison guard in 1995, who had read both the Justice Department's report and Federal District Court decisions addressing the use of the restraining bar, could have concluded only that there was a dispute as to whether handcuffing a prisoner to a restraining bar constituted an Eighth Amendment violation, not that such a practice was clearly unconstitutional.

The ADOC regulation relied upon by the Court not only fails to provide support for its holding today; the regulation weighs in respondents' favor because it expressly authorized prison guards to affix prisoners to a restraining bar when they were "disruptive to the work squad." App. 102. Alabama prison guards were entitled to rely on the validity of a duly promulgated state regulation instructing them to attach prisoners to a restraining bar under specified circumstances. See *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999) (crediting officer's reliance on Marshals Service policy as "important" to the conclusion that qualified immunity was warranted in an area where the state of the law "was at best undeveloped"). And, as the Court recounts, petitioner was placed on the restraining bar after entering into an argument with another inmate while on work duty (May 11) and a wrestling match with a guard when arriving at his work site (June 7). *Ante*, at 734.

The Court argues that respondents must have been "aware of the wrongful character of their conduct" because they did not precisely abide by the policy set forth in the ADOC regulation. *Ante*, at 744. Even taking petitioner's allegations as true, however, I am at a loss to understand how respondents failed to comply with the regulation. With respect to respondents McClaran and Pelzer, who were involved only in the May 11 incident, the Court concedes that the required activity log was filled out on that date, and petitioner was offered water and bathroom breaks every 15 minutes. *Ante*, at 734, 744. With respect to respondent Gates, the Court complains that no such log exists for petitioner's

June 7 stay on the bar and the record suggests that the periodic water and bathroom-break offers contemplated by the regulation were not made. Petitioner, however, has never alleged that Gates was responsible for supervising or looking after him once he was handcuffed to the post. He has only alleged that Gates placed him there.

While the Court also observes that the regulation provides that an inmate "'will be allowed to join his assigned squad'" whenever he tells an officer "'that he is ready to go to work,'" *ante,* at 744 (quoting App. 103), the Court again does not explain how any of the respondents in this case failed to observe this requirement. Petitioner has never alleged that he informed respondents or any other prison guard while he was on the bar that he was ready to go to work.

Finally, the "binding Eleventh Circuit precedent" relied upon by the Court, *ante,* at 741–743, was plainly insufficient to give respondents fair warning that their alleged conduct ran afoul of petitioner's Eighth Amendment rights. The Court of Appeals held in *Ort* v. *White,* 813 F. 2d 318 (CA11 1987), that a prison guard did not violate an inmate's Eighth Amendment rights by denying him water when he refused to work, and the Court admits that this holding provides no support for petitioner. Instead, it claims that the "reasoning" in *Ort* "gave fair warning to respondents that their conduct crossed the line of what is constitutionally permissible." *Ante,* at 743. But *Ort* provides at least as much support to respondents as it does to petitioner. For instance, *Ort* makes it abundantly clear that prison guards "have the authority to use that amount of force or those coercive measures reasonably necessary to enforce an inmate's compliance with valid prison rules" so long as such measures are not undertaken "maliciously or sadistically." 813 F. 2d, at 325.

To be sure, the Court correctly notes that the Court of Appeals in *Ort* suggested that it "might have reached a different decision" had the prison officer denied the inmate

water after he had returned to the prison instead of while he was out with the work squad. *Id.*, at 326. But the suggestion in dicta that a guard might have violated a prisoner's Eighth Amendment rights by denying him water once he returned from work duty does not come close to clearly establishing the unconstitutionality of attaching a disruptive inmate to a restraining bar after he is removed from his work squad and back within prison walls.

Admittedly, the other case upon which the Court relies, *Gates* v. *Collier*, 501 F. 2d 1291 (CA5 1974), is more on point. Nevertheless, *Gates* is also inadequate to establish clearly the unlawfulness of respondents' alleged conduct. In *Gates*, the Court of Appeals listed "handcuffing inmates to [a] fence and to cells for long periods of time" as one of many unacceptable forms of "physical brutality and abuse" present at a Mississippi prison. *Id.*, at 1306. Others included administering milk of magnesia as a form of punishment, depriving inmates of mattresses, hygienic materials, and adequate food, and shooting at and around inmates to keep them standing or moving. See *ibid.* The Court of Appeals had "no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment." *Ibid.*

It is not reasonable, however, to read *Gates* as establishing a bright-line rule forbidding the attachment of prisoners to a restraining bar. For example, in referring to the fact that prisoners were handcuffed to a fence and cells "for long periods of time," the Court of Appeals did not indicate whether it considered a "long period of time" to be 1 hour, 5 hours, or 25 hours. The Court of Appeals also provided no explanation of the circumstances surrounding these incidents. The opinion does not indicate whether the handcuffed prisoners were given water and suitable restroom breaks or whether they were handcuffed in a bid to induce them to comply with prison rules. In the intervening 21 years between *Gates* and the time respondents affixed petitioner to

the restraining bar, there were no further decisions clarifying the contours of the law in this area. Therefore, as another court interpreting *Gates* has noted: "There is no blanket prohibition against the use of punishment such as the hitching post in *Gates* which would signal to the Commissioner of Corrections [let alone ordinary corrections officers] that the mere use of the hitching post would be a constitutional violation." *Fountain* v. *Talley*, 104 F. Supp. 2d 1345, 1354 (MD Ala. 2000).

Moreover, Eighth Amendment law has not stood still since *Gates* was decided. In *Farmer* v. *Brennan*, 511 U. S. 825 (1994), this Court elucidated the proper test for measuring whether a prison official's state of mind is one of "deliberate indifference," holding that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*, at 837. Because the Court of Appeals in *Gates* did not consider this subjective element, *Gates* alone could not have clearly established that affixing prisoners to a restraining bar was clearly unconstitutional in 1995. Also, in the face of recent Federal District Court decisions specifically rejecting prisoners' claims that Alabama prison guards violated their Eighth Amendment rights by attaching them to a restraining bar as well as a state regulation authorizing such conduct, it seems contrary to the purpose of qualified immunity to hold that one vague sentence plucked out of a 21-year-old Court of Appeals opinion provided clear notice to respondents in 1995 that their conduct was unlawful.

* * *

It is most unfortunate that the Court holds that Officer McClaran, Sergeant Pelzer, and Lieutenant Gates are not

entitled to qualified immunity. It was not at all clear in 1995 that respondents' conduct violated the Eighth Amendment, and they certainly could not have anticipated that this Court or any other would rule against them on the basis of nonexistent allegations or allegations involving the behavior of other prison guards. For the foregoing reasons, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Syllabus

REPUBLICAN PARTY OF MINNESOTA ET AL. *v.* WHITE, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANDARDS, ET AL.

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

No. 01–521. Argued March 26, 2002—Decided June 27, 2002

The Minnesota Supreme Court has adopted a canon of judicial conduct that prohibits a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political issues" (hereinafter announce clause). While running for associate justice of that court, petitioner Gregory Wersal (and others) filed this suit seeking a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. The District Court granted respondent officials summary judgment, and the Eighth Circuit affirmed.

Held: The announce clause violates the First Amendment. Pp. 770–788.

(a) The record demonstrates that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis.* Pp. 770–774.

(b) The announce clause both prohibits speech based on its content and burdens a category of speech that is at the core of First Amendment freedoms—speech about the qualifications of candidates for public office. The Eighth Circuit concluded, and the parties do not dispute, that the proper test to be applied to determine the constitutionality of such a restriction is strict scrutiny, under which respondents have the burden to prove that the clause is (1) narrowly tailored, to serve (2) a compelling state interest. *E. g., Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 222. That court found that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the state judiciary's impartiality and preserving the appearance of that impartiality. Pp. 774–775.

(c) Under any definition of "impartiality," the announce clause fails strict scrutiny. First, it is plain that the clause is not narrowly tailored to serve impartiality (or its appearance) in the traditional sense of the word, *i. e.*, as a lack of bias for or against either party to the proceeding. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties,

Syllabus

but rather speech for or against particular issues. Second, although "impartiality" in the sense of a lack of preconception in favor of or against a particular legal view may well be an interest served by the announce clause, pursuing this objective is not a compelling state interest, since it is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law, see *Laird* v. *Tatum*, 409 U. S. 824, 835. Third, the Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose. See, *e. g.*, *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52–53. Respondents have not carried the burden imposed by strict scrutiny of establishing that statements made during an election campaign are uniquely destructive of openmindedness. See, *e. g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 841. Pp. 775–784.

(d) A universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional, see *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 375–377. However, the practice of prohibiting speech by judicial candidates is neither ancient nor universal. The Court knows of no such prohibitions throughout the 19th and the first quarter of the 20th century, and they are still not universally adopted. This does not compare well with the traditions deemed worthy of attention in, *e. g.*, *Burson* v. *Freeman*, 504 U. S. 191, 205–206. Pp. 785–787.

(e) There is an obvious tension between Minnesota's Constitution, which requires judicial elections, and the announce clause, which places most subjects of interest to the voters off limits. The First Amendment does not permit Minnesota to leave the principle of elections in place while preventing candidates from discussing what the elections are about. See, *e. g.*, *Renne* v. *Geary*, 501 U. S. 312, 349. Pp. 787–788.

247 F. 3d 854, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 788, and KENNEDY, J., *post*, p. 792, filed concurring opinions. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 797. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 803.

James Bopp, Jr., argued the cause for petitioners Republican Party of Minnesota et al. With him on the briefs were

Counsel

Thomas J. Marzen, *Richard E. Coleson*, and *Ronald D. Rotunda*. *William F. Mohrman* and *Erick G. Kaardal* filed briefs for petitioners Wersal et al.

Alan I. Gilbert, Chief Deputy and Solicitor General of Minnesota, argued the cause for respondents. With him on the brief were *Mike Hatch*, Attorney General, *Kristine L. Eiden*, Deputy Attorney General, and *Julie Ralston Aoki*, *Mark B. Levinger*, and *Thomas C. Vasaly*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *James H. Henderson, Sr.*, *Colby M. May*, and *Walter M. Weber;* for the American Civil Liberties Union et al. by *David B. Isbell*, *David H. Remes*, and *Steven R. Shapiro;* for the Chamber of Commerce of the United States by *Jan Witold Baran* and *Stephen A. Bokat;* for Minnesota State Representative Philip Krinkie et al. by *Raymond C. Ortman, Jr.;* for Public Citizen by *Allison M. Zieve*, *David C. Vladeck*, and *Scott L. Nelson;* and for State Supreme Court Justices by *Erik S. Jaffe*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, and *Manuel M. Medeiros*, State Solicitor, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *John Cornyn* of Texas, and *Christine O. Gregoire* of Washington; for the Ad hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary by *S. Shawn Stephens* and *Andy Taylor;* for the American Bar Association by *Robert E. Hirshon*, *Reagan Wm. Simpson*, and *Warren S. Huang;* for the Minnesota State Bar Association by *Wayne D. Struble;* for the Brennan Center for Justice at NYU School of Law et al. by *Scott Bales* and *Deborah Goldberg;* for the Conference of Chief Justices by *Roy A. Schotland*, *George T. Patton, Jr.*, *Sarah Steele Riordan*, and *Robert F. Bauer;* for the Missouri Bar by *Joseph C. Blanton, Jr.;* and for Pennsylvanians for Modern Courts by *Edmund B. Spaeth, Jr.*, and *Brett G. Sweitzer*.

Briefs of *amici curiae* were filed for the Idaho Conservation League et al. by *John D. Echeverria;* and for the National Association of Criminal Defense Lawyers by *David W. Ogden*, *Jonathan J. Frankel*, *Neil M. Richards*, and *Lisa Kemler*.

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

I

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, § 7. Since 1912, those elections have been nonpartisan. Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4–6. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct"). Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation. Rule 8.4(a); Minn. Rules on Lawyers Professional Responsibility 8–14, 15(a) (2002).

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal

challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board,[1] investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.[2]

Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents,[3] seeking, *inter alia*, a

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[1] The Eighth Circuit did not parse out the separate functions of these two entities in the case at hand, referring to the two of them collectively as the "Lawyers Board." We take the same approach.

[2] Nor did Wersal have any success receiving answers from the Lawyers Board when he included "concrete examples," *post*, at 799, n. 2 (STEVENS, J., dissenting), in his request for an advisory opinion on other subjects a month later:

"As you are well aware, there is pending litigation over the constitutionality of certain portions of Canon 5. You are a plaintiff in this action and you have sued, among others, me as Director of the Office of Lawyers Professional Responsibility and Charles Lundberg as the Chair of the Board of Lawyers Professional Responsibility. Due to this pending litigation, I will not be answering your request for an advisory opinion at this time." App. 153.

[3] Respondents are officers of the Lawyers Board and of the Minnesota Board on Judicial Standards (Judicial Board), which enforces the ethical rules applicable to judges.

declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. The parties filed cross-motions for summary judgment, and the District Court found in favor of respondents, holding that the announce clause did not violate the First Amendment. 63 F. Supp. 2d 967 (Minn. 1999). Over a dissent by Judge Beam, the United States Court of Appeals for the Eighth Circuit affirmed. *Republican Party of Minn.* v. *Kelly*, 247 F. 3d 854 (2001). We granted certiorari. 534 U. S. 1054 (2001).

II

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002).

We know that "announc[ing] . . . views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," *ibid.*—a prohibition that is not challenged here and on which we express no view.

There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text. The statements that formed the basis of the complaint against Wersal in 1996 included criticism of past decisions of the Minnesota Supreme Court. One piece of campaign literature stated that "[t]he Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." App. 37. It went on to criticize a decision excluding from evidence confessions by criminal defendants that were not tape-recorded, asking "[s]hould we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" *Ibid.* It criticized a decision striking down a state law restricting welfare benefits, asserting that "[i]t's the Legislature which should set our spending policies." *Ibid.* And it criticized a decision requiring public financing of abortions for poor women as "unprecedented" and a "pro-abortion stance." *Id.*, at 38. Although one would think that all of these statements touched on disputed legal or political issues, they did not (or at least do not now) fall within the scope of the announce clause. The Judicial Board issued an opinion stating that judicial candidates may criticize past decisions, and the Lawyers Board refused to discipline Wersal for the foregoing statements because, in part, it thought they did not violate the announce clause. The Eighth Circuit relied on the Judicial Board's opinion in upholding the announce clause, 247 F. 3d, at 882, and the Minnesota Supreme Court recently embraced the Eighth Circuit's interpretation, *In re Code of Judicial Conduct*, 639 N. W. 2d 55 (2002).

There are yet further limitations upon the apparent plain meaning of the announce clause: In light of the constitutional concerns, the District Court construed the clause to reach only disputed issues that are likely to come before the candidate if he is elected judge. 63 F. Supp. 2d, at 986. The

Eighth Circuit accepted this limiting interpretation by the District Court, and in addition construed the clause to allow general discussions of case law and judicial philosophy. 247 F. 3d, at 881–882. The Supreme Court of Minnesota adopted these interpretations as well when it ordered enforcement of the announce clause in accordance with the Eighth Circuit's opinion. *In re Code of Judicial Conduct*, *supra.*

It seems to us, however, that—like the text of the announce clause itself—these limitations upon the text of the announce clause are not all that they appear to be. First, respondents acknowledged at oral argument that statements critical of past judicial decisions are *not* permissible if the candidate also states that he is against *stare decisis.* Tr. of Oral Arg. 33–34.[4] Thus, candidates must choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis.* Or, to look at it more concretely, they may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions. Second, limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all. One would hardly expect the "disputed legal or political issues" raised in the course of a state judicial election to include such matters as whether the Federal Government should end the embargo of Cuba. Quite obviously, they will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts. And within that relevant category, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."

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[4] JUSTICE GINSBURG argues that we should ignore this concession at oral argument because it is inconsistent with the Eighth Circuit's interpretation of the announce clause. *Post*, at 810 (dissenting opinion). As she appears to acknowledge, however, the Eighth Circuit was merely silent on this particular question. *Ibid.* Silence is hardly inconsistent with what respondents conceded at oral argument.

Buckley v. *Illinois Judicial Inquiry Bd.*, 997 F. 2d 224, 229 (CA7 1993). Third, construing the clause to allow "general" discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "'strict constructionist.'" Tr. of Oral Arg. 29. But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution. Respondents conceded that the announce clause would prohibit the candidate from exemplifying his philosophy in this fashion. *Id.*, at 43. Without such application to real-life issues, all candidates can claim to be "strict constructionists" with equal (and unhelpful) plausibility.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.[5]

[5] In 1990, in response to concerns that its 1972 Model Canon—which was the basis for Minnesota's announce clause—violated the First Amendment, see L. Milord, The Development of the ABA Judicial Code 50 (1992), the ABA replaced that canon with a provision that prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Judicial Conduct, Canon 5(A)(3)(d)(ii) (2000). At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. Tr. of Oral Arg. 38. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. Final Report of the Advi-

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Brief for Respondents 35–36. Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Minnesota State Bar Association Judicial Elections Task Force Report & Recommendations, App. C (June 19, 1997), reprinted at App. 97–103. Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

III

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms"—speech about the qualifications of candidates for public office. 247 F. 3d, at 861, 863. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, *id.*, at 864; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the an-

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sory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5–6 (June 29, 1994), reprinted at App. 367–368. The ABA, however, agrees with respondents' position, Brief for ABA as *Amicus Curiae* 5. We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question.

nounce clause is (1) narrowly tailored, to serve (2) a compelling state interest. *E. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 222 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression." *Brown* v. *Hartlage*, 456 U. S. 45, 54 (1982).

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. 247 F. 3d, at 867. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary.[6] Respondents are rather vague, however, about what they mean by "impartiality." Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

A

One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense

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[6] Although the Eighth Circuit also referred to the compelling interest in an "independent" judiciary, 247 F. 3d, at 864–868, both it and respondents appear to use that term, as applied to the issues involved in this case, as interchangeable with "impartial." See *id.*, at 864 (describing a judge's independence as his "ability to apply the law neutrally"); Brief for Respondents 20, n. 4 ("[J]udicial impartiality is linked to judicial independence").

assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process. *Tumey* v. *Ohio*, 273 U. S. 510, 523, 531–534 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 822–825 (1986) (same); *Ward* v. *Monroeville*, 409 U. S. 57, 58–62 (1972) (same); *Johnson* v. *Mississippi*, 403 U. S. 212, 215–216 (1971) *(per curiam)* (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy* v. *Gramley*, 520 U. S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U. S. 133, 137–139 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party.

Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.[7]

B

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view.* This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-JUSTICE REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had

[7] JUSTICE STEVENS asserts that the announce clause "serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality." *Post,* at 801. We do not disagree. Some of the speech prohibited by the announce clause may well exhibit a bias against parties—including JUSTICE STEVENS's example of an election speech stressing the candidate's unbroken record of affirming convictions for rape, *ante,* at 800–801. That is why we are careful to say that the announce clause is "*barely* tailored to serve that interest," *supra,* at 776 (emphasis added). The question under our strict scrutiny test, however, is not whether the announce clause serves this interest *at all,* but whether it is *narrowly tailored* to serve this interest. It is not.

not at least given opinions as to constitutional issues in their previous legal careers." *Laird* v. *Tatum*, 409 U. S. 824, 835 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.* The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, § 5 ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

C

A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in openmindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with

statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. See, *e. g.*, *Laird*, *supra*, at 831–833 (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes's authorship of the opinion overruling *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923), a case he had criticized in a book written before his appointment to the Court). More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) ("A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law . . ."); Minn. Code of Judicial Conduct, Canon 4(B), Comment. (2002) ("To the extent that time permits, a judge is encouraged to do so . . ."). That is quite incompatible with the notion that the need for openmindedness (or for the appearance of openmindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeat-

edly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. See *City of Ladue* v. *Gilleo,* 512 U. S. 43, 52–53 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Florida Star* v. *B. J. F.*, 491 U. S. 524, 541–542 (1989) (SCALIA, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).

JUSTICE STEVENS asserts that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will have a *particular* reluctance to contradict them. *Post,* at 801. That might be plausible, perhaps, with regard to campaign *promises.* A candidate who says "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages" will positively be breaking his word if he does not do so (although one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign "pledges or promises," which is not challenged here. The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely

to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice. In any event, it suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of openmindedness) on which the validity of the announce clause rests. See, *e. g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 841 (1978) (rejecting speech restriction subject to strict scrutiny where the State "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined"); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 816–825 (2000) (same).[8]

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. *Eu*, 489 U. S., at 222–223 (internal quotation marks omitted). "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters

[8] We do not agree with JUSTICE STEVENS's broad assertion that "to the extent that [statements on legal issues] seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence *a lack of fitness for office.*" *Post*, at 798 (emphasis added). Of course *all* statements on real-world legal issues "indicate" how the speaker would rule "in specific cases." And if making such statements *(of honestly held views)* with the hope of enhancing one's chances with the electorate displayed a lack of fitness for office, so would similarly motivated honest statements of judicial candidates made with the hope of enhancing their chances of confirmation by the Senate, or indeed of appointment by the President. Since such statements are made, we think, in every confirmation hearing, JUSTICE STEVENS must contemplate a federal bench filled with the unfit.

of current public importance." *Wood* v. *Georgia*, 370 U. S. 375, 395 (1962). "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Brown*, 456 U. S., at 60 (internal quotation marks and citation omitted). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

JUSTICE GINSBURG would do so—and much of her dissent confirms rather than refutes our conclusion that the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections. She contends that the announce clause must be constitutional because due process would be denied if an elected judge sat in a case involving an issue on which he had previously announced his view. *Post*, at 816, 819. She reaches this conclusion because, she says, such a judge would have a "direct, personal, substantial, and pecuniary interest" in ruling consistently with his previously announced view, in order to reduce the risk that he will be "voted off the bench and thereby lose [his] salary and emoluments," *post*, at 816 (internal quotation marks and alterations omitted). But elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue. So if, as JUSTICE GINSBURG claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. It is not difficult to understand how one with these views would approve the election-nullifying effect of the announce

clause.[9] They are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted, see *infra*, at 785–786.

JUSTICE GINSBURG devotes the rest of her dissent to attacking arguments we do not make. For example, despite the number of pages she dedicates to disproving this proposition, *post*, at 805–809, we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.[10] What we do assert, and what JUSTICE GINSBURG ignores, is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms. We rely on the cases involving speech during elections, *supra*, at 781–782, only to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.[11]

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[9] JUSTICE GINSBURG argues that the announce clause is not election nullifying because Wersal criticized past decisions of the Minnesota Supreme Court in his campaign literature and the Lawyers Board decided not to discipline him for doing so. *Post*, at 811–812. As we have explained, however, had Wersal additionally stated during his campaign that he did not feel bound to follow those erroneous decisions, he would not have been so lucky. *Supra*, at 772–773. This predicament hardly reflects "the robust communication of ideas and views from judicial candidate to voter." *Post*, at 812.

[10] JUSTICE STEVENS devotes most of his dissent to this same argument that we do not make.

[11] Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues. Thus, JUSTICE GINSBURG's repeated invocation of instances in which nominees to this Court declined to announce such views during Senate confirmation hearings is pointless. *Post*, at 807–808, n. 1, 818–819, n. 4. That the practice

But in any case, JUSTICE GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench." *Post*, at 806. This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well. See, *e. g.*, *Baker* v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999). Which is precisely why the election of state judges became popular.[12]

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of *voluntarily* demurring does not establish the legitimacy of *legal compulsion* to demur is amply demonstrated by the unredacted text of the sentence she quotes in part, *post*, at 819, from *Laird* v. *Tatum*, 409 U. S. 824, 836, n. 5 (1972): "*In terms of propriety, rather than disqualification*, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench." (Emphasis added.)

[12] Although JUSTICE STEVENS at times appears to agree with JUSTICE GINSBURG's premise that the judiciary is completely separated from the enterprise of representative government, *post*, at 798 ("[E]very good judge is fully aware of the distinction between the law and a personal point of view"), he eventually appears to concede that the separation does not hold true for many judges who sit on courts of last resort, *ante*, at 799 ("If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls"); *post*, at 799, n. 2. Even if the policymaking capacity of judges were limited to courts of last resort, that would only prove that the announce clause fails strict scrutiny. "[I]f announcing one's views in the context of a campaign for the State Supreme Court might be" protected speech, *ibid.*, then—even if announcing one's views in the context of a campaign for a lower court were *not* protected speech, *ibid.*—the announce clause would not be narrowly tailored, since it applies to high-

IV

To sustain the announce clause, the Eighth Circuit relied heavily on the fact that a pervasive practice of prohibiting judicial candidates from discussing disputed legal and political issues developed during the last half of the 20th century. 247 F. 3d, at 879–880. It is true that a "universal and long-established" tradition of prohibiting certain conduct creates "a strong presumption" that the prohibition is constitutional: "Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 375–377 (1995) (SCALIA, J., dissenting). The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal.

At the time of the founding, only Vermont (before it became a State) selected any of its judges by election. Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy. By the time of the Civil War, the great majority of States elected their judges. E. Haynes, Selection and Tenure of Judges 99–135 (1944); Berkson, Judicial Selection in the United States: A Special Report, 64 Judicature 176 (1980). We know of no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century. Indeed, judicial elections were generally partisan during this period, the movement toward nonpartisan judicial elections not even beginning until the 1870's. *Id.*, at 176–177;

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and low-court candidates alike. In fact, however, the judges of inferior courts *often* "make law," since the precedent of the highest court does not cover every situation, and not every case is reviewed. JUSTICE STEVENS has repeatedly expressed the view that a settled course of lower court opinions binds the highest court. See, *e. g.*, *Reves* v. *Ernst & Young*, 494 U. S. 56, 74 (1990) (concurring opinion); *McNally* v. *United States*, 483 U. S. 350, 376–377 (1987) (dissenting opinion).

M. Comisky & P. Patterson, The Judiciary—Selection, Compensation, Ethics, and Discipline 4, 7 (1987). Thus, not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while.

The first code regulating judicial conduct was adopted by the ABA in 1924. 48 ABA Reports 74 (1923) (report of Chief Justice Taft); P. McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns 86 (1990). It contained a provision akin to the announce clause: "A candidate for judicial position . . . should not announce in advance his conclusions of law on disputed issues to secure class support . . . ." ABA Canon of Judicial Ethics 30 (1924). The States were slow to adopt the canons, however. "By the end of World War II, the canons . . . were binding by the bar associations or supreme courts of only eleven states." J. MacKenzie, The Appearance of Justice 191 (1974). Even today, although a majority of States have adopted either the announce clause or its 1990 ABA successor, adoption is not unanimous. Of the 31 States that select some or all of their appellate and general-jurisdiction judges by election, see American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr. 2002), 4 have adopted no candidate-speech restriction comparable to the announce clause,[13] and 1 prohibits only the discussion of "pending litigation."[14] This practice, relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases. *E. g.*, *Burson* v. *Freeman*, 504 U. S. 191, 205–206 (1992) (crediting tradition of prohibiting speech around

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[13] Idaho Code of Judicial Conduct, Canon 7 (2001); Mich. Code of Judicial Conduct, Canon 7 (2002); N. C. Code of Judicial Conduct, Canon 7 (2001); Ore. Code of Judicial Conduct, Rule 4–102 (2002). All of these States save Idaho have adopted the pledges or promises clause.

[14] Ala. Canon of Judicial Ethics 7(B)(1)(c) (2002).

polling places that began with the very adoption of the secret ballot in the late 19th century, and in which every State participated); *id.*, at 214–216 (SCALIA, J., concurring in judgment) (same); *McIntyre*, *supra*, at 375–377 (SCALIA, J., dissenting) (crediting tradition of prohibiting anonymous election literature, which again began in 1890 and was universally adopted).

* * *

There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits. (The candidate-speech restrictions of all the other States that have them are also the product of judicial fiat.[15]) The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. See ABA Model Code of Judicial Conduct, Canon 5(C)(2), Comment (2000) ("[M]erit selection of judges is a preferable manner in which to select the judiciary"); An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence 96 (1997) ("The American Bar Association strongly endorses the merit selection of judges, as opposed to their election . . . . Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected . . . to work for the adoption of merit selection and retention"). That opposition may be well taken (it certainly had the sup-

[15] These restrictions are all contained in these States' codes of judicial conduct, App. to Brief for ABA as *Amicus Curiae*. "In every state, the highest court promulgates the Code of Judicial Conduct, either by express constitutional provision, statutory authorization, broad constitutional grant, or inherent power." In the Supreme Court of Texas: Per Curiam Opinion Concerning Amendments to Canons 5 and 6 of the Code of Judicial Conduct, 61 Tex. B. J. 64, 66 (1998) (collecting provisions).

port of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Renne* v. *Geary*, 501 U. S. 312, 349 (1991) (Marshall, J., dissenting); accord, *Meyer* v. *Grant*, 486 U. S. 414, 424–425 (1988) (rejecting argument that the greater power to end voter initiatives includes the lesser power to prohibit paid petition-circulators).

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. Respondents claim that "[t]he Announce Clause is necessary . . . to protect the State's compelling governmental interes[t] in an actual and perceived . . . impartial judiciary." Brief for Respondents 8. I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at

least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is "'like ignoring a crocodile in your bathtub'"); Bright & Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B. U. L. Rev. 759, 793–794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. See Schotland, Financing Judicial Elections, 2000: Change and Challenge, 2001 L. Rev. Mich. State U. Detroit College of Law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for 5 seats on the Alabama Supreme Court spent an average of $1,092,076 on their campaigns); American Bar Association, Report and Recommendations of the Task Force on Lawyers' Political Contributions, pt. 2 (July 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme Court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court). Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of

campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. See Thomas, National L. J., Mar. 16, 1998, p. A8, col. 1 (reporting that a study by the public interest group Texans for Public Justice found that 40 percent of the $9,200,000 in contributions of $100 or more raised by seven of Texas' nine Supreme Court justices for their 1994 and 1996 elections "came from parties and lawyers with cases before the court or contributors closely linked to these parties"). Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary. See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001) (available at http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf) (describing survey results indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment); Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 Cath. U. L. Rev. 361, 379 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court).

Despite these significant problems, 39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both. American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr. 2002). Judicial elections were not always so prevalent. The first 29 States of the Union adopted methods for selecting judges that did not involve popular elections. See Croley, The Majoritarian Dif-

ficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 716 (1995). As the Court explains, however, beginning with Georgia in 1812, States began adopting systems for judicial elections. See *ante*, at 785. From the 1830's until the 1850's, as part of the Jacksonian movement toward greater popular control of public office, this trend accelerated, see Goldschmidt, Merit Selection: Current Status, Procedures, and Issues, 49 U. Miami L. Rev. 1, 5 (1994), and by the Civil War, 22 of the 34 States elected their judges, *ibid.* By the beginning of the 20th century, however, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted. Croley, *supra*, at 723. In 1906, Roscoe Pound gave a speech to the American Bar Association in which he claimed that "compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." The Causes of Popular Dissatisfaction with the Administration of Justice, 8 Baylor L. Rev. 1, 23 (1956) (reprinting Pound's speech).

In response to such concerns, some States adopted a modified system of judicial selection that became known as the Missouri Plan (because Missouri was the first State to adopt it for most of its judicial posts). See Croley, 62 U. Chi. L. Rev., at 724. Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. *Ibid.* If a judge is recalled, the vacancy is filled through a new nomination and appointment. *Ibid.* This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges. See Grodin, Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections, 61 S. Cal. L. Rev. 1969, 1980 (1988) (admitting that he cannot be sure that his votes as a California Supreme Court Justice

in "critical cases" during 1986 were not influenced subconsciously by his awareness that the outcomes could affect his chances in the retention elections being conducted that year). The Missouri Plan is currently used to fill at least some judicial offices in 15 States. Croley, *supra*, at 725–726; American Judicature Society, *supra*.

Thirty-one States, however, still use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who thereafter run for reelection periodically. *Ibid.* Of these, slightly more than half use nonpartisan elections, and the rest use partisan elections. *Ibid.* Most of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation. See Croley, *supra*, at 725.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

JUSTICE KENNEDY, concurring.

I agree with the Court that Minnesota's prohibition on judicial candidates' announcing their legal views is an unconstitutional abridgment of the freedom of speech. There is authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases, see, *e. g.*, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105 (1991), and the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test. So I join its opinion.

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." *Id.*, at 124 (KENNEDY, J., concurring in judgment). The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. Nothing in the Court's opinion should be read to cast doubt on the vital importance of this state interest. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Articulated standards of judicial conduct may advance this interest. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059 (1996). To comprehend, then to codify, the essence of judicial integrity is a hard task, however. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe

the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921). Much the same can be said of explicit standards to ensure judicial integrity. To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service. See, *e. g.,* Administrative Office of U. S. Courts, Code of Judicial Conduct for United States Judges (1999). Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State. See *Brown* v. *Hartlage*, 456 U. S. 45, 60 (1982). The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to

cure this tendency with governmental restrictions on political speech. See Sedition Act of 1798, ch. 74, 1 Stat. 596. Cooler heads have always recognized, however, that these measures abridge the freedom of speech—not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are "'expressly and positively forbidden by'" the First Amendment. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 274 (1964) (quoting the Virginia Resolutions of 1798). The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal Judiciary. In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation.

By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor." *Bridges* v. *California*, 314 U. S. 252, 273 (1941).

These considerations serve but to reinforce the conclusion that Minnesota's regulatory scheme is flawed. By abridging speech based on its content, Minnesota impeaches its own system of free and open elections. The State may not regulate the content of candidate speech merely because the speakers are candidates. This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968), and *Connick* v. *Myers*, 461 U. S. 138 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.

Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner. Even the undoubted interest of the State in the excellence of its judiciary does not allow it to restrain candidate speech by reason of its content. Minnesota's attempt to regulate campaign speech is impermissible.

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

In her dissenting opinion, JUSTICE GINSBURG has cogently explained why the Court's holding is unsound. I therefore join her opinion without reservation. I add these comments to emphasize the force of her arguments and to explain why I find the Court's reasoning even more troubling than its holding. The limits of the Court's holding are evident: Even if the Minnesota Lawyers Professional Responsibility Board (Board) may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. If the solution to harmful speech must be more speech, so be it. The Court's reasoning, however, will unfortunately endure beyond the next election cycle. By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.

The Court's disposition rests on two seriously flawed premises—an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom "'to express themselves on matters of current public importance'" as do all other elected officials. *Ante*, at 781–782. Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. Sir Matthew Hale pointedly described this essential attribute of the judicial office in words which have retained their integrity for centuries:

> "'11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.
>
> "'12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.'"[1]

Consistent with that fundamental attribute of the office, countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections. For this reason, opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the distinction between the law and a personal point of view. It is equally clear, however, that such expressions after a lawyer has been nominated to judicial office shed little, if any, light on his capacity for judicial service. Indeed, to the extent that such statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for the office.

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[1] 2 J. Campbell, Lives of the Chief Justices of England 208 (1873) (quoting Hale's Rules For His Judicial Guidance, Things Necessary to be Continually Had in Remembrance).

Of course, any judge who faces reelection may believe that he retains his office only so long as his decisions are popular. Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls.[2] He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.

By recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary, we

[2] The Court largely ignores the fact that judicial elections are not limited to races for the highest court in the State. Even if announcing one's views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship. Such statements not only display a misunderstanding of the judicial role, but also mislead the voters by giving them the false impression that a candidate for the trial court will be able to and should decide cases based on his personal views rather than precedent.

Indeed, the Court's entire analysis has a hypothetical quality to it that stems, in part, from the fact that no candidate has yet been sanctioned for violating the announce clause. The one complaint filed against petitioner Gregory Wersal for campaign materials during his 1996 election run was dismissed by the Board. App. 16–21. Moreover, when Wersal sought an advisory opinion during his 1998 campaign, the Board could not evaluate his request because he had "not specified what statement [he] would make that may or may not be a view on a disputed, legal or political issue." *Id.*, at 32. Since Wersal failed to provide examples of statements he wished to make, and because the Board had its own doubts about the constitutionality of the announce clause, it advised Wersal that "unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable." *Ibid.* Consequently, the Court is left to decide a question of great constitutional importance in a case in which either the petitioner's statements were not subject to the prohibition in question, or he neglected to supply any concrete examples of statements he wished to make, and the Board refused to enforce the prohibition because of its own constitutional concerns.

do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes. As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency. In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office. But we do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly." Once elected, he may feel free to disregard his campaign statements, *ante*, at 780–781, but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him.* Minnesota has a compelling interest in sanctioning such statements.

A candidate for judicial office who goes beyond the expression of "general observation about the law . . . in order to obtain favorable consideration" of his candidacy, *Laird* v. *Tatum*, 409 U. S. 824, 836, n. 5 (1972) (memorandum of REHNQUIST, J., on motion for recusal), demonstrates either a lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary. It is only by failing to recognize the distinction, clearly stated by then-JUSTICE REHNQUIST, between statements made during a campaign or confirmation hearing and those made before announcing one's candidacy, that the Court is able to conclude: "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either," *ante*, at 778.

Even when "impartiality" is defined in its narrowest sense to embrace only "the lack of bias for or against either *party* to the proceeding," *ante*, at 775, the announce clause serves that interest. Expressions that stress a candidate's unbro-

ken record of affirming convictions for rape,[3] for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases). Contrary to the Court's reasoning in its first attempt to define impartiality, *ante*, at 775–776, an interpretation of the announce clause that prohibits such statements serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality.

When the Court evaluates the importance of impartiality in its broadest sense, which it describes as "the interest in openmindedness, or at least in the appearance of openmindedness," *ante*, at 778, it concludes that the announce clause is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous," *ante*, at 780. It is underinclusive, in the Court's view, because campaign statements are an infinitesimal portion of the public commitments to legal positions that candidates make during their professional careers. It is not, however, the number of legal views that a candidate may have formed or discussed in his prior career that is significant. Rather, it is the ability both to reevaluate them in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial openmindedness.

The Court boldly asserts that respondents have failed to carry their burden of demonstrating "that campaign statements are uniquely destructive of openmindedness," *ante*, at 781. But the very purpose of most statements prohibited by the announce clause is to convey the message that the candidate's mind is not open on a particular issue. The lawyer who writes an article advocating harsher penalties for polluters surely does not commit to that position to the same degree as the candidate who says "vote for me because I believe all polluters deserve harsher penalties." At the

[3] See *Buckley* v. *Illinois Judicial Inquiry Bd.*, 997 F. 2d 224, 226 (CA7 1993).

very least, such statements obscure the appearance of open-mindedness. More importantly, like the reasoning in the Court's opinion, they create the false impression that the standards for the election of political candidates apply equally to candidates for judicial office.[4]

The Court seems to have forgotten its prior evaluation of the importance of maintaining public confidence in the "disinterestedness" of the judiciary. Commenting on the danger that participation by judges in a political assignment might erode that public confidence, we wrote: "While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Mistretta* v. *United States*, 488 U. S. 361, 407 (1989).

Conversely, the judicial reputation for impartiality and openmindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office. As an elected judge recently noted:

> "Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an

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[4] JUSTICE KENNEDY would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment. *Ante*, at 793 (concurring opinion). While he does not say so explicitly, this extreme position would preclude even Minnesota's prohibition against "pledges or promises" by a candidate for judicial office. Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). A candidate could say "vote for me because I promise to never reverse a rape conviction," and the Board could do nothing to formally sanction that candidate. The unwisdom of this proposal illustrates why the same standards should not apply to speech in campaigns for judicial and legislative office.

> important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have 'political constituencies.' Rather, a judge's fidelity must be to enforcement of the rule of law regardless of perceived popular will." De Muniz, Politicizing State Judicial Elections: A Threat to Judicial Independence, 38 Willamette L. Rev. 367, 387 (2002).

The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided. I therefore respectfully dissent.

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

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judge[s] represen[t] the Law." *Chisom* v. *Roemer*, 501 U. S. 380, 411 (1991) (SCALIA, J., dissenting). Unlike their counterparts in the political branches, judges are expected to

refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 266 (1995) (STEVENS, J., dissenting), neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will," Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1180 (1989).

A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," *United States* v. *Will*, 449 U. S. 200, 217 (1980), an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). "Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota

has designated all judicial elections nonpartisan. See *Peterson* v. *Stafford*, 490 N. W. 2d 418, 425 (Minn. 1992). And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minn.* v. *Kelly*, 247 F. 3d 854, 881–882 (CA8 2001).

The question this case presents is whether the First Amendment stops Minnesota from furthering its interest in judicial integrity through this precisely targeted speech restriction.

I

The speech restriction must fail, in the Court's view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say. See *ante*, at 781 (notion that "right to speak out on disputed issues" may be abridged in an election context "sets our First Amendment jurisprudence on its head"); *ante*, at 787–788 (power to dispense with elections does not include power to curtail candidate speech if State leaves election process in place); 247 F. 3d, at 897 (Beam, J., dissenting) ("[W]hen a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association."); *id.*, at 903 (same).

I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their repre-

sentative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections; they are "at the core of our electoral process," *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968), for they "enhance the accountability of government officials to the people whom they represent," *Brown* v. *Hartlage*, 456 U. S. 45, 55 (1982).

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. "[I]t is the business of judges to be indifferent to popularity." *Chisom*, 501 U. S., at 401, n. 29 (internal quotation marks omitted). They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. Rehnquist, Dedicatory Address: Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229–300 (1980). Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public. See *Barnette*, 319 U. S., at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench. As to persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place. *E. g.*, *ante*, at 781–782 (quoting *Wood* v. *Georgia*,

370 U. S. 375, 395 (1962) ("*The role that elected officials play in our society* makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." (Emphasis added.))). See O'Neil, The Canons in the Courts: Recent First Amendment Rulings, 35 Ind. L. Rev. 701, 717 (2002) (reliance on cases involving nonjudicial campaigns, particularly *Brown* v. *Hartlage*, is "grievously misplaced"; "[h]ow any thoughtful judge could derive from that ruling any possible guidance for cases that involve judicial campaign speech seems baffling"). In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office. See *Buckley* v. *Illinois Judicial Inquiry Bd.*, 997 F. 2d 224, 228 (CA7 1993) ("Mode of appointment is only one factor that enables distinctions to be made among different kinds of public official. Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

The Court sees in this conclusion, and in the Announce Clause that embraces it, "an obvious tension," *ante*, at 787: The Minnesota electorate is permitted to select its judges by popular vote, but is not provided information on "subjects of interest to the voters," *ibid.*—in particular, the voters are not told how the candidate would decide controversial cases or issues if elected. This supposed tension, however, rests on the false premise that by departing from the federal model with respect to who *chooses* judges, Minnesota necessarily departed from the federal position on the *criteria* relevant to the exercise of that choice.[1]

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[1] In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be "of interest" to the President and the Senate in the exercise of their respective nomination and confirmation powers, just as information of that type would "interest" a Minnesota voter. But in accord with a longstand-

The Minnesota Supreme Court thought otherwise:

> "The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson*, 490 N. W. 2d, at 420.

Nothing in the Court's opinion convincingly explains why Minnesota may not pursue that goal in the manner it did.

Minnesota did not choose a judicial selection system with all the trappings of legislative and executive races. While providing for public participation, it tailored judicial selection to fit the character of third branch office holding. See *id.*, at 425 (Minnesota's system "keep[s] the ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function."). The balance the State sought to achieve—allowing the people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised—should en-

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ing norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well. See Brief for Respondents 17–42 (collecting statements at Senate confirmation hearings). Surely the Court perceives no tension here; the line each of us drew in response to preconfirmation questioning, the Court would no doubt agree, is crucial to the health of the Federal Judiciary. But by the Court's reasoning, the reticence of prospective and current federal judicial nominees dishonors Article II, for it deprives the President and the Senate of information that might aid or advance the decision to nominate or confirm. The point is not, of course, that this "practice of voluntarily demurring" by itself "establish[es] the legitimacy of legal compulsion to demur," *ante,* at 783–784, n. 11 (emphasis deleted). The federal norm simply illustrates that, contrary to the Court's suggestion, there is nothing inherently incongruous in depriving those charged with choosing judges of certain information they might desire during the selection process.

counter no First Amendment shoal. See generally O'Neil, *supra*, at 715–723.

II

Proper resolution of this case requires correction of the Court's distorted construction of the provision before us for review. According to the Court, the Announce Clause "prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*." *Ante*, at 773. In two key respects, that construction misrepresents the meaning of the Announce Clause as interpreted by the Eighth Circuit and embraced by the Minnesota Supreme Court, *In re Code of Judicial Conduct*, 639 N. W. 2d 55 (2002), which has the final word on this matter, see *Hortonville Joint School Dist. No. 1* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State.").

First and most important, the Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions, *ante*, at 773; it prevents her from "publicly making known how [she] would *decide*" disputed issues, 247 F. 3d, at 881–882 (emphasis added). That limitation places beyond the scope of the Announce Clause a wide range of comments that may be highly informative to voters. Consistent with the Eighth Circuit's construction, such comments may include, for example, statements of historical fact ("As a prosecutor, I obtained 15 drunk driving convictions"); qualified statements ("Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers"); and statements framed

at a sufficient level of generality ("Drunk drivers are a threat to the safety of every driver"). What remains within the Announce Clause is the category of statements that essentially commit the candidate to a position on a specific issue, such as "I think all drunk drivers should receive the maximum sentence permitted by law." See Tr. of Oral Arg. 45 (candidate may not say "'I'm going to decide this particular issue this way in the future'").

Second, the Court misportrays the scope of the Clause as applied to a candidate's discussion of past decisions. Citing an apparent concession by respondents at argument, *id.*, at 33–34, the Court concludes that "statements critical of past judicial decisions are not permissible if the candidate also states that he is against *stare decisis*," *ante*, at 772 (emphasis deleted). That conclusion, however, draws no force from the meaning attributed to the Announce Clause by the Eighth Circuit. In line with the Minnesota Board on Judicial Standards, the Court of Appeals stated without qualification that the Clause "does not prohibit candidates from discussing appellate court decisions." 247 F. 3d, at 882 (citing Minn. Bd. on Judicial Standards, Informal Opinion, Oct. 10, 1990, App. 55 ("In all election contests, a candidate for judicial office may discuss decisions and opinions of the Appellate courts.")). The Eighth Circuit's controlling construction should not be modified by respondents' on the spot answers to fast-paced hypothetical questions at oral argument. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170 (1972) ("We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument.").

The Announce Clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges. Judicial candidates in Minnesota may not only convey general information about themselves, see *ante*, at 774, they may also describe their conception of the role of a judge and their views on a wide range of sub-

jects of interest to the voters. See App. 97–103; Brief for Minnesota State Bar Association as *Amicus Curiae* 22–23 (*e. g.*, the criteria for deciding whether to depart from sentencing guidelines, the remedies for racial and gender bias, and the balance between "free speech rights [and] the need to control [hate crimes]" (internal quotation marks omitted)). Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do—simply or with sophistication—is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, as to an appellate bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

The Court's characterization of the Announce Clause as "election-nullifying," *ante*, at 782, "plac[ing] most subjects of interest to the voters off limits," *ante*, at 787, is further belied by the facts of this case. In his 1996 bid for office, petitioner Gregory Wersal distributed literature sharply criticizing three Minnesota Supreme Court decisions. Of the court's holding in the first case—that certain unrecorded confessions must be suppressed—Wersal asked, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" App. 37. Of the second case, invalidating a state welfare law, Wersal stated: "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies." *Ibid.* And of the third case, a decision involving abortion rights, Wersal charged that the court's holding was "directly contrary to the opinion of the U. S. Supreme Court," "unprecedented," and a "pro-abortion stance." *Id.*, at 38.

When a complaint was filed against Wersal on the basis of those statements, *id.*, at 12–15, the Lawyers Professional Responsibility Board concluded that no discipline was war-

ranted, in part because it thought the disputed campaign materials did not violate the Announce Clause, *id.*, at 20–21. And when, at the outset of his 1998 campaign, Wersal sought to avoid the possibility of sanction for future statements, he pursued the option, available to all Minnesota judicial candidates, Tr. of Oral Arg. 12–13, of requesting an advisory opinion concerning the application of the Announce Clause. App. 24–26. In response to that request, the Board indicated that it did not anticipate any adverse action against him. *Id.*, at 31–33.[2] Wersal has thus never been sanctioned under the Announce Clause for any campaign statement he made. On the facts before us, in sum, the Announce Clause has hardly stifled the robust communication of ideas and views from judicial candidate to voter.

III

Even as it exaggerates the reach of the Announce Clause, the Court ignores the significance of that provision to the integrated system of judicial campaign regulation Minnesota has developed. Coupled with the Announce Clause in Minnesota's Code of Judicial Conduct is a provision that prohibits candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). Although the Court is correct that this "pledges or promises" provision is not directly at issue in this case, see *ante*, at 770, the Court errs in overlooking the interdependence of that prohibition and the one before us. In my view, the constitutionality of the Announce

[2] In deciding not to sanction Wersal for his campaign statements, and again in responding to his inquiry about the application of the Announce Clause, the Board expressed "doubts about the constitutionality of the current Minnesota Canon." App. 20; *id.*, at 32. Those doubts, however, concerned the meaning of the Announce Clause before the Eighth Circuit applied, and the Minnesota Supreme Court adopted, the limiting constructions that now define that provision's scope.

Clause cannot be resolved without an examination of that interaction in light of the interests the pledges or promises provision serves.

A

All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results. See Brief for Petitioners Republican Party of Minnesota et al. 36–37; Tr. of Oral Arg. 14–16 (petitioners' acknowledgment that candidates may be barred from making a "pledge or promise of an outcome"); Brief for Respondents 11; see also Brief for Brennan Center for Justice et al. as *Amici Curiae* 23 ("All of the parties and *amici* in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner.").

The reasons for this agreement are apparent. Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent "with the judge's obligation to decide cases in accordance with his or her role." Tr. of Oral Arg. 16; see Brief for Petitioners Republican Party of Minnesota et al. 36 ("[B]ecause [judges] have a duty to decide a case on the basis of the law and facts before them, they can be prohibited, as candidates, from making such promises."). This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases," *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980). The proscription against pledges or promises thus represents an accommodation of "constitutionally protected interests [that] lie on both sides of the legal equation." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400 (2000) (BREYER, J., concurring). Balanced against the candidate's interest in free expression is the litigant's "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall*, 446 U. S., at 243; see *Buckley*, 997 F. 2d,

at 227 ("Two principles are in conflict and must, to the extent possible, be reconciled. . . . The roots of both principles lie deep in our constitutional heritage.").

The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136 (1955). Our cases have "jealously guarded" that basic concept, for it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 446 U. S., at 242.

Applying this principle in *Tumey* v. *Ohio*, 273 U. S. 510 (1927), we held that due process was violated where a judge received a portion of the fines collected from defendants whom he found guilty. Such an arrangement, we said, gave the judge a "direct, personal, substantial[, and] pecuniary interest" in reaching a particular outcome and thereby denied the defendant his right to an impartial arbiter. *Id.*, at 523. *Ward* v. *Monroeville*, 409 U. S. 57 (1972), extended *Tumey*'s reasoning, holding that due process was similarly violated where fines collected from guilty defendants constituted a large part of a village's finances, for which the judge, who also served as the village mayor, was responsible. Even though the mayor did not personally share in those fines, we concluded, he "perforce occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial." 409 U. S., at 60 (internal quotation marks omitted).

We applied the principle of *Tumey* and *Ward* most recently in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813 (1986). That decision invalidated a ruling of the Alabama Supreme Court written by a justice who had a personal interest in the resolution of a dispositive issue. The Alabama Supreme Court's ruling was issued while the justice was pursuing a separate lawsuit in an Alabama lower court, and its outcome "had the clear and immediate effect of enhancing both the legal status

and the settlement value" of that separate suit. *Id.*, at 824. As in *Ward* and *Tumey*, we held, the justice therefore had an interest in the outcome of the decision that unsuited him to participate in the judgment. 475 U. S., at 824. It mattered not whether the justice was actually influenced by this interest; "[t]he Due Process Clause," we observed, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.*, at 825 (internal quotation marks omitted).

These cases establish three propositions important to this dispute. First, a litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in ruling against him. *Id.*, at 824 (internal quotation marks and alteration omitted). Second, this interest need not be as direct as it was in *Tumey*, where the judge was essentially compensated for each conviction he obtained; the interest may stem, as in *Ward*, from the judge's knowledge that his success and tenure in office depend on certain outcomes. "[T]he test," we have said, "is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U. S., at 60 (quoting *Tumey*, 273 U. S., at 532). And third, due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, our cases have "always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U. S., at 136. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U. S., at 532.[3]

[3] To avoid the import of our due process decisions, the Court dissects the concept of judicial "impartiality," *ante*, at 775–779, concluding that only one variant of that concept—lack of prejudice against a *party*—is secured by the Fourteenth Amendment, *ante*, at 775–777. Our Due Proc-

The justification for the pledges or promises prohibition follows from these principles. When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views; she will also "ris[k] being assailed as a dissembler," 247 F. 3d, at 878, willing to say one thing to win an election and to do the opposite once in office.

A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, *Tumey*, 273 U. S., at 523, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059, 1083–1092 (1996); see *id.*, at 1088 ("[A] campaign promise [may be characterized as] a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employ-

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ess Clause cases do not focus solely on bias against a particular party, but rather inquire more broadly into whether the surrounding circumstances and incentives compromise the judge's ability faithfully to discharge her assigned duties. See *supra*, at 815. To be sure, due process violations may arise where a judge has been so personally "enmeshed in matters" concerning one party that he is biased against him. See *Johnson* v. *Mississippi*, 403 U. S. 212, 215 (1971) *(per curiam)* (judge had been "a defendant in one of petitioner's civil rights suits and a losing party at that"). They may also arise, however, not because of any predisposition toward a party, but rather because of the judge's personal interest in resolving an issue a certain way. See *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813 (1986). Due process will not countenance the latter situation, even though the self-interested judge "will apply the law to [the losing party] in the same way he [would apply] it to any other party" advancing the same position, *ante*, at 776.

ment as a judge."); see also The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) ("In the general course of human nature, a power over a man's subsistence amounts to a power over his will." (emphasis deleted)).

Given this grave danger to litigants from judicial campaign promises, States are justified in barring expression of such commitments, for they typify the "situatio[n] . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). By removing this source of "possible temptation" for a judge to rule on the basis of self-interest, *Tumey*, 273 U. S., at 532, the pledges or promises prohibition furthers the State's "compellin[g] interest in maintaining a judiciary fully capable of performing" its appointed task, *Gregory* v. *Ashcroft*, 501 U. S. 452, 472 (1991): "judging [each] particular controversy fairly on the basis of its own circumstances," *United States* v. *Morgan*, 313 U. S. 409, 421 (1941). See O'Neil, 35 Ind. L. Rev., at 723 ("What is at stake here is no less than the promise of fairness, impartiality, and ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.").

In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary. See Tr. of Oral Arg. 16 (petitioners' statement that pledges or promises properly fosters "public perception of the impartiality of the judiciary"). See *Cox* v. *Louisiana*, 379 U. S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); *In re Murchison*, 349 U. S., at 136 ("[T]o perform its high function in the best way[,] 'justice must satisfy the appearance of justice.'" (quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954))). Because courts con-

trol neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. See *Mistretta* v. *United States*, 488 U. S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). As the Minnesota Supreme Court has recognized, all legal systems—regardless of their method of judicial selection—"can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N. W. 2d 337, 340 (1984).

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo*—a judicial candidate's promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.[4] Then-JUSTICE REHNQUIST's observations

[4] The author of the Court's opinion declined on precisely these grounds to tell the Senate whether he would overrule a particular case:

"Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." 13 R. Mersky & J. Jacobstein, The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916–1986,

about the federal system apply with equal if not greater force in the context of Minnesota's elective judiciary: Regarding the appearance of judicial integrity,

> "[one must] distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird* v. *Tatum*, 409 U. S. 824, 836, n. 5 (1972) (memorandum opinion).

B

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate

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p. 131 (1989) (hearings before the Senate Judiciary Committee on the nomination of then-Judge Scalia).

who campaigns by saying, "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages," *ante*, at 780, will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: "I think it is constitutional for the legislature to prohibit same-sex marriages," *ante*, at 779. Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." *Ante*, at 770. And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one. See *ante*, at 780–781 (emphasis deleted).

By targeting statements that do not technically constitute pledges or promises but nevertheless "publicly mak[e] known how [the candidate] would decide" legal issues, 247 F. 3d, at 881–882, the Announce Clause prevents this end run around the letter and spirit of its companion provision.[5] No less than the pledges or promises clause itself, the Announce

[5] In the absence of the Announce Clause, other components of the Minnesota Code of Judicial Conduct designed to maintain the nonpartisan character of the State's judicial elections would similarly unravel. A candidate would have no need to "attend political gatherings" or "make speeches on behalf of a political organization," Minn. Code of Judical Conduct, Canon 5(A)(1)(c), (d) (2002), for she could simply state her views elsewhere, counting on her supporters to carry those views to the party faithful. And although candidates would remain barred from "seek[ing], accept[ing,] or us[ing] endorsements from a political organization," Canon 5(A)(1)(d), parties might well provide such endorsements unsolicited upon hearing candidates' views on specific issues. Cf. *ante*, at 770 (Minnesota Republican Party sought to learn Wersal's views so party could support or oppose his candidacy). Those unsolicited endorsements, in turn, would render ineffective the prohibition against candidates "identify[ing] themselves as members of a political organization," Canon 5(A)(1)(a). "Indeed, it is not too much to say that the entire fabric of Minnesota's non[p]artisan elections hangs by the Announce clause thread." Brief for Minnesota State Bar Association as *Amicus Curiae* 20.

Clause is an indispensable part of Minnesota's effort to maintain the health of its judiciary, and is therefore constitutional for the same reasons.

* * *

This Court has recognized in the past, as JUSTICE O'CONNOR does today, see *ante*, at 788–790 (concurring opinion), a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom*, 501 U. S., at 400. We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States that wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. P. McFadden, Electing Justice: The Law and Ethics of Judicial Election Campaigns 86 (1990); Brief for the Conference of Chief Justices as *Amicus Curiae* 5. The Announce Clause, borne of this long effort, "comes to this Court bearing a weighty title of respect," *Teamsters* v. *Hanke*, 339 U. S. 470, 475 (1950). I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area. Accordingly, I would affirm the judgment of the Court of Appeals for the Eighth Circuit.

Syllabus

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY ET AL. *v.* EARLS ET AL.

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

No. 01–332. Argued March 19, 2002—Decided June 27, 2002

The Student Activities Drug Testing Policy (Policy) adopted by the Tecumseh, Oklahoma, School District (School District) requires all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association (OSSAA). Respondent high school students and their parents brought this 42 U. S. C. § 1983 action for equitable relief, alleging that the Policy violates the Fourth Amendment. Applying *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, in which this Court upheld the suspicionless drug testing of school athletes, the District Court granted the School District summary judgment. The Tenth Circuit reversed, holding that the Policy violated the Fourth Amendment. It concluded that before imposing a suspicionless drug testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those tested, such that testing that group will actually redress its drug problem. The court then held that the School District had failed to demonstrate such a problem among Tecumseh students participating in competitive extracurricular activities.

Held: Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren and does not violate the Fourth Amendment. Pp. 828–838.

(a) Because searches by public school officials implicate Fourth Amendment interests, see, *e. g.*, *Vernonia*, 515 U. S., at 652, the Court must review the Policy for "reasonableness," the touchstone of constitutionality. In contrast to the criminal context, a probable-cause finding is unnecessary in the public school context because it would unduly interfere with maintenance of the swift and informal disciplinary procedures that are needed. In the public school context, a search may be reasonable when supported by "special needs" beyond the normal need for law enforcement. Because the "reasonableness" inquiry cannot dis-

regard the schools' custodial and tutelary responsibility for children, *id.*, at 656, a finding of individualized suspicion may not be necessary. In upholding the suspicionless drug testing of athletes, the *Vernonia* Court conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. Applying *Vernonia*'s principles to the somewhat different facts of this case demonstrates that Tecumseh's Policy is also constitutional. Pp. 828–830.

(b) Considering first the nature of the privacy interest allegedly compromised by the drug testing, see *Vernonia*, 515 U. S., at 654, the Court concludes that the students affected by this Policy have a limited expectation of privacy. Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress they have a stronger expectation of privacy than the *Vernonia* athletes. This distinction, however, was not essential in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority. See, *e. g.*, *id.*, at 665. In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress, and all of them have their own rules and requirements that do not apply to the student body as a whole. Each of them must abide by OSSAA rules, and a faculty sponsor monitors students for compliance with the various rules dictated by the clubs and activities. Such regulation further diminishes the schoolchildren's expectation of privacy. Pp. 830–832.

(c) Considering next the character of the intrusion imposed by the Policy, see *Vernonia*, 515 U. S., at 658, the Court concludes that the invasion of students' privacy is not significant, given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put. The degree of intrusion caused by collecting a urine sample depends upon the manner in which production of the sample is monitored. Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must listen for the normal sounds of urination to guard against tampered specimens and ensure an accurate chain of custody. This procedure is virtually identical to the "negligible" intrusion approved in *Vernonia*, *ibid.* The Policy clearly requires that test results be kept in confidential files separate from a student's other records and released to school personnel only on a "need to know" basis. Moreover, the test results are not turned over to any law enforcement authority. Nor do the test

results lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Pp. 832–834.

(d) Finally, considering the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them, see *Vernonia*, 515 U. S., at 660, the Court concludes that the Policy effectively serves the School District's interest in protecting its students' safety and health. Preventing drug use by schoolchildren is an important governmental concern. See *id.*, at 661–662. The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. The School District has also presented specific evidence of drug use at Tecumseh schools. Teachers testified that they saw students who appeared to be under the influence of drugs and heard students speaking openly about using drugs. A drug dog found marijuana near the school parking lot. Police found drugs or drug paraphernalia in a car driven by an extracurricular club member. And the school board president reported that people in the community were calling the board to discuss the "drug situation." Respondents consider the proffered evidence insufficient and argue that there is no real and immediate interest to justify a policy of drug testing nonathletes. But a demonstrated drug abuse problem is not always necessary to the validity of a testing regime, even though some showing of a problem does shore up an assertion of a special need for a suspicionless general search program. *Chandler* v. *Miller*, 520 U. S. 305, 319. The School District has provided sufficient evidence to shore up its program. Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. See, *e. g.*, *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 673–674. The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. Pp. 834–838.

242 F. 3d 1264, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 838. O'CONNOR, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 842. GINSBURG, J., filed a dissent-

ing opinion, in which STEVENS, O'CONNOR, and SOUTER, JJ., joined, *post*, p. 842.

Linda Maria Meoli argued the cause for petitioners. With her on the briefs were *Stephanie J. Mather* and *William P. Bleakley.*

Deputy Solicitor General Clement argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Gregory G. Garre*, *Leonard Schaitman*, and *Lowell V. Sturgill, Jr.*

Graham A. Boyd argued the cause for respondents. With him on the brief was *Steven R. Shapiro.**

JUSTICE THOMAS delivered the opinion of the Court.

The Student Activities Drug Testing Policy implemented by the Board of Education of Independent School District No. 92 of Pottawatomie County (School District) requires all students who participate in competitive extracurricular activities to submit to drug testing. Because this Policy reasonably serves the School District's important interest in detecting and preventing drug use among its students, we hold that it is constitutional.

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*A brief of *amici curiae* urging reversal was filed for the Washington Legal Foundation et al. by *Richard Willard*, *Daniel J. Popeo*, and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by *David T. Goldberg* and *Daniel N. Abrahamson;* for Jean Burkett et al. by *Craig Goldblatt;* for the Juvenile Law Center et al. by *Marsha L. Levick;* for the National Association of Criminal Defense Lawyers et al. by *John Wesley Hall, Jr.*, *Lisa B. Kemler*, *Timothy Lynch*, and *Kevin B. Zeese;* and for the Rutherford Institute by *John W. Whitehead*, *Steven H. Aden*, and *Jamin B. Raskin.*

Briefs of *amici curiae* were filed for the Drug-Free Schools Coalition et al. by *David G. Evans;* for the National School Boards Association et al. by *Julie K. Underwood*, *Christopher B. Gilbert*, and *Thomas E. Wheeler;* and for Professor Akhil Reed Amar et al. by *Julia M. Carpenter.*

I

The city of Tecumseh, Oklahoma, is a rural community located approximately 40 miles southeast of Oklahoma City. The School District administers all Tecumseh public schools. In the fall of 1998, the School District adopted the Student Activities Drug Testing Policy (Policy), which requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading, and athletics. Under the Policy, students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbituates, not medical conditions or the presence of authorized prescription medications.

At the time of their suit, both respondents attended Tecumseh High School. Respondent Lindsay Earls was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Respondent Daniel James sought to participate in the Academic Team.[1] Together with their parents, Earls and James brought a Rev.

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[1] The District Court noted that the School District's allegations concerning Daniel James called his standing to sue into question because his failing grades made him ineligible to participate in any interscholastic competition. See 115 F. Supp. 2d 1281, 1282, n. 1 (WD Okla. 2000). The court noted, however, that the dispute need not be resolved because Lindsay Earls had standing, and therefore the court was required to address the constitutionality of the drug testing policy. See *ibid.* Because we are likewise satisfied that Earls has standing, we need not address whether James also has standing.

Stat. § 1979, 42 U. S. C. § 1983, action against the School District, challenging the Policy both on its face and as applied to their participation in extracurricular activities.[2] They alleged that the Policy violates the Fourth Amendment as incorporated by the Fourteenth Amendment and requested injunctive and declarative relief. They also argued that the School District failed to identify a special need for testing students who participate in extracurricular activities, and that the "Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school." App. 9.

Applying the principles articulated in *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), in which we upheld the suspicionless drug testing of school athletes, the United States District Court for the Western District of Oklahoma rejected respondents' claim that the Policy was unconstitutional and granted summary judgment to the School District. The court noted that "special needs" exist in the public school context and that, although the School District did "not show a drug problem of epidemic proportions," there was a history of drug abuse starting in 1970 that presented "legitimate cause for concern." 115 F. Supp. 2d 1281, 1287 (2000). The District Court also held that the Policy was effective because "[i]t can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs." *Id.*, at 1295.

The United States Court of Appeals for the Tenth Circuit reversed, holding that the Policy violated the Fourth Amendment. The Court of Appeals agreed with the District Court that the Policy must be evaluated in the "unique environment of the school setting," but reached a different conclu-

[2] The respondents did not challenge the Policy either as it applies to athletes or as it provides for drug testing upon reasonable, individualized suspicion. See App. 28.

sion as to the Policy's constitutionality. 242 F. 3d 1264, 1270 (2001). Before imposing a suspicionless drug testing program, the Court of Appeals concluded that a school "must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." *Id.*, at 1278. The Court of Appeals then held that because the School District failed to demonstrate such a problem existed among Tecumseh students participating in competitive extracurricular activities, the Policy was unconstitutional. We granted certiorari, 534 U. S. 1015 (2001), and now reverse.

II

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests. See *Vernonia*, *supra*, at 652; cf. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 334 (1985). We must therefore review the School District's Policy for "reasonableness," which is the touchstone of the constitutionality of a governmental search.

In the criminal context, reasonableness usually requires a showing of probable cause. See, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). The probable-cause standard, however, "is peculiarly related to criminal investigations" and may be unsuited to determining the reasonableness of administrative searches where the "Government seeks to *prevent* the development of hazardous conditions." *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 667–668 (1989) (internal quotation marks and citations omitted) (collecting cases). The Court has also held that a warrant and finding of probable cause are unnecessary in the public school context because such requirements " 'would unduly interfere with the maintenance of the swift and infor-

mal disciplinary procedures [that are] needed.'" *Vernonia*, *supra*, at 653 (quoting *T. L. O.*, *supra*, at 340–341).

Given that the School District's Policy is not in any way related to the conduct of criminal investigations, see Part II–B, *infra*, respondents do not contend that the School District requires probable cause before testing students for drug use. Respondents instead argue that drug testing must be based at least on some level of individualized suspicion. See Brief for Respondents 12–14. It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. See *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979). But we have long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976). "[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Von Raab*, *supra*, at 668; see also *Skinner*, *supra*, at 624. Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987) (quoting *T. L. O.*, *supra*, at 351 (Blackmun, J., concurring in judgment)); see also *Vernonia*, *supra*, at 653; *Skinner*, *supra*, at 619.

Significantly, this Court has previously held that "special needs" inhere in the public school context. See *Vernonia*, *supra*, at 653; *T. L. O.*, *supra*, at 339–340. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, see *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969), "Fourth

Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia*, 515 U. S., at 656. In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

In *Vernonia*, this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. See *id.*, at 652–653. Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that Tecumseh's Policy is also constitutional.

A

We first consider the nature of the privacy interest allegedly compromised by the drug testing. See *id.*, at 654. As in *Vernonia*, the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general. See *ibid.* ("Central . . . is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster"); see also *id.*, at 665 ("The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care"); *ibid.* ("[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake").

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations

against disease. See *id.*, at 656. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See *T. L. O.*, 469 U. S., at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").

Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*. See Brief for Respondents 18–20. This distinction, however, was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority.[3]

In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.[4]

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[3] JUSTICE GINSBURG argues that *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), depended on the fact that the drug testing program applied only to student athletes. But even the passage cited by the dissent manifests the supplemental nature of this factor, as the Court in *Vernonia* stated that "[l]egitimate privacy expectations are *even less* with regard to student athletes." See *post*, at 847 (quoting *Vernonia*, 515 U. S., at 657) (emphasis added). In upholding the drug testing program in *Vernonia*, we considered the school context "[c]entral" and "[t]he most significant element." *Id.*, at 654, 665. This hefty weight on the side of the school's balance applies with similar force in this case even though we undertake a separate balancing with regard to this particular program.

[4] JUSTICE GINSBURG's observations with regard to extracurricular activities apply with equal force to athletics. See *post*, at 845 ("Participation in such [extracurricular] activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience").

Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. 115 F. Supp. 2d, at 1289–1290. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. See *id.*, at 1290. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. Cf. *Vernonia*, *supra*, at 657 ("Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy" (internal quotation marks omitted)). We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

B

Next, we consider the character of the intrusion imposed by the Policy. See *Vernonia*, *supra*, at 658. Urination is "an excretory function traditionally shielded by great privacy." *Skinner*, 489 U. S., at 626. But the "degree of intrusion" on one's privacy caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Vernonia*, *supra*, at 658.

Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must "listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." App. 199. The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student. This procedure is virtually identical to that reviewed in *Vernonia*, except that it additionally protects privacy by

allowing male students to produce their samples behind a closed stall. Given that we considered the method of collection in *Vernonia* a "negligible" intrusion, 515 U. S., at 658, the method here is even less problematic.

In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. Respondents nonetheless contend that the intrusion on students' privacy is significant because the Policy fails to protect effectively against the disclosure of confidential information and, specifically, that the school "has been careless in protecting that information: for example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them." Brief for Respondents 24. But the choir teacher is someone with a "need to know," because during off-campus trips she needs to know what medications are taken by her students. Even before the Policy was enacted the choir teacher had access to this information. See App. 132. In any event, there is no allegation that any other student did see such information. This one example of alleged carelessness hardly increases the character of the intrusion.

Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Cf. *Vernonia*, *supra*, at 658, and n. 2. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Indeed, a student may test positive for drugs twice and still be allowed to participate in extracurricular activities. After the first positive test, the school contacts the student's parent or guardian for a meeting. The student may continue to participate in the activity if within five days of the meeting the student shows proof of receiving drug counseling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participation in

all extracurricular activities for 14 days, must complete four hours of substance abuse counseling, and must submit to monthly drug tests. Only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer. See App. 201–202.

Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.

C

Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them. See *Vernonia*, 515 U. S., at 660. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. See *id.*, at 661–662. The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse.[5] As in *Vernonia*, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.*, at 662. The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be

[5] For instance, the number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001. The number of 12th graders reporting they had used marijuana jumped from 41.7 percent to 49.0 percent during that same period. See Department of Health and Human Services, Monitoring the Future: National Results on Adolescent Drug Use, Overview of Key Findings (2001) (Table 1).

under the influence of drugs and that they had heard students speaking openly about using drugs. See, *e. g.*, App. 72 (deposition of Dean Rogers); *id.*, at 115 (deposition of Sheila Evans). A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the "drug situation." See 115 F. Supp. 2d, at 1285–1286. We decline to second-guess the finding of the District Court that "[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy." *Id.*, at 1287.

Respondents consider the proffered evidence insufficient and argue that there is no "real and immediate interest" to justify a policy of drug testing nonathletes. Brief for Respondents 32. We have recognized, however, that "[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime," but that some showing does "shore up an assertion of special need for a suspicionless general search program." *Chandler* v. *Miller*, 520 U. S. 305, 319 (1997). The School District has provided sufficient evidence to shore up the need for its drug testing program.

Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *Von Raab* the Court upheld the drug testing of customs officials on a purely preventive basis, without any documented history of drug use by such officials. See 489 U. S., at 673. In response to the lack of evidence relating to drug use, the Court noted generally that "drug abuse is one of the most serious problems confronting our society today," and that programs to prevent and detect drug use among customs officials could not be deemed unreasonable. *Id.*, at 674; cf. *Skinner*, 489 U. S., at 607, and n. 1 (noting nationwide

studies that identified on-the-job alcohol and drug use by railroad employees). Likewise, the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals' novel test that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." 242 F. 3d, at 1278. Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a "drug problem."

Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a "crucial factor" in applying the special needs framework. Brief for Respondents 25–27. They contend that there must be "surpassing safety interests," *Skinner*, *supra*, at 634, or "extraordinary safety and national security hazards," *Von Raab*, *supra*, at 674, in order to override the usual protections of the Fourth Amendment. See Brief for Respondents 25–26. Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug

use carries a variety of health risks for children, including death from overdose.

We also reject respondents' argument that drug testing must presumptively be based upon an individualized reasonable suspicion of wrongdoing because such a testing regime would be less intrusive. See *id.*, at 12–16. In this context, the Fourth Amendment does not require a finding of individualized suspicion, see *supra*, at 829, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use. See *Vernonia*, 515 U. S., at 663–664 (offering similar reasons for why "testing based on 'suspicion' of drug use would not be better, but worse"). In any case, this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Martinez-Fuerte*, 428 U. S., at 556–557, n. 12; see also *Skinner*, *supra*, at 624 ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable").

Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem

was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. 515 U. S., at 663; cf. *id.*, at 684–685 (O'CONNOR, J., dissenting) (questioning the extent of the drug problem, especially as applied to athletes). *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

III

Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BREYER, concurring.

I agree with the Court that *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), governs this case and requires reversal of the Tenth Circuit's decision. The school's drug testing program addresses a serious national problem by focusing upon demand, avoiding the use of criminal or disciplinary sanctions, and relying upon professional counseling and treatment. See App. 201–202. In my view, this program does not violate the Fourth Amendment's prohibition of "unreasonable searches and seizures." I reach this conclusion primarily for the reasons given by the Court, but I would

emphasize several underlying considerations, which I understand to be consistent with the Court's opinion.

I

In respect to the school's need for the drug testing program, I would emphasize the following: First, the drug problem in our Nation's schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us. See, *e. g.*, White House Nat. Drug Control Strategy 25 (Feb. 2002) (drug abuse leads annually to about 20,000 deaths, $160 billion in economic costs); Department of Health and Human Services, L. Johnston et al., Monitoring the Future: National Results on Adolescent Drug Use, Overview of Key Findings 5 (2001) (Monitoring the Future) (more than one-third of all students have used illegal drugs before completing the eighth grade; more than half before completing high school); *ibid.* (about 30% of all students use drugs *other than marijuana* prior to completing high school (emphasis added)); National Center on Addiction and Substance Abuse, Malignant Neglect: Substance Abuse and America's Schools 15 (Sept. 2001) (Malignant Neglect) (early use leads to later drug dependence); Nat. Drug Control Strategy, *supra*, at 1 (same).

Second, the government's emphasis upon supply side interdiction apparently has not reduced teenage use in recent years. Compare R. Perl, CRS Issue Brief for Congress, Drug Control: International Policy and Options CRS–1 (Dec. 12, 2001) (supply side programs account for 66% of the federal drug control budget), with Partnership for a Drug-Free America, 2001 Partnership Attitude Tracking Study: Key Findings 1 (showing increase in teenage drug use in early 1990's, peak in 1997, holding steady thereafter); 2000–2001 PRIDE National Summary: Alcohol, Tobacco, Illicit Drugs, Violence and Related Behaviors, Grades 6 thru 12 (Jul. 16, 2002), http://www.pridesurveys.com/main/supportfiles/natsum00.pdf, p. 15 (slight rise in high school drug use in

2000–2001); Monitoring the Future, Table 1 (lifetime prevalence of drug use increasing over last 10 years).

Third, public school systems must find effective ways to deal with this problem. Today's public expects its schools not simply to teach the fundamentals, but "to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services," all in a school environment that is safe and encourages learning. Brief for National School Boards Association et al. as *Amici Curiae* 3–4. See also *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 681 (1986) (Schools " 'prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conductive to happiness and as indispensable to the practice of self-government in the community and the nation' ") (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). The law itself recognizes these responsibilities with the phrase *in loco parentis*—a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions. Cf. *Vernonia*, *supra*, at 654–655. A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead—with help from the State. See *Zelman* v. *Simmons-Harris*, *ante*, p. 639.

Fourth, the program at issue here seeks to discourage demand for drugs by changing the school's environment in order to combat the single most important factor leading schoolchildren to take drugs, namely, peer pressure. Malignant Neglect 4 (students "whose friends use illicit drugs are more than 10 times likelier to use illicit drugs than those whose friends do not"). It offers the adolescent a nonthreat-

ening reason to decline his friend's drug-use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.

II

In respect to the privacy-related burden that the drug testing program imposes upon students, I would emphasize the following: First, not everyone would agree with this Court's characterization of the privacy-related significance of urine sampling as "'negligible.'" *Ante*, at 833 (quoting *Vernonia*, 515 U. S., at 658). Some find the procedure no more intrusive than a routine medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening "outside the closed restroom stall," *ante*, at 832. When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community "the opportunity to be able to participate" in developing the drug policy. App. 87. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.

Second, the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.

Third, a contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups," *ante*, at 837, or leave those whose behavior is slightly abnormal

stigmatized in the minds of others. See Belsky, Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma, 27 Okla. City U. L. Rev. 1, 20–21 (forthcoming 2002) (listing court-approved factors justifying suspicion-based drug testing, including tiredness, overactivity, quietness, boisterousness, sloppiness, excessive meticulousness, and tardiness). If so, direct application of the Fourth Amendment's prohibition against "unreasonable searches and seizures" will further that Amendment's liberty-protecting objectives at least to the same extent as application of the mediating "individualized suspicion" test, where, as here, the testing program is neither criminal nor disciplinary in nature.

* * *

I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort. Emphasizing the considerations I have mentioned, along with others to which the Court refers, I conclude that the school's drug testing program, constitutionally speaking, is not "unreasonable." And I join the Court's opinion.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, dissenting.

I dissented in *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), and continue to believe that case was wrongly decided. Because *Vernonia* is now this Court's precedent, and because I agree that petitioners' program fails even under the balancing approach adopted in that case, I join JUSTICE GINSBURG's dissent.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER join, dissenting.

Seven years ago, in *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), this Court determined that a school

district's policy of randomly testing the urine of its student athletes for illicit drugs did not violate the Fourth Amendment. In so ruling, the Court emphasized that drug use "increase[d] the risk of sports-related injury" and that Vernonia's athletes were the "leaders" of an aggressive local "drug culture" that had reached "'epidemic proportions.'" *Id.*, at 649. Today, the Court relies upon *Vernonia* to permit a school district with a drug problem its superintendent repeatedly described as "not . . . major," see App. 180, 186, 191, to test the urine of an academic team member solely by reason of her participation in a nonathletic, competitive extracurricular activity—participation associated with neither special dangers from, nor particular predilections for, drug use.

"[T]he legality of a search of a student," this Court has instructed, "should depend simply on the reasonableness, under all the circumstances, of the search." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 341 (1985). Although "'special needs' inhere in the public school context," see *ante*, at 829 (quoting *Vernonia*, 515 U. S., at 653), those needs are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install. The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects. I therefore dissent.

I

A

A search unsupported by probable cause nevertheless may be consistent with the Fourth Amendment "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987) (internal quotation marks omitted). In *Vernonia*, this Court made clear that "such 'special needs' . . . exist in the public school con-

text." 515 U. S., at 653 (quoting *Griffin,* 483 U. S., at 873). The Court observed:

> "[W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969), the nature of those rights is what is appropriate for children in school. . . . Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." 515 U. S., at 655–656 (other citations omitted).

The *Vernonia* Court concluded that a public school district facing a disruptive and explosive drug abuse problem sparked by members of its athletic teams had "special needs" that justified suspicionless testing of district athletes as a condition of their athletic participation.

This case presents circumstances dispositively different from those of *Vernonia.* True, as the Court stresses, Tecumseh students participating in competitive extracurricular activities other than athletics share two relevant characteristics with the athletes of *Vernonia.* First, both groups attend public schools. "[O]ur decision in *Vernonia,*" the Court states, "depended primarily upon the school's custodial responsibility and authority." *Ante,* at 831; see also *ante,* at 840 (BREYER, J., concurring) (school districts act *in loco parentis*). Concern for student health and safety is basic to the school's caretaking, and it is undeniable that "drug use carries a variety of health risks for children, including death from overdose." *Ante,* at 836–837 (majority opinion).

Those risks, however, are present for *all* schoolchildren. *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, en-

gage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities. If a student has a reasonable subjective expectation of privacy in the personal items she brings to school, see *T. L. O.*, 469 U. S., at 338–339, surely she has a similar expectation regarding the chemical composition of her urine. Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words. See, *e. g.*, 515 U. S., at 662 ("[I]t must not be lost sight of that [the Vernonia School District] program is directed . . . to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.").

The second commonality to which the Court points is the voluntary character of both interscholastic athletics and other competitive extracurricular activities. "By choosing to 'go out for the team,' [school athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.*, at 657. Comparably, the Court today observes, "students who participate in competitive extracurricular activities voluntarily subject themselves to" additional rules not applicable to other students. *Ante*, at 831.

The comparison is enlightening. While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program; for that reason, the petitioner (hereinafter School District) is justified in expending public resources to make them available. Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. See Brief for Respondents 6; Brief for American Academy of Pediatrics et al. as *Amici Curiae* 8–9. Students

"volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 595 (1992) ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.").

Voluntary participation in athletics has a distinctly different dimension: Schools regulate student athletes discretely because competitive school sports by their nature require communal undress and, more important, expose students to physical risks that schools have a duty to mitigate. For the very reason that schools cannot offer a program of competitive athletics without intimately affecting the privacy of students, *Vernonia* reasonably analogized school athletes to "adults who choose to participate in a closely regulated industry." 515 U. S., at 657 (internal quotation marks omitted). Industries fall within the closely regulated category when the nature of their activities requires substantial government oversight. See, *e. g.*, *United States* v. *Biswell*, 406 U. S. 311, 315–316 (1972). Interscholastic athletics similarly require close safety and health regulation; a school's choir, band, and academic team do not.

In short, *Vernonia* applied, it did not repudiate, the principle that "the legality of a search of a student should depend simply on the reasonableness, *under all the circumstances*, of the search." *T. L. O.*, 469 U. S., at 341 (emphasis added). Enrollment in a public school, and election to participate in school activities beyond the bare minimum that the curriculum requires, are indeed factors relevant to reasonableness, but they do not on their own justify intrusive, suspicionless searches. *Vernonia*, accordingly, did not rest upon these

factors; instead, the Court performed what today's majority aptly describes as a "fact-specific balancing," *ante*, at 830. Balancing of that order, applied to the facts now before the Court, should yield a result other than the one the Court announces today.

B

Vernonia initially considered "the nature of the privacy interest upon which the search [there] at issue intrude[d]." 515 U. S., at 654. The Court emphasized that student athletes' expectations of privacy are necessarily attenuated:

> "Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. . . . [T]here is an element of communal undress inherent in athletic participation." *Id.*, at 657 (internal quotation marks omitted).

Competitive extracurricular activities other than athletics, however, serve students of all manner: the modest and shy along with the bold and uninhibited. Activities of the kind plaintiff-respondent Lindsay Earls pursued—choir, show choir, marching band, and academic team—afford opportunities to gain self-assurance, to "come to know faculty members in a less formal setting than the typical classroom," and to acquire "positive social supports and networks [that] play a critical role in periods of heightened stress." Brief for American Academy of Pediatrics et al. as *Amici Curiae* 13.

On "occasional out-of-town trips," students like Lindsay Earls "must sleep together in communal settings and use

communal bathrooms." 242 F. 3d 1264, 1275 (CA10 2001). But those situations are hardly equivalent to the routine communal undress associated with athletics; the School District itself admits that when such trips occur, "public-like restroom facilities," which presumably include enclosed stalls, are ordinarily available for changing, and that "more modest students" find other ways to maintain their privacy. Brief for Petitioners 34.[1]

After describing school athletes' reduced expectation of privacy, the *Vernonia* Court turned to "the character of the intrusion . . . complained of." 515 U. S., at 658. Observing that students produce urine samples in a bathroom stall with a coach or teacher outside, *Vernonia* typed the privacy interests compromised by the process of obtaining samples "negligible." *Ibid.* As to the required pretest disclosure of prescription medications taken, the Court assumed that "the School District would have permitted [a student] to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab." *Id.*, at 660. On that assumption, the Court concluded that Vernonia's athletes faced no significant invasion of privacy.

In this case, however, Lindsay Earls and her parents allege that the School District handled personal information collected under the policy carelessly, with little regard for its confidentiality. Information about students' prescription drug use, they assert, was routinely viewed by Lindsay's choir teacher, who left files containing the information unlocked and unsealed, where others, including students, could see them; and test results were given out to all activity sponsors whether or not they had a clear "need to know." See

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[1] According to Tecumseh's choir teacher, choir participants who chose not to wear their choir uniforms to school on the days of competitions could change either in "a rest room in a building" or on the bus, where "[m]any of them have figured out how to [change] without having [anyone] . . . see anything." 2 Appellants' App. in No. 00–6128 (CA10), p. 296.

Brief for Respondents 6, 24; App. 105–106, 131. But see *id.*, at 199 (policy requires that "[t]he medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees").

In granting summary judgment to the School District, the District Court observed that the District's "[p]olicy expressly provides for confidentiality of test results, and the Court must assume that the confidentiality provisions will be honored." 115 F. Supp. 2d 1281, 1293 (WD Okla. 2000). The assumption is unwarranted. Unlike *Vernonia*, where the District Court held a bench trial before ruling in the School District's favor, this case was decided by the District Court on summary judgment. At that stage, doubtful matters should not have been resolved in favor of the judgment seeker. See *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam)* ("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion."); see also 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2716, pp. 274–277 (3d ed. 1998).

Finally, the "nature and immediacy of the governmental concern," *Vernonia*, 515 U. S., at 660, faced by the Vernonia School District dwarfed that confronting Tecumseh administrators. Vernonia initiated its drug testing policy in response to an alarming situation: "[A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . fueled by alcohol and drug abuse as well as the student[s'] misperceptions about the drug culture." *Id.*, at 649 (internal quotation marks omitted). Tecumseh, by contrast, repeatedly reported to the Federal Government during the period leading up to the adoption of the policy that "types of drugs [other than alcohol and tobacco] including controlled dangerous substances, are present [in the schools] but have not identified themselves as major problems at this time." 1998–1999 Tecum-

seh School's Application for Funds under the Safe and Drug-Free Schools and Communities Program, reprinted at App. 191; accord, 1996–1997 Application, reprinted at App. 186; 1995–1996 Application, reprinted at App. 180.[2] As the Tenth Circuit observed, "without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is . . . greatly diminished." 242 F. 3d, at 1277.

The School District cites *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 673–674 (1989), in which this Court permitted random drug testing of customs agents absent "any perceived drug problem among Customs employees," given that "drug abuse is one of the most serious problems confronting our society today." See also *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 607, and n. 1 (1989) (upholding random drug and alcohol testing of railway employees based upon industry-wide, rather than railway-specific, evidence of drug and alcohol problems). The tests in *Von Raab* and *Railway Labor Executives*, however, were installed to avoid enormous risks to the lives and limbs of others, not dominantly in response to the health risks to users invariably present in any case of drug use. See *Von Raab*, 489 U. S., at 674 (drug use by customs agents involved in drug interdiction creates "extraordinary safety and national security hazards"); *Railway Labor Executives*, 489 U. S., at 628 (railway operators "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences"); see

[2] The Court finds it sufficient that there be evidence of *some* drug use in Tecumseh's schools: "As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Ante*, at 836. One need not establish a bright-line "constitutional quantum of drug use" to recognize the relevance of the superintendent's reports characterizing drug use among Tecumseh's students as "not . . . [a] major proble[m]," App. 180, 186, 191.

also *Chandler* v. *Miller*, 520 U. S. 305, 321 (1997) ("*Von Raab* must be read in its unique context").

Not only did the Vernonia and Tecumseh districts confront drug problems of distinctly different magnitudes, they also chose different solutions: Vernonia limited its policy to athletes; Tecumseh indiscriminately subjected to testing all participants in competitive extracurricular activities. Urging that "the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike," *ante*, at 836, the Court cuts out an element essential to the *Vernonia* judgment. Citing medical literature on the effects of combining illicit drug use with physical exertion, the *Vernonia* Court emphasized that "the particular drugs screened by [Vernonia's] Policy have been demonstrated to pose substantial physical risks to athletes." 515 U. S., at 662; see also *id.*, at 666 (GINSBURG, J., concurring) (*Vernonia* limited to "those seeking to engage with others in team sports"). We have since confirmed that these special risks were necessary to our decision in *Vernonia*. See *Chandler*, 520 U. S., at 317 (*Vernonia* "emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field"); see also *Ferguson* v. *Charleston*, 532 U. S. 67, 87 (2001) (KENNEDY, J., concurring) (Vernonia's policy had goal of " '[d]eterring drug use by our Nation's schoolchildren,' and particularly by student-athletes, because 'the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high' ") (quoting *Vernonia*, 515 U. S., at 661–662).

At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address. The School District cites the dangers faced by members of the band, who must "perform extremely precise routines with heavy equipment and instruments in close proximity to other students," and by Future Farmers of America, who

"are required to individually control and restrain animals as large as 1500 pounds." Brief for Petitioners 43. For its part, the United States acknowledges that "the linebacker faces a greater risk of serious injury if he takes the field under the influence of drugs than the drummer in the half-time band," but parries that "the risk of injury to a student who is under the influence of drugs while playing golf, cross country, or volleyball (sports covered by the policy in *Vernonia*) is scarcely any greater than the risk of injury to a student . . . handling a 1500-pound steer (as [Future Farmers of America] members do) or working with cutlery or other sharp instruments (as [Future Homemakers of America] members do)." Brief for United States as *Amicus Curiae* 18. One can demur to the Government's view of the risks drug use poses to golfers, cf. *PGA TOUR, Inc.* v. *Martin*, 532 U. S. 661, 687 (2001) ("golf is a low intensity activity"), for golfers were surely as marginal among the linebackers, sprinters, and basketball players targeted for testing in Vernonia as steer-handlers are among the choristers, musicians, and academic-team members subject to urinalysis in Tecumseh.[3] Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.

The Vernonia district, in sum, had two good reasons for testing athletes: Sports team members faced special health risks and they "were the leaders of the drug culture." *Vernonia,* 515 U. S., at 649. No similar reason, and no other tenable justification, explains Tecumseh's decision to target

[3] Cross-country runners and volleyball players, by contrast, engage in substantial physical exertion. See *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 663 (1995) (describing special dangers of combining drug use with athletics generally).

for testing all participants in every competitive extracurricular activity. See *Chandler*, 520 U. S., at 319 (drug testing candidates for office held incompatible with Fourth Amendment because program was "not well designed to identify candidates who violate antidrug laws").

Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. See, *e. g.*, N. Zill, C. Nord, & L. Loomis, Adolescent Time Use, Risky Behavior, and Outcomes 52 (1995) (tenth graders "who reported spending no time in school-sponsored activities were . . . 49 percent more likely to have used drugs" than those who spent 1–4 hours per week in such activities). Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use. Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.[4]

To summarize, this case resembles *Vernonia* only in that the School Districts in both cases conditioned engagement in activities outside the obligatory curriculum on random subjection to urinalysis. The defining characteristics of the two programs, however, are entirely dissimilar. The Vernonia district sought to test a subpopulation of students distinguished by their reduced expectation of privacy, their special

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[4] The Court notes that programs of individualized suspicion, unlike those using random testing, "might unfairly target members of unpopular groups." *Ante*, at 837; see also *ante*, at 841–842 (BREYER, J., concurring). Assuming, *arguendo*, that this is so, the School District here has not exchanged individualized suspicion for random testing. It has installed random testing in addition to, rather than in lieu of, testing "at any time when there is reasonable suspicion." App. 197.

susceptibility to drug-related injury, and their heavy involvement with drug use. The Tecumseh district seeks to test a much larger population associated with none of these factors. It does so, moreover, without carefully safeguarding student confidentiality and without regard to the program's untoward effects. A program so sweeping is not sheltered by *Vernonia;* its unreasonable reach renders it impermissible under the Fourth Amendment.

II

In *Chandler*, this Court inspected "Georgia's requirement that candidates for state office pass a drug test"; we held that the requirement "d[id] not fit within the closely guarded category of constitutionally permissible suspicionless searches." 520 U. S., at 309. Georgia's testing prescription, the record showed, responded to no "concrete danger," *id.*, at 319, was supported by no evidence of a particular problem, and targeted a group not involved in "high-risk, safety-sensitive tasks," *id.*, at 321–322. We concluded:

> "What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. . . . The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Ibid.*

Close review of Tecumseh's policy compels a similar conclusion. That policy was not shown to advance the "'special needs' [existing] in the public school context [to maintain] . . . swift and informal disciplinary procedures . . . [and] order in the schools," *Vernonia*, 515 U. S., at 653 (internal quotation marks omitted). See *supra*, at 846–848, 849–853. What is left is the School District's undoubted purpose to heighten awareness of its abhorrence of, and strong stand against, drug abuse. But the desire to augment communica-

tion of this message does not trump the right of persons—even of children within the schoolhouse gate—to be "secure in their persons . . . against unreasonable searches and seizures." U. S. Const., Amdt. 4.

In *Chandler*, the Court referred to a pathmarking dissenting opinion in which "Justice Brandeis recognized the importance of teaching by example: 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.'" 520 U. S., at 322 (quoting *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928)). That wisdom should guide decisionmakers in the instant case: The government is nowhere more a teacher than when it runs a public school.

It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting "the schools' custodial and tutelary responsibility for children." *Vernonia*, 515 U. S., at 656. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 637 (1943).

* * *

For the reasons stated, I would affirm the judgment of the Tenth Circuit declaring the testing policy at issue unconstitutional.

Syllabus

STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SMITH

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

No. 01–339. Decided June 28, 2002

Respondent filed a federal habeas petition, claiming, *inter alia*, ineffective assistance of counsel. He had previously brought that claim in a state petition for postconviction relief pursuant to Arizona Rule of Criminal Procedure 32, but the County Superior Court found it waived under Rule 32.2(a)(3) because he had not raised it in two previous Rule 32 petitions. The Federal District Court concluded that the state court's ruling barred federal habeas relief, but the Ninth Circuit reversed, finding that the state procedural default was not independent of federal law and thus did not bar federal review. This Court granted certiorari and certified to the Arizona Supreme Court a question concerning Rule 32.2(a)(3)'s proper interpretation. The latter court responded that, at the time of respondent's state petition, the question whether an asserted claim was of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver for purposes of the Rule depended not upon the merits of the particular claim but upon the particular right alleged to have been violated.

Held: The District Court properly refused to review respondent's ineffective-assistance-of-counsel claim. The Arizona Supreme Court's reply makes clear that Rule 32.2(a)(3) only requires courts to categorize a claim, not to evaluate the claim's merits. When resolution of a state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law and this Court's direct review jurisdiction is not precluded. *Ake* v. *Oklahoma*, 470 U. S. 68, 75. Assuming that the same standard governs the scope of a district court's power to grant federal habeas relief, Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a constitutional ruling on the merits. Although the state court's decision would not be independent of federal law if it rested primarily on a ruling on the merits, the record here reveals no such ruling.

241 F. 3d 1191, reversed and remanded.

PER CURIAM.

At issue in this case is whether, when an Arizona Superior Court denied respondent's successive petition for state postconviction relief because respondent had failed to comply with Arizona Rule of Criminal Procedure 32.2(a)(3) (West 2000), the state court's ruling was independent of federal law. The Court of Appeals for the Ninth Circuit thought not. We granted certiorari and certified to the Arizona Supreme Court a question concerning the proper interpretation of Rule 32.2(a)(3). We have received a response and now reverse the Ninth Circuit's decision.

I

Respondent, Robert Douglas Smith, was convicted in Arizona in 1982 of first-degree murder, kidnaping, and sexual assault. He was sentenced to death on the murder count and to consecutive 21-year prison terms on the other counts. After a series of unsuccessful petitions for state postconviction relief, respondent filed a federal petition for a writ of habeas corpus under 28 U. S. C. §§ 2241 and 2254 in the United States District Court for the District of Arizona. The petition alleged, among other things, that respondent's Sixth Amendment right to counsel had been violated because his trial counsel had provided ineffective assistance during the sentencing phase of his trial.

Respondent had previously brought this ineffective-assistance claim in a 1995 petition for state postconviction relief pursuant to Ariz. Rule Crim. Proc. 32. The Pima County Superior Court denied the claim, finding it waived under Rule 32.2(a)(3) because respondent had failed to raise it in two previous Rule 32 petitions. The state court rejected respondent's contention that his procedural default was excused because his appellate and Rule 32 attorneys suffered from a conflict of interest between their responsibility

toward respondent and their allegiance to the Public Defender's office, of which respondent's trial counsel was also a member.

The District Court relied on the Pima County Superior Court's procedural ruling on respondent's ineffective-assistance-of-trial-counsel claim to bar federal habeas relief. Like the state court, the District Court rejected respondent's argument that his appellate and Rule 32 counsel suffered from a conflict of interest which excused his procedural default. The Court of Appeals for the Ninth Circuit reversed, finding that although the state court's procedural default ruling was regularly followed and therefore adequate, see 241 F. 3d 1191, 1195, n. 2 (2001) (citing *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988)), the ruling required consideration of the merits of respondent's claim and was therefore not independent of federal law, see 241 F. 3d, at 1196–1197. Rule 32.2(a)(3) applies different standards for waiver depending on whether the claim asserted in a Rule 32 petition is of "sufficient constitutional magnitude." If it is, the rule requires that the waiver be "knowin[g], voluntar[y] and intelligen[t]," not merely omitted from previous petitions. Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000). The Ninth Circuit opined that, at the time the state court ruled on respondent's ineffective-assistance claim, the determination of whether a claim is of sufficient magnitude required consideration of the merits of the claim. See 241 F. 3d, at 1197 (citing *State* v. *French*, 198 Ariz. 119, 121, 7 P. 3d 128, 130 (App. 2000); *State* v. *Curtis*, 185 Ariz. 112, 115, 912 P. 2d 1341, 1344 (App. 1995)). The Ninth Circuit concluded that, under *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), the state court's ruling did not bar federal review of the merits of respondent's claim. See 241 F. 3d, at 1196–1197. We granted certiorari to review the Ninth Circuit's decision. 534 U. S. 157 (2001) *(per curiam)*.

II

Because we were uncertain about the proper interpretation of Rule 32.2(a)(3), we certified the following question to the Arizona Supreme Court:

> "At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of 'sufficient constitutional magnitude' to require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see *State* v. *French*, 198 Ariz. 119, 121–122, 7 P. 3d 128, 130–131 (App. 2000); *State* v. *Curtis*, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see *State* v. *Espinosa*, 200 Ariz. 503, 505, 29 P. 3d 278, 280 (App. 2001)?" 534 U. S., at 159.

We received the following reply:

> "We hold that at the time of respondent's third Rule 32 petition in 1995, the question whether an asserted claim was of 'sufficient constitutional magnitude' to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Comment to 32.2(a)(3), depended not upon the merits of the particular claim, but rather merely upon the particular right alleged to have been violated." *Stewart* v. *Smith*, 202 Ariz. 446, 447, 46 P. 3d 1067, 1068 (2002) (en banc).

The Arizona Supreme Court's reply makes clear that Rule 32.2(a)(3) does not require courts to evaluate the merits of a particular claim, but only to categorize the claim. According to the Arizona Supreme Court, courts must evaluate whether "at its core, [a] claim implicates a significant right that requires a knowing, voluntary, and intelligent waiver." *Id.*, at 450, 46 P. 3d, at 1071. Courts need not decide the

merits of the claim, *i. e.*, whether the right was actually violated. They need only identify what type of claim it is, and there is no indication that this identification is based on an interpretation of what federal law requires. See *Delaware* v. *Prouse*, 440 U. S. 648, 652–653 (1979).

Our cases make clear that "when resolution of [a] state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our [direct review] jurisdiction is not precluded." *Ake*, *supra*, at 75. Even assuming that the same standard governs the scope of a district court's power to grant federal habeas relief as governs this Court's jurisdiction to review a state-court judgment on direct review, see *Coleman* v. *Thompson*, 501 U. S. 722, 729–732, 741 (1991), Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a federal constitutional ruling on the merits. The District Court properly refused to review respondent's ineffective-assistance-of-trial-counsel claim. The Ninth Circuit erred in holding otherwise.

Even though Rule 32.2(a)(3) does not require a federal constitutional ruling on the merits, if the state court's decision rested primarily on a ruling on the merits nevertheless, its decision would not be independent of federal law. The Ninth Circuit interpreted the state court's order rejecting respondent's ineffective-assistance-of-trial-counsel claim as possibly resting on a ruling on the merits of the claim. The record, however, reveals no such ruling.

The state court did not even reach the merits of respondent's ineffective-assistance-of-trial-counsel claim, finding it waived because respondent had failed to raise it in prior petitions for postconviction relief. As an excuse, respondent asserted that his prior appellate and Rule 32 counsel, who were members of the Arizona Public Defender's office, had refused to file the claim because his trial counsel was also a member of the Public Defender's office. The state court did not find this excuse sufficient to overcome respondent's procedural

default. See App. H to Pet. for Cert. The state court explained that, because deputies in the Public Defender's office represent their clients and not their office, respondent's appellate lawyers would never have allowed "a colorable claim for ineffective assistance of counsel" to go unstated. *Id.*, at 2. The Ninth Circuit read the reference to a "colorable claim" as a conclusion that respondent's claim that his trial counsel had rendered ineffective assistance lacked merit, that is, as a comment on the merits of respondent's underlying claim. 241 F. 3d, at 1197. In context, however, it is clear that the reference to "colorable claim" was used only as a rhetorical device for emphasizing the lack of any conflict of interest that might excuse respondent's waiver.

Because the state court's determination that respondent waived his ineffective-assistance-of-counsel claim under Ariz. Rule Crim. Proc. 32.2(a)(3) did not require an examination of the merits of that claim, it was independent of federal law. We voice no opinion on whether respondent has provided valid cause to overcome his procedural default in state court. The Ninth Circuit's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Per Curiam

UNITED STATES *v.* BASS

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

No. 01–1471. Decided June 28, 2002

Claiming that the United States filed a notice of intent to seek the death penalty in respondent's capital murder case because of his race, respondent moved to dismiss the notice and, in the alternative, for discovery of information relating to the Government's capital charging practices. The District Court granted his discovery motion and dismissed the notice after the Government said that it would not comply with the discovery order. The Sixth Circuit affirmed.

Held: The Sixth Circuit's decision is contrary to *United States* v. *Armstrong,* 517 U. S. 456, 465, in which this Court held that a defendant seeking discovery on a selective prosecution claim must show some evidence of both discriminatory effect and discriminatory intent. As to evidence of discriminatory effect, a defendant must make a credible showing that similarly situated individuals of a different race were not prosecuted. *Id.,* at 465, 470. The Sixth Circuit concluded that respondent had made such a showing based on nationwide statistics demonstrating that the Government charges blacks with a death-eligible offense more than twice as often as it charges whites and that it enters into plea bargains more frequently with whites than with blacks. Even assuming that a nationwide showing can satisfy the *Armstrong* requirement, raw statistics regarding overall charges say nothing about charges brought against similarly situated defendants. And the plea bargain statistics are even less relevant, since respondent declined the plea bargain offered him.

Certiorari granted; 266 F. 3d 532, reversed.

PER CURIAM.

A federal grand jury sitting in the Eastern District of Michigan returned a second superseding indictment charging respondent with, *inter alia,* the intentional firearm killings of two individuals. The United States filed a notice of intent to seek the death penalty. Respondent, who is black, alleged that the Government had determined to seek the death penalty against him because of his race. He moved to dis-

miss the death penalty notice and, in the alternative, for discovery of information relating to the Government's capital charging practices. The District Court granted the motion for discovery, and after the Government informed the court that it would not comply with the discovery order, the court dismissed the death penalty notice. A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the District Court's discovery order. 266 F. 3d 532 (2001). We grant the petition for a writ of certiorari and now summarily reverse.

In *United States* v. *Armstrong*, 517 U. S. 456, 465 (1996), we held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. We need go no further in the present case than consideration of the evidence supporting discriminatory effect. As to that, *Armstrong* says that the defendant must make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." *Id.*, at 465, 470. The Sixth Circuit concluded that respondent had made such a showing based on nationwide statistics demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites" and that the United States enters into plea bargains more frequently with whites than it does with blacks. 266 F. 3d, at 538–539 (citing U. S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988–2000), p. 2 (Sept. 12, 2000)).* Even assuming that the *Armstrong* requirement can be satisfied

*In January 1995, the Department of Justice (DOJ) instituted a policy, known as the death penalty protocol, that required the Attorney General to make the decision whether to seek the death penalty once a defendant had been charged with a capital-eligible offense. See Pet. for Cert. 3 (citing DOJ, United States Attorneys' Manual § 9–10.010 *et seq.* (Sept. 1997)). The charging decision continued to be made by one of the 93 United States Attorneys throughout the country, but the protocol required that the United States Attorneys submit for review all cases in which they had charged a defendant with a capital-eligible offense. *Ibid.*

by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. And the statistics regarding plea bargains are even less relevant, since respondent *was* offered a plea bargain but declined it. See Pet. for Cert. 16. Under *Armstrong*, therefore, because respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.

The Sixth Circuit's decision is contrary to *Armstrong* and threatens the "performance of a core executive constitutional function." *Armstrong*, *supra*, at 465. For that reason, we reverse.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 864 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 10 THROUGH
OCTOBER 3, 2002

JUNE 10, 2002

Certiorari Granted—Vacated and Remanded

No. 01–600. MASON, WARDEN *v.* MITCHELL. C. A. 6th 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 *Bell* v. *Cone*, 535 U. S. 685 (2002). Reported below: 257 F. 3d 554.

Certiorari Dismissed

No. 01–9231. MARBLY *v.* DEPARTMENT OF THE TREASURY ET AL. 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: 22 Fed. Appx. 582.

Miscellaneous Orders

No. 01A930. RODRIGUEZ *v.* HAZBUN ESCAF. D. C. E. D. Va. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–2315. IN RE DISCIPLINE OF REEKS. Thomas Eugene Reeks, 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–2316. IN RE DISCIPLINE OF MARSHALL. Douglas M. Marshall, of Grand Forks, N. D., 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–2317. IN RE DISCIPLINE OF RICHEY. Thomas B. Richey, of Fresno, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, re-

quiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2318. IN RE DISCIPLINE OF HUGHES. Nathaniel Barker Hughes III, 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–2319. IN RE DISCIPLINE OF BAGWELL. N. Reese Bagwell, Jr., of Clarksville, 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–2320. IN RE DISCIPLINE OF BELSKY. Jonathan W. Belsky, of University City, Mo., 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–2321. IN RE DISCIPLINE OF CARON. Ronald George Caron, of Saco, Me., 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–2322. IN RE DISCIPLINE OF CASSIDY. Timothy Edward Cassidy, of West Mifflin, Pa., 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–2323. IN RE DISCIPLINE OF SPITZER. Richard Clark Spitzer, of Arlington, Va., 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. 01M64. MUNOZ *v.* MUNOZ. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 01M65. PETROVICH *v.* SANDS CASINO & HOTEL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 01M66. ESCOBEDO *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 129, Orig. VIRGINIA *v.* MARYLAND. Motion of the Special Master for fees and reimbursement of expenses granted, and the Special Master is awarded a total of $74,811.30 for the period August 1, 2001, through April 30, 2002, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 534 U. S. 807.]

No. 01–8880. IN RE THOMPSON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [535 U. S. 968] denied.

No. 01–10147. IN RE SAUNDERS; and
No. 01–10247. IN RE DEESE. Petitions for writs of habeas corpus denied.

No. 01–10179. IN RE HOLLINGSWORTH. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 01–1537. IN RE SIMPSON;
No. 01–9541. IN RE MASON;
No. 01–9560. IN RE WILLIAMS; and
No. 01–10080. IN RE STOVER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 01–1437. BRANCH ET AL. *v.* SMITH ET AL.; and
No. 01–1596. SMITH ET AL. *v.* BRANCH ET AL. Appeals from D. C. S. D. Miss. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 189 F. Supp. 2d 548.

Certiorari Granted

No. 01–1325. BROWN ET AL. *v.* LEGAL FOUNDATION OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 271 F. 3d 835.

No. 01–1243. BORDEN RANCH PARTNERSHIP ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 261 F. 3d 810.

Certiorari Denied

No. 00–1305. KISMET INVESTORS, INC. *v.* COUNTY OF BENTON. Ct. App. Minn. Certiorari denied. Reported below: 617 N. W. 2d 85.

No. 01–144. FULTON COUNTY, GEORGIA, ET AL. *v.* FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 242 F. 3d 976.

No. 01–785. SEARLES *v.* VAN BEBBER. C. A. 10th Cir. Certiorari denied. Reported below: 251 F. 3d 869.

No. 01–1277. KRILICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–1292. EPILEPSY FOUNDATION OF NORTHEAST OHIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 268 F. 3d 1095.

No. 01–1318. BZAPS, INC., DBA BUSTER'S BAR *v.* CITY OF MANKATO. C. A. 8th Cir. Certiorari denied. Reported below: 268 F. 3d 603.

No. 01–1380. SINYARD ET UX. *v.* ROSSOTTI, COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 268 F. 3d 756.

No. 01–1456. RITTER ET AL. *v.* STANTON ET UX. Ct. App. Ind. Certiorari denied. Reported below: 745 N. E. 2d 828.

No. 01–1466. NEW YORK CITY HOUSING AUTHORITY *v.* DAVIS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 278 F. 3d 64.

No. 01–1468. PHONOMETRICS, INC. *v.* HOTEL CORPORATION OF THE PACIFIC, DBA ASTON HOTELS & RESORTS. C. A. Fed. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 859.

No. 01–1473. HUNT TRUCK LINES, INC. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 1000.

No. 01–1474. BLEDSOE *v.* NUCOR-YAMATO STEEL CO. C. A. 8th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 433.

No. 01–1481. WEICHERT *v.* KRUK, TREASURER OF COUNTY OF OSWEGO. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 288 App. Div. 2d 841, 732 N. Y. S. 2d 186.

No. 01–1482. PROGRESS RAIL SERVICES CORP. ET AL. *v.* ALLFIRST BANK. C. A. 11th Cir. Certiorari denied.

No. 01–1485. KAPLAN *v.* LUDWIG ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 286 App. Div. 2d 970, 730 N. Y. S. 2d 765.

No. 01–1486. MANN *v.* UPJOHN CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 324 Ill. App. 3d 367, 753 N. E. 2d 452.

No. 01–1488. OREGON ARENA CORP. ET AL. *v.* LEE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 276 F. 3d 550.

No. 01–1489. NATIONAL ELECTRICAL MANUFACTURERS ASSN. *v.* SORRELL, ATTORNEY GENERAL OF VERMONT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 272 F. 3d 104.

No. 01–1493. MULCAHY ET AL. *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 107 Wash. App. 1010.

No. 01–1497. CABALLERO RIVERA ET AL. *v.* CHASE MANHATTAN BANK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 276 F. 3d 85.

No. 01–1498. RUTHERFORD *v.* LAKE MICHIGAN CONTRACTORS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 395.

No. 01–1505. COSTA *v.* MCCULLOUGH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 576.

No. 01–1510. QUINCY MALL, INC. *v.* PARISIAN, INC. C. A. 7th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 631.

No. 01–1520. SMITH *v.* ODUM. Super. Ct. DeKalb County, Ga. Certiorari denied.

No. 01–1523. VOIT *v.* LOUISVILLE AND JEFFERSON COUNTY BOARD OF HEALTH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 488.

No. 01–1524. ZAMOS *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 01–1526. BROWN *v.* CITY OF WILMINGTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 33.

No. 01–1529. HUTCHINS *v.* WILENTZ, GOLDMAN & SPITZER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 253 F. 3d 176.

No. 01–1531. MAYNES *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 01–1538. SISK *v.* VIRGINIA. Cir. Ct., City of Charlottesville, Va. Certiorari denied.

No. 01–1544. DAVIS *v.* CITY OF EUCLID. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 01–1556. OUIMETTE *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 785 A. 2d 1132.

No. 01–1558. TYLER *v.* DOUGLAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 280 F. 3d 116.

No. 01–1568. FULTON COUNTY, GEORGIA, ET AL. *v.* LAMBERT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 253 F. 3d 588.

No. 01–1579. SMITH *v.* WATERMAN STEAMSHIP CORP. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 832.

No. 01–1611. MURPHY ET AL. *v.* CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 112.

No. 01–1638. GLASSCOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–7143. OSTERBACK *v.* INGRAM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 263 F. 3d 169.

No. 01–8115. MCCOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 266 F. 3d 1245.

No. 01–8272. HANEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 264 F. 3d 1161.

No. 01–8432. DUNCAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 802 So. 2d 533.

No. 01–8451. PHILISTIN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 565 Pa. 455, 774 A. 2d 741.

No. 01–8780. EMERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 270 F. 3d 203.

No. 01–8861. HAMMONDS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 353, 554 S. E. 2d 645.

No. 01–9024. STUART *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 136 Idaho 490, 36 P. 3d 1278.

No. 01–9456. MORALES *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 01–9465. JAMES *v.* MOBILE CITY POLICE DEPARTMENT. C. A. 11th Cir. Certiorari denied.

No. 01–9475. CARROLL *v.* PFEFFER. C. A. 8th Cir. Certiorari denied. Reported below: 262 F. 3d 847.

No. 01–9479. HORN *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9482. GIBBS *v.* SNYDER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–9484. HENLEY *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 756.

No. 01–9485. GIBBS *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY. C. A. 3d Cir. Certiorari denied.

No. 01–9488. HOLLEY *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9490. ADAM *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 97 Haw. 413, 38 P. 3d 581.

No. 01–9491. ELDRIDGE *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9492. WOODLAND *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 234.

No. 01–9493. TOWARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9495. RODRIGUEZ *v.* LEWIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–9505. WILLIAMS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 832.

No. 01–9506. TAYLOR *v.* REYNOLDS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 537.

No. 01–9508. BLANEY *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 324 Ill. App. 3d 221, 754 N. E. 2d 405.

No. 01–9518. JACKSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 790 So. 2d 398.

No. 01–9519. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 01–9520. JACKSON *v.* ARKANSAS DEPARTMENT OF EDUCATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 1020.

No. 01–9521. LEWIS *v.* RADER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–9523. KINNAIRD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 01–9524. BUSTAMONTE *v.* CITY OF SPRINGFIELD ET AL. C. A. 1st Cir. Certiorari denied.

No. 01–9527. BERRIOS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 804 So. 2d 1261.

No. 01–9530. JONES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 347 Ark. 455, 65 S. W. 3d 402.

No. 01–9537. WILLIAMS *v.* WADE. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 219.

No. 01–9538. ORTIZ *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 36 Fed. Appx. 1.

No. 01–9540. JENKINS *v.* BELL. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 115.

No. 01–9544. MILLER *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 01–9545. MCFADDEN *v.* CLARENDON COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 207.

No. 01–9546. HOOSMAN *v.* IOWA. Ct. App. Iowa. Certiorari denied.

No. 01–9547. SMITH *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 01–9548. SIMMONS *v.* HAMBLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 918.

No. 01–9550. BRYANT *v.* JOHNSON, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 01–9553. RAMIREZ *v.* GERLINSKI, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 37.

No. 01–9554. AL-HAKIM *v.* BEALLS DEPARTMENT STORE 32 ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9555. LUGO *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 932.

No. 01–9557. BATTLE *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9561. LOVERA *v.* GUIDA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9565. TERRY *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 333 Ore. 163, 37 P. 3d 157.

No. 01–9596. HOLLAND *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 01–9600. SINCLAIR *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 769 So. 2d 1270.

No. 01–9612. RENEAU *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 151.

No. 01–9624. NICOLAISON *v.* MILCZART ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 596.

No. 01–9627. MORDOWANEC *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 259 Conn. 94, 788 A. 2d 48.

No. 01–9641. FARINA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 801 So. 2d 44.

No. 01–9687. ARRINGTON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 01–9705. ZEITSCHIK *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 17 Fed. Appx. 60.

No. 01–9713. CASTILLE *v.* COMPLIANCE SOLUTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 559.

No. 01–9738. MCDOWELL *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 01–9899. LOUDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 2 Fed. Appx. 131.

No. 01–9900. KOCH *v.* POTTER, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 750.

No. 01–9906. STEINBRECHER *v.* STEINBRECHER ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 197 Ill. 2d 514, 759 N. E. 2d 509.

No. 01–9908. BURL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 276.

No. 01–9909. DUNCAN *v.* POTTER, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 8 Fed. Appx. 670.

No. 01–9919. MCDUFFIE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 167.

No. 01–9939. BELKNAP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 600.

No. 01–9969. MUNDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–9972. VERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 278 F. 3d 672 and 30 Fed. Appx. 602.

No. 01–10003. BAILEY *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 271 F. 3d 652.

No. 01–10006. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 280 F. 3d 403.

No. 01–10013. BLACKBURN *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 229.

No. 01–10016. BAD WOUND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–10021. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 31 Fed. Appx. 9.

No. 01–10029. PELAYO-JIMINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 544.

No. 01–10032. LITTLEJOHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–10033. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 278 F. 3d 711.

No. 01–10036. MCGEORGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 184.

No. 01–10042. BROADNAX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 126.

No. 01–10044. SAENZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 701.

No. 01–10046. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 140.

No. 01–10047. PRICE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 635.

No. 01–10050. CORTES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 32 Fed. Appx. 1.

No. 01–10051. CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 480.

No. 01–10052. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 513.

No. 01–10053. CHAMBERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 346.

No. 01–10054. LEYVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 282 F. 3d 623.

No. 01–10055. CANO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 388.

No. 01–10056. CARRANZA CHAVEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 198.

No. 01–10057. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10059. PILART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10062. SAMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 294.

No. 01–10065. WARREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 312.

No. 01–10071. HAMM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 269 F. 3d 1247.

No. 01–10073. FOSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10076. WHOOTEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 279 F. 3d 58.

No. 01–10085. CORDOVA-GONZALEZ *v.* GONZALEZ, WARDEN, ET AL.; and CORDOVA-GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–10086. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 254 F. 3d 424.

No. 01–10088. NAVA-HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 756.

No. 01–10089. PARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10090. GARCIA RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 278 F. 3d 486.

No. 01–10093. MARTINEZ-VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 388.

No. 01–10094. DIX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 534.

No. 01–10096. MCQUEEN *v.* SCOTT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 200.

No. 01–10098. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 966.

No. 01–10100. URIAS-ESCOBAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 165.

No. 01–10101. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 941.

No. 01–10102. CASTRO *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 160.

No. 01–10109. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 312.

No. 01–10112. WELKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 208.

No. 01–10117. BEAHM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 171.

No. 01–10120. OCHOA-OLIVAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 893.

No. 01–10123. RICHARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 308.

No. 01–10125. COLEMAN *v.* DEWITT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 282 F. 3d 908.

No. 01–10126. RUMARO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 636.

No. 01–10128. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10129. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 938.

No. 01–10131. SHACKLEFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 290.

No. 01–10133. ODIODIO, AKA SULEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 838.

No. 01–10135. CERVANTES-NAVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 501.

No. 01–10136. ACEVEDO-CRUZ *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 839.

No. 01–10144. CHARLUISANT-PAGAN *v.* VASQUEZ, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 937.

No. 01–10148. ALI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 220.

No. 01–10155. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10158. BRINKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 130.

No. 01–10163. RIANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–10166. LOCKETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1086.

No. 01–10167. MALLOY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 520.

No. 01–10170. PEREZ-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 388.

No. 01–803. HOPKINS, WARDEN *v.* NEWMAN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 247 F. 3d 848.

No. 01–820. REYNOLDS, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY *v.* MORRIS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 264 F. 3d 38.

No. 01–1180. FLORIDA *v.* PULLEN. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 802 So. 2d 1113.

No. 01–1475. TEXAS *v.* VICIOSO. Ct. App. Tex., 10th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 54 S. W. 3d 104.

No. 01–1080. TRANS UNION LLC *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 245 F. 3d 809.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, dissenting.

Petitioner Trans Union LLC is one of three major credit reporting agencies in the United States. Its business consists of three

activities: (1) traditional credit reporting; (2) prescreening individuals for offers of credit or insurance; and (3) the creation of target marketing lists. The lists in the third category are at issue in this case. They contain the names and addresses of individuals who meet specific criteria such as having obtained an auto loan or two or more mortgages, or having a department store credit card. Marketers purchase these lists, then contact the individuals by mail or telephone to offer them goods and services.

In 1994, the Federal Trade Commission (FTC) issued a decision holding that the information communicated by petitioner's target marketing lists were "consumer reports," the sale of which is prohibited by the Fair Credit Reporting Act (FCRA), 84 Stat. 1128, 15 U. S. C. § 1681 *et seq.* The Court of Appeals for the District of Columbia Circuit rejected petitioner's subsequent First Amendment challenge to the FTC's decision. 245 F. 3d 809 (2001). Relying on our decision in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985), the Court of Appeals held that the information communicated by petitioner's target marketing lists is subject to reduced constitutional protection because it "is solely of interest to the company and its business customers and relates to no matter of public concern." 245 F. 3d, at 818. The court determined that the FTC's ban survived this reduced level of scrutiny despite two arguments from petitioner. First, petitioner urged that an opt-out requirement would be a less restrictive means to achieve the Government's stated purpose. Second, petitioner argued that the FTC's decision does little to protect consumer privacy because credit card companies are still permitted to make widespread disclosures of more invasive information about consumers.

In my view this case meets the standards for review by this Court. The plurality opinion in *Dun & Bradstreet* concluded that a false statement in a credit report was not speech on a matter of public concern, as that term is used in the context of defamation law. It is questionable, however, whether this precedent has any place in the context of truthful, nondefamatory speech. Indeed, *Dun & Bradstreet* rejected in specific terms the view that its holding "leaves all credit reporting subject to reduced First Amendment protection." 472 U. S., at 762, n. 8. The Court of Appeals, nonetheless, relied on *Dun & Bradstreet* to denigrate the importance of this speech. A grant of certiorari is warranted to weigh the validity of this new principle.

Even accepting the Court of Appeals' distinction between public and private speech, it appears that petitioner's speech touches upon matters of public concern. The Government concedes the speech is essential to the purchasing decisions of millions of Americans. In addition, many charitable and political organizations use the information provided in petitioner's marketing information to solicit support for their causes.

In light of the fact that the FCRA permits prescreening—the disclosure of consumer reports for target marketing for credit and insurance, § 1681b(c)(1)(B)(i)—the FTC's decision to ban target marketing lists is nonsensical. Prescreening entails the disclosure of detailed credit performance information, including bill payment history. Release of this information is far more invasive of consumer privacy than release of the names and addresses contained in petitioner's target marketing lists. Like target marketing, prescreening touches a vast majority of American adults; credit providers extended close to 1.8 billion credit prescreening offers to American consumers in 1997. And the public value of prescreening is not obviously greater than that provided by other forms of target marketing; only about 1 to 2 percent of consumers who receive prescreening offers respond to them.

This case has important practical implications. Petitioner, one of only three major credit reporting agencies in the United States, faces bankruptcy as a result of the decision of the Court of Appeals. Petitioner has been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of the 190 million individuals in petitioner's database. Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion. If the Court of Appeals' decision is given collateral-estoppel effect in these class actions (as the class-action plaintiffs seek), petitioner will face crushing liability. The company's demise will have adverse effects on both the national economy and petitioner's thousands of employees.

This case is of national importance, and the Court of Appeals has adopted a novel approach to commercial speech. I would grant the petition for certiorari.

No. 01–1464. VISA U. S. A. INC. ET AL. *v.* WAL-MART STORES, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER

took no part in the consideration or decision of this petition. Reported below: 280 F. 3d 124.

No. 01–1539. SUDARSKY *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Motion of Shemco, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 24 Fed. Appx. 28.

No. 01–8443. BEN-YISRAYL *v.* INDIANA. Sup. Ct. Ind. Motion of petitioner to strike the brief in opposition denied. Certiorari denied. Reported below: 753 N. E. 2d 649.

Rehearing Denied

No. 01–1137. BANDUSKY *v.* ARIZONA, 535 U. S. 987;

No. 01–1240. IN RE KELLY, 535 U. S. 985;

No. 01–1250. DONNER *v.* DONNER ET AL., 535 U. S. 989;

No. 01–1343. KNISKERN ET AL. *v.* AMSTUTZ ET AL., 535 U. S. 990;

No. 01–7296. STOKES ET AL. *v.* UNITED STATES, 535 U. S. 990;

No. 01–7632. TWILLIE *v.* BRENNAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 535 U. S. 936;

No. 01–8158. COLWICK *v.* TEXAS, 535 U. S. 994;

No. 01–8575. JONES *v.* BRYANT, WARDEN, 535 U. S. 1022;

No. 01–8663. EARLY *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, 535 U. S. 1023; and

No. 01–9181. MCHAN *v.* UNITED STATES, 535 U. S. 1027. Petitions for rehearing denied.

JUNE 11, 2002

Miscellaneous Order

No. 01A954 (01–10635). MODDEN *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, 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 issuance of the mandate of this Court. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS would deny the application for stay of execution.

JUNE 17, 2002

Affirmed on Appeal

No. 01–1126. MAYFIELD ET AL. *v.* TEXAS ET AL.;
No. 01–1196. BALDERAS ET AL. *v.* TEXAS ET AL.;
No. 01–1225. MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES *v.* TEXAS ET AL.;
No. 01–1242. AMPS ET AL. *v.* TEXAS ET AL.; and
No. 01–1453. MAYFIELD ET AL. *v.* TEXAS ET AL. Affirmed on appeals from D. C. E. D. Tex.

Certiorari Granted—Reversed and Remanded. (See No. 01–1385, *ante*, p. 266.)

Certiorari Granted—Vacated and Remanded

No. 00–1231. SIMMONS, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS *v.* JOHNSTON. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKune* v. *Lile*, *ante*, p. 24. Reported below: 232 F. 3d 901.

No. 00–1397. UAL CORP., DBA UNITED AIRLINES *v.* FIELDER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National Railroad Passenger Corporation* v. *Morgan*, *ante*, p. 101. Reported below: 218 F. 3d 973.

No. 01–985. MADISON *v.* IBP, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National Railroad Passenger Corporation* v. *Morgan*, *ante*, p. 101. Reported below: 257 F. 3d 780.

No. 01–1068. HENDERSON *v.* GENERAL AMERICAN LIFE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Devlin* v. *Scardelletti*, *ante*, p. 1. Reported below: 268 F. 3d 627.

No. 01–1205. O'CONNOR *v.* NORTHSHORE INTERNATIONAL INSURANCE SERVICES, INC., ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506 (2002). Reported below: 21 Fed. Appx. 15.

No. 01–1297. GRIMES ET AL., TRUSTEES UNDER THE WILL OF CHAPLIN, ET AL. *v.* NAVIGANT CONSULTING, INC., ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Devlin* v. *Scardelletti*, *ante*, p. 1. Reported below: 275 F. 3d 616.

No. 01–1360. SCARBOROUGH *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Edelman* v. *Lynchburg College*, 535 U. S. 106 (2002). Reported below: 273 F. 3d 1087.

Certiorari Dismissed

No. 01–9583. BISHOP *v.* BOOKHARD ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–9663. MARCELLO ET UX. *v.* MAINE DEPARTMENT OF HUMAN SERVICES. C. A. 1st Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 28 Fed. Appx. 1.

No. 01–9745. IN RE NUBINE. Sup. Ct. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–10257. DEBARDELEBEN *v.* PUGH, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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: 24 Fed. Appx. 230.

Miscellaneous Orders

No. 01M67. KINDER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER;

No. 01M68. DESIDERIO-MEZA *v.* UNITED STATES; and

No. 01M69. COUCH *v.* ROE, WARDEN, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00–799. CITY OF LOS ANGELES *v.* ALAMEDA BOOKS, INC., ET AL., 535 U. S. 425. Motion of respondents to modify plurality opinion denied.

No. 01–270. YELLOW TRANSPORTATION, INC. *v.* MICHIGAN ET AL. Sup. Ct. Mich. [Certiorari granted, 534 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–706. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF SPRIETSMA, DECEASED *v.* MERCURY MARINE, A DIVISION OF BRUNSWICK CORP. Sup. Ct. Ill. [Certiorari granted, 534 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–729. GODFREY ET AL. *v.* DOE ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Otte* v. *Doe,* 534 U. S. 1126.] Motion of the Reporters Committee for Freedom of the Press for leave to file a brief as *amicus curiae* granted.

No. 01–1184. UNITED STATES *v.* JIMENEZ RECIO ET AL. C. A. 9th Cir. [Certiorari granted, 535 U. S. 1094.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 01–1605. IN RE TAYLOR; IN RE HARRIS ET AL.; and

No. 01–1623. IN RE WISCHKAEMPER ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 01–9588. IN RE POWELL. Petition for writ of mandamus denied.

Certiorari Denied

No. 00–1852. JETT *v.* WASHINGTON COUNTY SCHOOL BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1184.

No. 01–373. POTTER, POSTMASTER GENERAL *v.* FITZGERALD. C. A. 2d Cir. Certiorari denied. Reported below: 251 F. 3d 345.

No. 01–1129. PITTS ET AL. *v.* CITY OF KANKAKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 267 F. 3d 592.

No. 01–1132. MCBROOM ET AL. *v.* MOORE. C. A. 6th Cir. Certiorari denied. Reported below: 272 F. 3d 769.

No. 01–1186. VINYARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 266 F. 3d 320.

No. 01–1188. BHUTANI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 266 F. 3d 661.

No. 01–1233. MATO *v.* BALDAUF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 267 F. 3d 444.

No. 01–1234. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 260 F. 3d 68.

No. 01–1316. CITY OF SEATTLE *v.* FURFARO ET AL.; and
No. 01–1522. FURFARO ET AL. *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. Reported below: 144 Wash. 2d 363, 27 P. 3d 1160 and 36 P. 3d 1005.

No. 01–1329. NICKELL *v.* MEMPHIS LIGHT, GAS & WATER DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 401.

No. 01–1332. SATELLITE BROADCASTING AND COMMUNICATIONS ASSN. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 275 F. 3d 337.

No. 01–1357. OHIO ENVIRONMENTAL PROTECTION AGENCY *v.* NIHISER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 269 F. 3d 626.

No. 01–1362. ELAGAMY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–1365. DANKS *v.* APPEL ET AL. Sup. Ct. Colo. Certiorari denied.

No. 01–1393. COLKITT *v.* GFL ADVANTAGE FUND, LTD. C. A. 3d Cir. Certiorari denied. Reported below: 272 F. 3d 189.

No. 01–1396. PACKARD *v.* CONTINENTAL AIRLINES, INC. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 960.

No. 01–1499. CARSON *v.* NEWS-JOURNAL CORP. ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 790 So. 2d 1120.

No. 01–1504. CELTRONIX TELEMETRY, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 272 F. 3d 585.

No. 01–1509. SEITZ *v.* SPEAGLE ET UX. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 525, 557 S. E. 2d 83.

No. 01–1514. COLEMAN ET AL. *v.* PREUSSAG AKTIENGESELLSCHAFT. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 16 S. W. 3d 110.

No. 01–1515. CITY OF DETROIT ET AL. *v.* LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 876.

No. 01–1528. ALTMAN *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–1530. L. C., A MINOR *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 782 A. 2d 1064.

No. 01–1532. IN RE KITTRELL. Sup. Ct. Cal. Certiorari denied.

No. 01–1533. LEONARD, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LEONARD, ET AL. *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 686.

No. 01–1535. CASSATA, DIRECTOR, ADAMS COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* WESTON ET AL. Ct. App. Colo. Certiorari denied. Reported below: 37 P. 3d 469.

No. 01–1540. MICHIGAN *v.* SCHWESING. Ct. App. Mich. Certiorari denied.

No. 01–1541. SAGE REALTY CORP. ET AL. *v.* PROSKAUER ROSE LLP ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 284 App. Div. 2d 239, 726 N. Y. S. 2d 555.

No. 01–1543. OETTING *v.* INDIANA BOARD OF TAX COMMISSIONERS. Tax Ct. Ind. Certiorari denied. Reported below: 757 N. E. 2d 242.

No. 01–1546. CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY *v.* DOUGLAS. C. A. 9th Cir. Certiorari denied. Reported below: 271 F. 3d 812 and 910.

No. 01–1549. RODRIGUEZ *v.* HARBESTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 202.

No. 01–1550. WRIGHT-DEAN ET VIR *v.* GARLAND ET AL. Ct. App. D. C. Certiorari denied. Reported below: 779 A. 2d 911.

No. 01–1554. MIDDLETON *v.* BALL-FOSTER GLASS CONTAINER CO., L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 835.

No. 01–1570. JACOBSON *v.* VENEMAN, SECRETARY OF AGRICULTURE. C. A. 8th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 441.

No. 01–1575. BURRIER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (BLANCO ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–1592. JORDAN *v.* JORDAN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–1599. ABATE OF GEORGIA, INC. *v.* GEORGIA DEPARTMENT OF PUBLIC SAFETY. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1315.

No. 01–1602. NEW YORK STOCK EXCHANGE, INC. *v.* MFS SECURITIES CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 277 F. 3d 613.

No. 01–1633. WALLACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 276 F. 3d 360.

No. 01–1637. HERNANDEZ *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 841.

No. 01–1645. UNITED STATES EX REL. GAUDINEER AND COMITO, L. L. P. *v.* GESAMAN. C. A. 8th Cir. Certiorari denied. Reported below: 269 F. 3d 932.

No. 01–1675. DAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–1680. RINALDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 280 F. 3d 1103.

No. 01–8563. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 221 F. 3d 1356.

No. 01–8722. HIZBULLAHANKHAMON *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 255 F. 3d 65.

No. 01–9044. BURT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 205 Ill. 2d 28, 792 N. E. 2d 1250.

No. 01–9104. RHODE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 377, 552 S. E. 2d 855.

No. 01–9566. MCCOY *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 01–9570. RICCARDO ET UX. *v.* POLITZ. Super. Ct. Pa. Certiorari denied. Reported below: 779 A. 2d 1230.

No. 01–9584. RHODES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–9587. PEARSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 321 Ill. App. 3d 1060, 797 N. E. 2d 249.

No. 01–9592. BOETTNER *v.* KIRKWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 268 F. 3d 1064.

No. 01–9594. ISRAEL *v.* STENDER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–9595. HOWARD *v.* GREEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 179.

No. 01–9601. SEESE *v.* SPRINGS. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 659, 558 S. E. 2d 710.

No. 01–9602. ATWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 01–9604. DAHMER *v.* IDAHO ET AL. Ct. App. Idaho. Certiorari denied. Reported below: 137 Idaho 210, 46 P. 3d 27.

No. 01–9605. TYLER *v.* RACKLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 176.

No. 01–9606. LONG *v.* COMMUNIST PARTY OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 127.

No. 01–9608. JORDAN *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 666.

No. 01–9609. WEGER *v.* HICKS, JUDGE, SUPERIOR COURT OF WASHINGTON, THURSTON COUNTY. Sup. Ct. Wash. Certiorari denied.

No. 01–9611. MUNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 139 Md. App. 748.

No. 01–9613. REDIC *v.* MOSKOWITZ ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–9614. RHODES *v.* HIRSCHLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 902.

No. 01–9618. LOONEY *v.* HETSELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1379.

No. 01–9620. HATCHER *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 256 F. 3d 761.

No. 01–9622. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 626, 760 N. E. 2d 1281.

No. 01–9623. HARRISON *v.* MAHAFFEY, WARDEN, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 01–9625. MURPHY *v.* MAZZUCA, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 2d Jud.

Dept. Certiorari denied. Reported below: 286 App. Div. 2d 690, 729 N. Y. S. 2d 785.

No. 01–9626. BEATON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9628. NELSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9630. ANTHONY *v.* GASPAR, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9631. CORBIN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 01–9635. CARRILLO *v.* DESANTO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1098.

No. 01–9636. MILLER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 54 S. W. 3d 743.

No. 01–9637. MANUEL ACUNA *v.* AYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9639. JOHNSON *v.* DUFRAIN, SUPERINTENDENT, FRANKLIN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9645. WHITFIELD *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–9648. DOPP *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 859.

No. 01–9649. COLON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1120.

No. 01–9652. PUGH *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES. Sup. Ct. Ark. Certiorari denied.

No. 01–9657. LEDFORD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 471.

No. 01–9659. MARTIN *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 01–9661. JOHNSON *v.* SCOTT COUNTY SOIL AND WATER CONSERVATION DISTRICT ET AL. Dist. Ct. Iowa, Scott County. Certiorari denied.

No. 01–9664. LONGWORTH *v.* SOUTH CAROLINA. Ct. Common Pleas of Spartanburg County, S. C. Certiorari denied.

No. 01–9665. MCGEE *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 01–9670. O'QUINN *v.* BOOKER. C. A. 5th Cir. Certiorari denied.

No. 01–9671. MIXON *v.* BENNETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9672. MILLER *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–9674. ROWSEY *v.* ESLINGER ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9676. SIMON *v.* BOCK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9678. RODRIGUEZ *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 01–9679. TREJO PAULINO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9680. PANNELL *v.* HANKS ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–9681. PAYNE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 01–9685. MILLER *v.* TURNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 560.

No. 01–9686. MORRISON *v.* CONROY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 222.

No. 01–9691. HILL *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 01–9692. FERGUSON *v.* WM. WRIGLEY JR. CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 421.

No. 01–9693. GODEK *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9694. BAEZ *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9700. BREEZE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 799 So. 2d 216.

No. 01–9702. WASSERMAN ET UX. *v.* BARTHOLOMEW ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 38 P. 3d 1162.

No. 01–9703. TAYLOR *v.* KOTECKI. C. A. 7th Cir. Certiorari denied.

No. 01–9704. WADE *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. C. A. 9th Cir. Certiorari denied.

No. 01–9706. EDMONDS *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 01–9707. LUGO *v.* SHAM ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9708. BOBBITT *v.* WALKER, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 229.

No. 01–9711. WHEELER *v.* COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY. Sup. Ct. Pa. Certiorari denied.

No. 01–9712. THOMAS *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–9714. MEEGAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 01–9716. BOWLES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 804 So. 2d 1173.

No. 01–9729. BLAS *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9731. ARMSTRONG *v.* CITY OF GREENSBORO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 185.

No. 01–9740. NICOLAU *v.* NEW YORK COMMISSIONER OF TEMPORARY AND DISABILITY ASSISTANCE ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–9773. CRUMBAKER *v.* REGENCE BLUECROSS BLUESHIELD OF OREGON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 809.

No. 01–9857. HAFNER *v.* HUBBARD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 871.

No. 01–9864. MILANO *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Mecklenburg County, N. C. Certiorari denied.

No. 01–9904. HILL *v.* UNITED STATES TRUSTEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–9912. VARGAS DE ALMEIDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 930.

No. 01–9966. IN RE ARNETT. C. A. D. C. Cir. Certiorari denied.

No. 01–9979. MATHISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–10012. AHMED *v.* WARDEN, FEDERAL CORRECTIONS INSTITUTION, ENGLEWOOD, COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 943.

No. 01–10030. ANTHONY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 372, 555 S. E. 2d 557.

No. 01–10092. HANSEN *v.* SPARKMAN, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–10124. DESHIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 308.

No. 01–10152. COE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1111.

No. 01–10157. WRIGHT *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 900.

No. 01–10161. OWENS, AKA HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 199.

No. 01–10168. JORDAN *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 845.

No. 01–10172. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 293.

No. 01–10173. JOINER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10174. STERLING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 283 F. 3d 216.

No. 01–10176. MOODY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 58.

No. 01–10182. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 280 F. 3d 835.

No. 01–10183. ZUNIGA-SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10185. ALVAREZ-BECERRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 403.

No. 01–10187. VASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 226.

No. 01–10194. TOPETE-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 745.

No. 01–10197. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 352.

No. 01–10198. BRITTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10199. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 55.

No. 01–10200. GORDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10201. HANNAH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 203.

No. 01–10202. GLORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10203. FUELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 173.

No. 01–10204. GIBSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 01–10206. PEREZ-COLON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 279 F. 3d 105.

No. 01–10208. MCAFEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10209. LIFAITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1145.

No. 01–10210. BRAXTONBROWN-SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 278 F. 3d 1348.

No. 01–10212. CARL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–10214. BOSWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10216. BARRIOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 239.

No. 01–10217. CORTES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 354.

No. 01–10218. BUTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 277 F. 3d 481.

No. 01–10223. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 839.

No. 01–10227. MARTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10234. HOSKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 282 F. 3d 772.

No. 01–10235. HARRINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–10236. LEE *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–10239. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–10241. MCGEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 280 F. 3d 803.

No. 01–10242. MIRANDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–10244. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1286.

No. 01–10246. DOWNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10248. SHINGLETON *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 01–10251. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–10258. MORRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 287 F. 3d 985.

No. 01–10259. MCVAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 661.

No. 01–10262. MIRANDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1376.

No. 01–10265. TAYLOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 284 F. 3d 95.

No. 01–10267. ROSALES-GARAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 283 F. 3d 1200.

No. 01–10269. PETERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 283 F. 3d 300.

No. 01–10270. DARLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 661.

No. 01–10271. COPELAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 533.

No. 01–10272. SENFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 280 F. 3d 755.

No. 01–10281. JENKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 968.

No. 01–10284. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–10287. RIVERA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 380.

No. 01–10288. RICE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–10289. FERGUSON, AKA WEINBERGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 992.

No. 01–10294. STEVENSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 173.

No. 01–881. GENERAL ELECTRIC CAPITAL CORP., DBA GE CAPITAL, ET AL. *v.* THIESSEN. C. A. 10th Cir. Motions of Washington Legal Foundation and United States Chamber of Commerce for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 267 F. 3d 1095.

No. 01–1566. HAWKINS, INDIVIDUALLY, AND AS TRUSTEE, HAWKINS FAMILY TRUST *v.* VASTAR RESOURCES, INC. Sup. Ct. Okla. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 01–1577. MUMME *v.* DEPARTMENT OF LABOR. C. A. 1st Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

Rehearing Denied

No. 01–1221. OLMSTEAD *v.* WALTER INDUSTRIES, INC., DBA MID STATE HOMES, INC., 535 U. S. 1018;

No. 01–8343. JONES *v.* UNITED STATES, 535 U. S. 949;

No. 01–8415. MCBROOM *v.* COLUMBIA GAS OF OHIO, INC., 535 U. S. 1019;

No. 01–8612. NOLBERTO PENA *v.* UNITED STATES, 535 U. S. 965; and

No. 01–8729. CONNELLY *v.* LEAHEY & JOHNSON, 535 U. S. 1040. Petitions for rehearing denied.

JUNE 18, 2002

Certiorari Denied

No. 01–10810 (01A980). FUGATE *v.* HEAD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JUNE 20, 2002

Dismissal Under Rule 46

No. 01–538. VENCOR, INC., ET AL. *v.* HELWIG ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 251 F. 3d 540.

JUNE 24, 2002

Affirmed on Appeal

No. 01–1600. UNGER ET AL. *v.* MANCHIN, SECRETARY OF STATE OF WEST VIRGINIA, ET AL. Affirmed on appeal from D. C. N. D. W. Va. Reported below: 188 F. Supp. 2d 651.

Certiorari Granted—Reversed and Remanded. (See No. 01–8419, *ante*, p. 635.)

Certiorari Granted—Vacated and Remanded

No. 00–665. MONTEMAYOR, COMMISSIONER, TEXAS DEPARTMENT OF INSURANCE, ET AL. *v.* CORPORATE HEALTH INSURANCE ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rush*

Prudential HMO, Inc. v. *Moran*, *ante*, p. 355. Reported below: 215 F. 3d 526.

No. 01–1028. CITY OF SAN ANTONIO ET AL. *v.* STUCKY, DBA BILL'S WRECKER SERVICE, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, *ante*, p. 424. Reported below: 260 F. 3d 424.

No. 01–1206. CITY OF DALLAS *v.* COLE. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, *ante*, p. 424. Reported below: 277 F. 3d 1373.

Certiorari Dismissed

No. 01–9821. BROWN *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS 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. 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: 19 Fed. Appx. 513.

No. 01–9828. GLADSTONE *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2286. IN RE DISBARMENT OF MARKS. Disbarment entered. [For earlier order herein, see 535 U. S. 902.]

No. D–2287. IN RE DISBARMENT OF BUSHLOW. Disbarment entered. [For earlier order herein, see 535 U. S. 902.]

No. D–2290. IN RE DISBARMENT OF GRIDER. Disbarment entered. [For earlier order herein, see 535 U. S. 902.]

No. D–2291. IN RE DISBARMENT OF BAILEY. Disbarment entered. [For earlier order herein, see 535 U. S. 924.]

No. D–2324. IN RE DISCIPLINE OF WESTBY. Ragnhild Anne Westby, of Saint Paul, Minn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2325. IN RE DISCIPLINE OF HOVELL. William P. Hovell, of Spring Valley, 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–2326. IN RE DISCIPLINE OF BENJAMIN. Peter L. Benjamin, of Merrillville, Ind., 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–2327. IN RE DISCIPLINE OF REYNOLDS. David Glenn Reynolds, of Placitas, N. M., 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–2328. IN RE DISCIPLINE OF BRANDES. Joel R. Brandes, of Garden City, 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–2329. IN RE DISCIPLINE OF LEONARDO. Anthony F. Leonardo, Jr., of Rochester, 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–2330. IN RE DISCIPLINE OF ZOGBY. Peter S. Zogby, of New Hartford, 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. 01M70. CANTRELL *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 01–8601. MAYBERRY *v.* BURGHUIS. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [535 U. S. 1015] denied.

No. 01–9727. IN RE SNAVELY. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [535 U. S. 1052] denied.

No. 01–10296. IN RE SMITH;
No. 01–10358. IN RE CALLEN;
No. 01–10369. IN RE BOWEN;
No. 01–10405. IN RE BREWER;
No. 01–10460. IN RE DETHLEFS;
No. 01–10499. IN RE RIVA; and
No. 01–10531. IN RE ANTONELLI. Petitions for writs of habeas corpus denied.

No. 01–9238. IN RE MAYBERRY;
No. 01–9783. IN RE PETERSON;
No. 01–10331. IN RE WARREN; and
No. 01–10409. IN RE WOODARD. Petitions for writs of mandamus denied.

Certiorari Granted

No. 01–1418. ARCHER ET UX. *v.* WARNER. C. A. 4th Cir. Certiorari granted. Reported below: 283 F. 3d 230.

No. 01–1269. CITY OF CUYAHOGA FALLS, OHIO, ET AL. *v.* BUCKEYE COMMUNITY HOPE FOUNDATION ET AL. C. A. 6th Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 263 F. 3d 627.

No. 01–1368. NEVADA DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* HIBBS ET AL. C. A. 9th Cir. Motion of respondent William Hibbs for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 273 F. 3d 844.

Certiorari Denied

No. 01–200. UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC. *v.* PENNSYLVANIA HOSPITAL INSURANCE CO. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 564 Pa. 407, 768 A. 2d 1089.

No. 01–336. SERVANTES *v.* RENNE. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870.

No. 01–764. PATRICK *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–863. FIN CONTROL SYSTEMS PTY., LTD. *v.* SURFCO HAWAII. C. A. Fed. Cir. Certiorari denied. Reported below: 264 F. 3d 1062.

No. 01–873. BOWEN, WARDEN *v.* RICE. C. A. 7th Cir. Certiorari denied. Reported below: 264 F. 3d 698.

No. 01–1372. MINNESOTA SENIOR FEDERATION, METROPOLITAN REGION, ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 273 F. 3d 805.

No. 01–1384. MICHIGAN PEAT *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 344.

No. 01–1392. USA POLYMER CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 272 F. 3d 289.

No. 01–1404. LILLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 293.

No. 01–1417. PRESUTTI *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD. C. A. 2d Cir. Certiorari denied. Reported below: 24 Fed. Appx. 92.

No. 01–1429. AMALFITANO *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 21 Fed. Appx. 67.

No. 01–1449. ERVIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 766 A. 2d 859.

No. 01–1462. LINNEEN ET UX. *v.* GILA RIVER INDIAN COMMUNITY. C. A. 9th Cir. Certiorari denied. Reported below: 276 F. 3d 489.

No. 01–1547. SOUTH CAMDEN CITIZENS IN ACTION ET AL. *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 274 F. 3d 771.

No. 01–1551. PILIPSHEN *v.* IBM CORP. C. A. 2d Cir. Certiorari denied. Reported below: 15 Fed. Appx. 20.

No. 01–1553. OHIO *v.* REINER. Sup. Ct. Ohio. Certiorari denied. Reported below: 93 Ohio St. 3d 601, 757 N. E. 2d 1143.

No. 01–1560. BARRIOS *v.* FLORIDA BOARD OF REGENTS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 932.

No. 01–1564. CHAMBERS *v.* STERN ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 347 Ark. 395, 64 S. W. 3d 737.

No. 01–1571. DUHON ET AL. *v.* POLICE JURY OF VERMILLION PARISH, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 838.

No. 01–1578. MEDICAL ASSURANCE OF WEST VIRGINIA, INC. *v.* PIZARRO ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 01–1581. IDG, INC., ET AL. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 275 F. 3d 916.

No. 01–1583. THURLWELL *v.* WALT DISNEY PICTURES & TELEVISION, INC. C. A. 9th Cir. Certiorari denied. Reported below: 6 Fed. Appx. 647.

No. 01–1587. DAHLZ *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–1590. WRIGHT *v.* DAIGLE, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 850.

No. 01–1597. DUNN *v.* KEAN. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 808 So. 2d 216.

No. 01–1598. CLARK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–1606. DUNN *v.* KEAN. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 810 So. 2d 922.

No. 01–1610. McClure *v.* George. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 297.

No. 01–1612. Schultz *v.* Sykes et al. Ct. App. Wis. Certiorari denied. Reported below: 248 Wis. 2d 746, 638 N. W. 2d 604.

No. 01–1613. Wendt *v.* Mineta, Secretary of Transportation. C. A. 7th Cir. Certiorari denied.

No. 01–1615. McLachlan, Trustee of the Mary Butschek Living Trust, et al. *v.* Simon, an Individual and Former Trustee of the Navellier Series Fund, et al. C. A. 9th Cir. Certiorari denied. Reported below: 262 F. 3d 923.

No. 01–1619. Akers *v.* Bishop et al. C. A. 6th Cir. Certiorari denied.

No. 01–1620. Rodriguez *v.* Texas Department of Protective Services. Sup. Ct. Tex. Certiorari denied. Reported below: 63 S. W. 3d 796.

No. 01–1621. Bebchick *v.* Holland America Line-Westours, Inc., et al. Sup. Ct. Wash. Certiorari denied. Reported below: 145 Wash. 2d 178, 35 P. 3d 351.

No. 01–1673. Wagenknecht *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 482.

No. 01–1724. Bar-Meir *v.* North American Die Casting Assn. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 702.

No. 01–8465. Sol *v.* Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. Reported below: 274 F. 3d 648.

No. 01–8544. Morales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 272 F. 3d 284.

No. 01–8643. Amaya-Matamoros *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–8664. Wright *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1110.

No. 01–8678. FIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 128.

No. 01–8696. JEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–9153. GREEN *v.* NEWELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 718.

No. 01–9199. THOMPSON *v.* HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 255 F. 3d 1292.

No. 01–9228. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 269 F. 3d 940.

No. 01–9246. HERNANDEZ-PESINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–9339. NEW *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 807 So. 2d 52.

No. 01–9422. TAYLOR *v.* VETERANS ADMINISTRATION MEDICAL CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 940.

No. 01–9696. VALENTINE *v.* FRANCIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 270 F. 3d 1032.

No. 01–9709. DINSIO *v.* NEW YORK; and

No. 01–9710. DINSIO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 286 App. Div. 2d 517, 729 N. Y. S. 2d 208.

No. 01–9715. IN RE BRANDON LEE B.; and

No. 01–9724. CARRIE Q. B. *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 211 W. Va. 587, 567 S. E. 2d 597.

No. 01–9719. RICHARDSON *v.* LOWE ET AL. Ct. App. La., 2d Cir. Certiorari denied.

No. 01–9730. BARROW *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 273.

No. 01–9735. HAYWOOD *v.* MAZZUCA, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9737. PELTIER *v.* GREYHOUND LINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 182.

No. 01–9743. STEVENSON *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–9744. BALISOK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 106 Wash. App. 1058.

No. 01–9746. BOLTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9747. BUNNERY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–9753. CARTWRIGHT *v.* MOSLEY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–9756. JEMISON *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9758. HUFFMAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9759. HORTON *v.* DRAGOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–9760. HERNANDEZ *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9763. NATURALITE *v.* CIARLO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 506.

No. 01–9765. LANE *v.* FIELDS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 781.

No. 01–9769. POST *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied.

No. 01–9772. CAFFEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 205 Ill. 2d 52, 792 N. E. 2d 1163.

No. 01–9778. CLARK *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9782. HALL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 01–9785. CARLTON *v.* CARLTON. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 561, 557 S. E. 2d 529.

No. 01–9786. HERBERT *v.* CAROBINE ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9787. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–9791. ECHOLS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 325 Ill. App. 3d 515, 758 N. E. 2d 878.

No. 01–9794. CURRY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 01–9796. ATKINSON *v.* COMMISSIONER OF CORRECTION OF CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 67 Conn. App. 902, 786 A. 2d 545.

No. 01–9798. KNOBLAUCH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 706, 765 N. E. 2d 310.

No. 01–9800. THOMAS *v.* CITY OF WICHITA. C. A. 10th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 564.

No. 01–9801. HERDT *v.* UPHOFF, DIRECTOR, WYOMING DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 691.

No. 01–9803. HEINE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9804. PURPURA *v.* PURPURA. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 636, 760 N. E. 2d 1284.

No. 01–9805. GUY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–9806. HATCHER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9807. FORD *v.* MARION COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 72.

No. 01–9811. TAYLOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 63 S. W. 3d 151.

No. 01–9814. DONOGHUE *v.* ILLINOIS CIVIL SERVICE COMMISSION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9817. LEE *v.* DODRILL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 171.

No. 01–9820. OBANDO *v.* WHITE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 836.

No. 01–9822. WEATHERSPOON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9823. RAULS *v.* JOHNSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 01–9830. FOSTER *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–9831. HARRISON *v.* COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 01–9833. BALLARD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 01–9835. WHITE *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9836. TYLER *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–9837. WELLS *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 693.

No. 01–9838. TOWNSEND *v.* ADAIR, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 01–9839. ENGEL *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–9844. DEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9845. DE LA ROSA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9846. EARLY *v.* MILLER ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–9847. PARRA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9848. TRUJILLO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 995.

No. 01–9850. DUHON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9851. CHAVEZ *v.* ALDERMAN, CHAIRPERSON, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 237.

No. 01–9853. CURTIS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 663.

No. 01–9905. HUGHES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9914. WHITE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 786 So. 2d 981.

No. 01–9921. PIERCE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9946. WILLIAMS *v.* COYLE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 260 F. 3d 684.

No. 01–10031. JINADU *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–10084. PARDEE *v.* CONROY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 353.

No. 01–10134. CLOPTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–10175. SILVA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–10220. IHEKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1376.

No. 01–10304. ROSAS-ZULOAGA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 62.

No. 01–10306. RAMOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 39 Fed. Appx. 330.

No. 01–10307. RODRIGUEZ-LAZCANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10311. PHELPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 283 F. 3d 1176.

No. 01–10312. VALENZUELA-URIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10313. SANTOS-DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10314. WATTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 127.

No. 01–10316. LACEDRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–10318. AMEZCUA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 276 F. 3d 445.

No. 01–10319. BLAIR, AKA BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10320. STOVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 279.

No. 01–10321. APARCO-CENTENO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 280 F. 3d 1084.

No. 01–10324. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 535.

No. 01–10325. RODRIGUEZ PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10327. AL-ZUBAIDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 283 F. 3d 804.

No. 01–10328. ZAPATA-ROBLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 919.

No. 01–10332. SCHWEITZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 331.

No. 01–10334. MARINO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 277 F. 3d 11.

No. 01–10335. LUA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10336. LOPEZ *v.* ROMINE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 101.

No. 01–10339. AVILES-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 674.

No. 01–10342. BAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 256.

No. 01–10347. AGUILAR-PLATA *v.* UNITED STATES; CARAVEO-PRIETO *v.* UNITED STATES; FUENTES-PICON *v.* UNITED STATES; JIMENEZ-HERNANDEZ *v.* UNITED STATES; MOLINA-MORALES *v.* UNITED STATES; PADILLA-VELA, AKA PADILLA, AKA VELA-PADILLA *v.* UNITED STATES; ROMERO-RAMIREZ, AKA ROMERO, AKA SANCHEZ-PEREZ *v.* UNITED STATES; SANCHEZ-CALDERON, AKA SANCHEZ-RODRIGUEZ *v.* UNITED STATES; and ZAMUDIO-HINOJOSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10349. SWINT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 01–10350. SUMMERSETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 993.

No. 01–10354. GOMEZ-ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–10356. NORRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 281 F. 3d 357.

No. 01–10357. CARDENAS-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10362. WALLACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 280 F. 3d 781.

No. 01–10363. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10364. LUALEMAGA, AKA SALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 280 F. 3d 1260.

No. 01–10365. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 95.

No. 01–10366. FRANCIS, AKA RAMSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 128.

No. 01–10371. CECENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 127.

No. 01–10373. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10376. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 278 F. 3d 749.

No. 01–10377. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10378. LOPEZ-LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 282 F. 3d 1.

No. 01–10379. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10382. GENERAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 278 F. 3d 389.

No. 01–10384. ANGELO FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10386. ALIM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 533.

No. 01–10387. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10389. DUVALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 825.

No. 01–10390. ESTRADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 47.

No. 01–10394. GARY *v.* HOLT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 01–10408. MOLINA-PORTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 127.

No. 01–10439. FOSTER *v.* FULKERSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 806.

No. 01–1158. JAZZ PHOTO CORP. ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL.; and

No. 01–1376. FUJI PHOTO FILM CO., LTD. *v.* JAZZ PHOTO CORP. ET AL. C. A. Fed. Cir. Motion of petitioners in No. 01–1158 for leave to file petition for writ of certiorari under seal with redacted copies for the public granted. Motion of American Free Trade Association for leave to file a brief as *amicus curiae* granted. Motion of respondent Fuji Photo Film Co., Ltd., in No. 01–1158, for leave to file a brief in opposition under seal with redacted copies of the brief for the public granted. Motion of Costco Wholesale Corp. for leave to file a brief as *amicus curiae* granted. Motion of Grandway USA Corp. to be substituted in place of petitioner Dynatec International, Inc., denied. Motion of petitioner in No. 01–1376 for leave to file cross-petition for writ of certiorari under seal with redacted copies for the public granted. Motion of respondents Jazz Photo Corp. et al. for leave to file a

supplemental brief in No. 01–1376 under seal with redacted copies for the public granted. Certiorari denied. Reported below: 264 F. 3d 1094.

No. 01–1427. WALGREEN CO. *v.* HOOD, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 275 F. 3d 475.

No. 01–9742. BURGESS *v.* CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF ELECTIONS. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 01–1562. WOODFORD, WARDEN *v.* CARO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 280 F. 3d 1247.

No. 01–9725. ARMSTRONG *v.* STEPPES APARTMENTS, LTD., ET AL. Ct. App. Tex., 2d Dist. Motion of Kenneth A. Rushton, Chapter XI Trustee, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 57 S. W. 3d 37.

Rehearing Denied

No. 00–9952. BENNINGS *v.* KEARNEY ET AL., 534 U. S. 838;

No. 01–1150. LEON C. BAKER P. C. ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC., 535 U. S. 987;

No. 01–1222. SMITH *v.* TALLAHASSEE DEMOCRAT ET AL., 535 U. S. 1034;

No. 01–1251. COOK *v.* CLEVELAND STATE UNIVERSITY, 535 U. S. 1034;

No. 01–1257. Z. G. *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY DIVISION, ET AL., 535 U. S. 1034;

No. 01–1361. CLARK *v.* UNITED STATES, 535 U. S. 990;

No. 01–1432. LOPEZ *v.* UNITED STATES, 535 U. S. 1035;

No. 01–6897. GARDNER *v.* SEABOLD, WARDEN, 534 U. S. 1089;

No. 01–7933. BELL *v.* LARKINS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 535 U. S. 959;

No. 01–7941. THOMPSON *v.* FLORIDA, 535 U. S. 960;

No. 01–8160. TIDIK *v.* APPEALS JUDGES OF MICHIGAN, 535 U. S. 994;

No. 01–8258. TILLI *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 535 U. S. 997;

No. 01–8293. YOUNG-BEY *v.* MARYLAND, 535 U. S. 998;
No. 01–8372. IN RE WAUQUA, 535 U. S. 925;
No. 01–8421. LEWIS *v.* SMITH ET AL., 535 U. S. 1019;
No. 01–8955. WINKE *v.* BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P. C., 535 U. S. 1041;
No. 01–8968. MARCELLO ET UX. *v.* MAINE DEPARTMENT OF HUMAN SERVICES, 535 U. S. 1064; and
No. 01–9392. WILLIAMS *v.* UNITED STATES, 535 U. S. 1043. Petitions for rehearing denied.

No. 01–7292. RHOADS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., 535 U. S. 933. Motion for leave to file petition for rehearing denied.

JUNE 25, 2002

Miscellaneous Order

No. 01–10909 (01A990). IN RE BROWN. 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.

Certiorari Denied

No. 01–10941 (01A994). COULSON *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. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Certiorari denied.

JUNE 26, 2002

Miscellaneous Order

No. 01–10980 (01A1000). IN RE WILLIAMS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Petition for writ of habeas corpus denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

Certiorari Denied

No. 01–10950 (01A995). WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, pre-

sented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Certiorari denied.

JUNE 28, 2002

Certiorari Granted—Vacated and Remanded

No. 01–648. AINSWORTH ET AL. *v.* STANLEY, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKune* v. *Lile*, *ante*, p. 24. Reported below: 244 F. 3d 209.

No. 01–797. THOMAS, A MINOR, BY HER FATHER, THOMAS, ET AL. *v.* ROBERTS ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hope* v. *Pelzer*, *ante*, p. 730. Reported below: 261 F. 3d 1160.

No. 01–1159. VAUGHAN *v.* COX ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hope* v. *Pelzer*, *ante*, p. 730. Reported below: 264 F. 3d 1027.

No. 01–6798. PERKINS *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Atkins* v. *Virginia*, *ante*, p. 304. Reported below: 808 So. 2d 1143.

No. 01–6821. HARROD *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ring* v. *Arizona*, *ante*, p. 584. Reported below: 200 Ariz. 309, 26 P. 3d 492.

No. 01–7310. ALLEN *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 *Ring* v. *Arizona*, *ante*, p. 584. Reported below: 247 F. 3d 741.

No. 01–7743. PANDELI *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Cer-

tiorari granted, judgment vacated, and case remanded for further consideration in light of *Ring* v. *Arizona*, *ante*, p. 584. Reported below: 200 Ariz. 365, 26 P. 3d 1136.

No. 01–7837. SANSING *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ring* v. *Arizona*, *ante*, p. 584. Reported below: 200 Ariz. 347, 26 P. 3d 1118.

No. 01–8716. BELL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. 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 *Atkins* v. *Virginia*, *ante*, p. 304. Reported below: 31 Fed. Appx. 156.

No. 01–10635. MODDEN *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 *Atkins* v. *Virginia*, *ante*, p. 304.

Certiorari Granted—Reversed. (See No. 01–1471, *ante*, p. 862.)

Reversed and Remanded After Certiorari Granted. (See No. 01–339, *ante*, p. 856.)

Certiorari Dismissed

No. 01–9945. TIDIK *v.* HUNTER ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 01A991. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* NORTH JERSEY MEDIA GROUP, INC., ET AL. Application for stay, presented to JUSTICE SOUTER, and by him referred to the Court, granted, and it is ordered that the preliminary injunction entered by the United States District Court for the District of New Jersey on May 28, 2002, is stayed pending the final disposition of the Government's appeal of that injunction to the United States Court of Appeals for the Third Circuit.

No. D–2306. IN RE DISBARMENT OF SCHAEFER. Disbarment entered. [For earlier order herein, see 535 U. S. 1092.]

No. 01M71. TOWNES *v.* NEW HAMPSHIRE; and

No. 01M72. HOWARD *v.* NEWLAND, WARDEN, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 01M73. HALL *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Motion to amend the petition for writ of certiorari granted.

No. 01M75. HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF ATLANTIC CITY *v.* TAYLOR. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 01–653. FEDERAL COMMUNICATIONS COMMISSION *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL.; and

No. 01–657. ARCTIC SLOPE REGIONAL CORP. ET AL. *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL. C. A. D. C. Cir. [Certiorari granted, 535 U. S. 904.] Motion of the Acting Solicitor General for divided argument granted. Motion of Creditors of NextWave Personal Communications Inc. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 01–705. BARNHART, COMMISSIONER OF SOCIAL SECURITY *v.* PEABODY COAL CO. ET AL.; BARNHART, COMMISSIONER OF SOCIAL SECURITY *v.* BELLAIRE CORP. ET AL.; and

No. 01–715. HOLLAND ET AL. *v.* BELLAIRE CORP. ET AL. C. A. 6th Cir. [Certiorari granted, 534 U. S. 1112.] Motion of the Solicitor General for divided argument granted. Motion of respondents Bellaire Corp. et al. for divided argument granted.

No. 01–729. GODFREY ET AL. *v.* DOE ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Otte* v. *Doe*, 534 U. S. 1126.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–757. SYNGENTA CROP PROTECTION, INC., ET AL. *v.* HENSON. C. A. 11th Cir. [Certiorari granted, 534 U. S. 1126.] Motion of Texas for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 01–896. FORD MOTOR CO. ET AL. *v.* MCCAULEY ET AL. C. A. 9th Cir. [Certiorari granted, 534 U. S. 1126.] Motion of

the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 01–9927. KELLY *v.* NORTEL NETWORKS CORP. C. A. 1st Cir.; and

No. 01–10322. GEORGE *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 19, 2002, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–8822. IN RE RICHARDSON; and

No. 00–10749. IN RE HOLLADAY. Petitions for writs of habeas corpus denied. See *Ex parte Abernathy,* 320 U. S. 219 (1943).

No. 01–10340. IN RE DIXON. Petition for writ of mandamus denied.

No. 01–1700. IN RE WOJCIECHOWSKI ET UX. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 00–1471. KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., ET AL. *v.* MILLER, COMMISSIONER, KENTUCKY DEPARTMENT OF INSURANCE. C. A. 6th Cir. Certiorari granted. Reported below: 227 F. 3d 352.

No. 01–188. PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA *v.* CONCANNON, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 249 F. 3d 66.

No. 01–1491. DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* KIM. C. A. 9th Cir. Certiorari granted. Reported below: 276 F. 3d 523.

No. 01–1572. COOK COUNTY, ILLINOIS *v.* UNITED STATES EX REL. CHANDLER. C. A. 7th Cir. Certiorari granted. Reported below: 277 F. 3d 969.

No. 01–593. DOLE FOOD CO. ET AL. *v.* PATRICKSON ET AL.; and

No. 01–594. DEAD SEA BROMINE CO., LTD., ET AL. *v.* PATRICKSON ET AL. C. A. 9th Cir. Certiorari granted limited to the

following questions: "1. Whether a corporation is an 'agency or instrumentality' if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation. 2. Whether a corporation is an 'agency or instrumentality' if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation." Cases consolidated, and a total of one hour allotted for oral argument. Reported below: 251 F. 3d 795.

No. 01–1500. CLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted limited to the following question: "Whether petitioner's judgment of conviction became 'final' within the meaning of 28 U. S. C. § 2255, par. 6(1), one year after the Court of Appeals issued its mandate on direct appeal or one year after his time for filing a petition for writ of certiorari expired." Reported below: 30 Fed. Appx. 607.

Certiorari Denied

No. 00–1790. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 246.

No. 00–7021. MOORE *v.* UNITED STATES;
No. 00–7070. ELLIS *v.* UNITED STATES;
No. 00–7085. WILSON *v.* UNITED STATES; and
No. 00–8082. MCCAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 223 F. 3d 554.

No. 00–8810. RICHARDSON *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 00–9976. KING *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 273 Ga. 258, 539 S. E. 2d 783.

No. 00–10728. HOLLADAY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 00–10864. DICKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1036.

No. 00–10895. LANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1084.

No. 01–529. HOOVER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 246 F. 3d 1054.

No. 01–724. CAPANO *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 781 A. 2d 556.

No. 01–1145. RITH ENERGY, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 247 F. 3d 1355.

No. 01–1230. SPARING *v.* VILLAGE OF OLYMPIA FIELDS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 266 F. 3d 684.

No. 01–1245. RUTHERFORD ET AL. *v.* DEORLE. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 3d 1272.

No. 01–1410. DELONG *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 264 F. 3d 1334.

No. 01–1440. ORIN *v.* BARCLAY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 3d 1207.

No. 01–1446. FORMAN *v.* SMALL, SECRETARY, SMITHSONIAN INSTITUTION. C. A. D. C. Cir. Certiorari denied. Reported below: 271 F. 3d 285.

No. 01–1496. STEWART, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED *v.* ABRAHAM ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 220.

No. 01–1555. FENTROY *v.* DILLARDS TEXAS OPERATING LIMITED PARTNERSHIP. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–1576. FARRIOR *v.* WATERFORD BOARD OF EDUCATION. C. A. 2d Cir. Certiorari denied. Reported below: 277 F. 3d 633.

No. 01–1582. FIRESTONE ET AL. *v.* SOUTHERN CALIFORNIA GAS CO. C. A. 9th Cir. Certiorari denied. Reported below: 219 F. 3d 1063.

No. 01–1586. EVERHART *v.* ALLMERICA FINANCIAL LIFE INSURANCE CO., DBA STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 275 F. 3d 751.

No. 01–1589. HERNANDEZ-LOPEZ ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 639 N. W. 2d 226.

No. 01–1591. ULLICO, INC., ET AL. *v.* BLACK, TRUSTEE. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445.

No. 01–1593. POTTS *v.* POTTS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF POTTS, DECEASED, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 59 S. W. 3d 167.

No. 01–1594. ALCAN ALUMINUM CORP. *v.* PRUDENTIAL ASSURANCE CO. LTD. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 701.

No. 01–1595. MCGOVERN *v.* MCGOVERN ET UX. Ct. App. Ariz. Certiorari denied. Reported below: 201 Ariz. 172, 33 P. 3d 506.

No. 01–1603. LEVY ET UX. *v.* SWIFT TRANSPORTATION CO. ET AL. Ct. App. N. M. Certiorari denied.

No. 01–1604. LAVINE, AS NEXT FRIEND OF LAVINE *v.* BLAINE SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 257 F. 3d 981.

No. 01–1608. HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. *v.* CIRCLE K CORP., DEBTOR. C. A. 9th Cir. Certiorari denied. Reported below: 279 F. 3d 669.

No. 01–1609. INDIAN RIVER ESTATES ET AL. *v.* PREFERRED PROPERTIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 790.

No. 01–1614. LOCAL UNION NO. 272, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* PENNSYLVANIA POWER CO. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 174.

No. 01–1617. ATWOOD, DIRECTOR, WYOMING DEPARTMENT OF REVENUE, ET AL. *v.* BURLINGTON NORTHERN & SANTA FE RAILWAY CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 270 F. 3d 942.

No. 01–1625. SOLOMON *v.* SUPREME COURT OF FLORIDA ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 806 So. 2d 491.

No. 01–1628. KNUBBE *v.* DETROIT BOARD OF EDUCATION ET AL. Ct. App. Mich. Certiorari denied.

No. 01–1639. SMITH *v.* WILLIAMS, WARDEN. Dist. Ct. N. M., Socorro County. Certiorari denied.

No. 01–1646. SCHULTZ *v.* JOURNAL SENTINEL, INC. Ct. App. Wis. Certiorari denied. Reported below: 248 Wis. 2d 791, 638 N. W. 2d 76.

No. 01–1650. DEVRIES *v.* IOWA. Ct. App. Iowa. Certiorari denied.

No. 01–1654. THOMAS *v.* STONE, COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL HEALTH. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 284 App. Div. 2d 627, 725 N. Y. S. 2d 749.

No. 01–1658. ISKO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 344 N. J. Super. 521, 782 A. 2d 950.

No. 01–1668. BOYNE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 814 So. 2d 437.

No. 01–1669. FRANCOIS *v.* ENTERPRISE LOU-TEX NGL PIPELINE L. P. Ct. App. La., 3d Cir. Certiorari denied.

No. 01–1679. SPRINT COMMUNICATIONS CO. *v.* MISSOURI DIRECTOR OF REVENUE. Sup. Ct. Mo. Certiorari denied. Reported below: 64 S. W. 3d 832.

No. 01–1701. CLOUD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 158.

No. 01–1714. ORLANDO FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–1720. PENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 268 F. 3d 215.

No. 01–1734. HOUSE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 608.

No. 01–1737. AIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–1747. WEAVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1320.

No. 01–1750. MANDANICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 519.

No. 01–1751. METT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 274 F. 3d 1235.

No. 01–1769. WAYNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–1777. MCGONEGAL *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 01–1781. NAJJOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 3d 979.

No. 01–5169. RODGERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 245 F. 3d 961.

No. 01–5305. PITCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 7 Fed. Appx. 119.

No. 01–5346. BAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 7 Fed. Appx. 274.

No. 01–5481. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 2 Fed. Appx. 671.

No. 01–5501. KIJEWSKI *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 773 So. 2d 124.

No. 01–5526. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 8 Fed. Appx. 529.

No. 01–5718. PHILLIPS, AKA DUKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 73.

No. 01–5820. PICKENS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 19 P. 3d 866.

No. 01–5844. PETTUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 112.

No. 01–5860. WATTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 256 F. 3d 630.

No. 01–6252. WOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 7 Fed. Appx. 294.

No. 01–6281. KEMP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1361.

No. 01–6462. GRAVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 135.

No. 01–6491. LUZARDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 263 F. 3d 160.

No. 01–6987. HILL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 252 F. 3d 919.

No. 01–7092. MANN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 794 So. 2d 595.

No. 01–7161. RIOS-ARAIZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 721.

No. 01–7432. MASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 587.

No. 01–7485. RAWLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1114.

No. 01–7694. LEVINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 772.

No. 01–7723. ANTONIO RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 43.

No. 01–7758. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–7804. KING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 808 So. 2d 1237.

No. 01–8099. BOTTOSON *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 813 So. 2d 31.

No. 01–8208. MARCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 445.

No. 01–8336. DOUGLAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–8478. JIMENEZ-PINEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 55.

No. 01–8511. SANDERS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 272 Kan. 445, 33 P. 3d 596.

No. 01–8599. VELEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 179.

No. 01–8615. SHERMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 268 F. 3d 539.

No. 01–8712. BRYSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 268 F. 3d 560.

No. 01–8724. GRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 260 F. 3d 1267.

No. 01–8794. WILCOX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–8895. KELLY *v.* TOWN OF CHELMSFORD. C. A. 1st Cir. Certiorari denied. Reported below: 23 Fed. Appx. 18.

No. 01–8920. HATFIELD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 346 Ark. 319, 57 S. W. 3d 696.

No. 01–9014. VAZQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 93.

No. 01–9060. FORD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 198 Ill. 2d 68, 761 N. E. 2d 735.

No. 01–9065. GHOLSTON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 272 Kan. 601, 35 P. 3d 868.

No. 01–9152. CARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 803 So. 2d 613.

No. 01–9154. HERTZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 803 So. 2d 629.

No. 01–9273. DONCSES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1284.

No. 01–9284. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 162.

No. 01–9320. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9335. TONY, AKA ERNSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1144.

No. 01–9347. GRAYSON *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 257 F. 3d 1194.

No. 01–9360. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 263 F. 3d 170.

No. 01–9378. YIRKOVSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 259 F. 3d 704.

No. 01–9390. LOUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 830.

No. 01–9406. CHRISTOPHER, PERSONAL REPRESENTATIVE OF CHRISTOPHER, DECEASED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 102.

No. 01–9418. SINGLETARY *v.* UNITED STATES; and
No. 01–9440. RUSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 198.

No. 01–9454. BROWN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 01–9469. BROADNAX *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 825 So. 2d 233.

No. 01–9856. ROWELL *v.* DEL PAPA, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 01–9858. ABDUL-MUQSIT *v.* FEDERATED DEPARTMENT STORES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 218.

No. 01–9859. ENLOW *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 01–9860. DAVIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9861. De La Fuente *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 01–9862. Hunter *v.* Yukins, Warden. C. A. 6th Cir. Certiorari denied.

No. 01–9863. Easterwood *v.* Choctaw County District Attorney et al. Ct. Civ. App. Okla. Certiorari denied. Reported below: 45 P. 3d 436.

No. 01–9866. Turner *v.* Parker. C. A. 8th Cir. Certiorari denied.

No. 01–9869. Reeves *v.* St. Mary's County, Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 139 Md. App. 750.

No. 01–9876. Ellis *v.* Newland, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 734.

No. 01–9886. Pfeiffer-El *v.* Jackson, Superintendent, Brown Creek Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 302.

No. 01–9893. Owens *v.* Stine. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 351.

No. 01–9896. Wrencher *v.* River Falls School District et al. C. A. 7th Cir. Certiorari denied.

No. 01–9897. Wright *v.* Knox County Board of Education. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 519.

No. 01–9898. Taylor *v.* Campbell, Commissioner, Tennessee Department of Correction, et al. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 518.

No. 01–9901. Knox *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 805 So. 2d 527.

No. 01–9903. Hadix *v.* Wilson, Superintendent, State Correctional Institution at Cresson, et al. C. A. 3d Cir. Certiorari denied.

No. 01–9911. McCraw *v.* Lockyer, Attorney General of California, et al. C. A. 9th Cir. Certiorari denied.

No. 01–9916. EDWARDS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 793 So. 2d 943.

No. 01–9922. PRICE *v.* CRESTAR SECURITIES CORP. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–9923. JAMES *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 654.

No. 01–9931. SPAULDING *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9932. LOONEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 803 So. 2d 656.

No. 01–9933. BLANCO LERMA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 01–9934. MASSEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9935. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–9936. SWITZER *v.* SMITH ET AL. Sup. Ct. Va. Certiorari denied.

No. 01–9937. JONES *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 150.

No. 01–9938. JUMP *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 764.

No. 01–9942. BEASLEY *v.* STEWART, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 641.

No. 01–9943. ADDLEMAN *v.* PAYNE, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. Ct. App. Wash. Certiorari denied.

No. 01–9944. WEINSTEIN *v.* GRABELLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 226.

No. 01–9948. COFFMAN *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9949. CARPENTER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 147 N. C. App. 386, 556 S. E. 2d 316.

No. 01–9950. EASLEY *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1094.

No. 01–9974. TILGHMAN *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 311.

No. 01–10022. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–10028. PATTERSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 703.

No. 01–10060. BECKTEL *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (MORISSETTE, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied.

No. 01–10074. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–10081. TAYLOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 1155, 34 P. 3d 937.

No. 01–10087. MOSS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 205 Ill. 2d 139, 792 N. E. 2d 1217.

No. 01–10118. ABOUHALIMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 261 F. 3d 271 and 16 Fed. Appx. 73.

No. 01–10122. MCGEE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–10132. NEWSOME *v.* PHELPS MEMORIAL HOSPITAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 24 Fed. Appx. 33.

No. 01–10141. HERRERO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 324 Ill. App. 3d 876, 756 N. E. 2d 234.

No. 01–10162. McKinney *v.* Texas. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 59 S. W. 3d 304.

No. 01–10213. Bowman *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 325 Ill. App. 3d 411, 758 N. E. 2d 408.

No. 01–10221. White *v.* Riverfront State Prison et al. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 737.

No. 01–10233. Handy *v.* Department of the Army. C. A. Fed. Cir. Certiorari denied. Reported below: 26 Fed. Appx. 977.

No. 01–10240. Mobley *v.* Head, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 267 F. 3d 1312.

No. 01–10278. Thompson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 582.

No. 01–10323. Green *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 968.

No. 01–10337. Lacorse *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 183.

No. 01–10372. Avants *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 278 F. 3d 510.

No. 01–10391. Dixon *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 53.

No. 01–10410. Nelson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10411. Jenkins *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 462.

No. 01–10415. Marmolejo-Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 372.

No. 01–10416. Lopez-Torres *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10419. Gomez-Lepe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 665.

No. 01–10420. HERRERA-RAMIREZ *v.* UNITED STATES; and SANCHEZ-ESPINOSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129 (second judgment) and 130 (first judgment).

No. 01–10421. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10423. RUELAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 388.

No. 01–10424. SHARAF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 366.

No. 01–10425. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 332.

No. 01–10426. OTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 534.

No. 01–10429. COSBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10430. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 936.

No. 01–10431. TOMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10432. URENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 31 Fed. Appx. 9.

No. 01–10434. BOARDLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 165.

No. 01–10436. HICKMAN *v.* NASH, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 12 Fed. Appx. 42.

No. 01–10438. HERNANDEZ *v.* SWOPE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1286.

No. 01–10446. MORENO-AGUILAR, AKA MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10447. PEREZ-OVIEDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 400.

No. 01–10449. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10451. AZURE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 292.

No. 01–10453. PARTIDA-RAMIREZ, AKA RAMIREZ-PARTIDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 923.

No. 01–10455. BENITEZ *v.* ELLIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 917.

No. 01–10456. NUNEZ-RODRIGUEZ, AKA DIAZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 340.

No. 01–10457. LEDEZMA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 387.

No. 01–10458. DIAZ-VALENCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 260.

No. 01–10461. RANDOLPH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 215.

No. 01–10463. ROSTAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1086.

No. 01–10464. DANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10466. CASTELAN-PEREZ, AKA GONZALEZ PEREZ, AKA CASTELAN MONDRAGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10467. CORNOG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 389.

No. 01–10475. TELESCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–10476. VALDEZ-ESCOBEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 130.

No. 01–10477. ZAPATA-DIAZ, AKA RENDON-LEOBOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–10478. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–10480. MCMILLON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 289.

No. 01–10484. MONTOYA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 941.

No. 01–10486. ANDERSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 288 F. 3d 335.

No. 01–10487. HAMILTON *v.* REED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 202.

No. 01–10491. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10492. CAIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 599.

No. 01–10493. GUO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–10495. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 184.

No. 01–10503. ANDUJAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1283.

No. 01–10506. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 156.

No. 01–10507. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 129.

No. 01–10508. MOLINA-NAVARRATE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 992.

No. 01–10511. BOARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 01–10512. MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–10513. ELIECER PALACIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–10514. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 968.

No. 01–10515. GOMEZ-SOLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 440.

No. 01–10517. SCHETTLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 32 Fed. Appx. 14.

No. 01–10518. GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 792 A. 2d 1059.

No. 01–10519. GONZALEZ-RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 848.

No. 01–10520. TRIBBLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 704.

No. 01–10525. TREJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–10534. MANUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 121.

No. 01–1631. BASS *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 28 Fed. Appx. 201.

No. 01–1632. TEXAS *v.* MCCARTHY. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 65 S. W. 3d 47.

No. 01–9960. SUAREZ MEDINA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner to amend petition for writ of certiorari granted. Certiorari denied. Reported below: 31 Fed. Appx. 835.

Rehearing Denied

No. 01–895. FIORE *v.* UNITED STATES, 534 U. S. 1133;

No. 01–1401. WALL ET AL. *v.* CHEVERIE ET AL., 535 U. S. 1078;

No. 01–7831. CAMPBELL, AKA LEE *v.* PETERS ET AL., 535 U. S. 957;

No. 01–8251. KNOX *v.* SICKLES ET AL., 535 U. S. 996;

No. 01–8329. WOODFORD *v.* INDIANA, 535 U. S. 999;

No. 01–8413. PODOPRIGORA *v.* IMMIGRATION AND NATURALIZATION SERVICE, 535 U. S. 961;

No. 01–8486. BAGLEY *v.* VANCE ET AL., 535 U. S. 1021;

No. 01–8600. BEATON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 535 U. S. 1037;

No. 01–8715. FRIES *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, 535 U. S. 1039;

No. 01–8720. PIERCE *v.* PRICE, FORMER SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREEN, ET AL., 535 U. S. 1039;

No. 01–9067. CAMPOS *v.* UNITED STATES, 535 U. S. 1010;

No. 01–9198. CUNNINGHAM *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 535 U. S. 1066; and

No. 01–9460. IN RE WALKER, 535 U. S. 1033. Petitions for rehearing denied.

No. 01–1353. LEE *v.* DOW CHEMICAL CO. ET AL., 535 U. S. 1073. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

JULY 10, 2002

Miscellaneous Orders

No. 02A34. MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BOTTOSON. Application to vacate stay of execution of sentence of death entered by the Supreme Court of Florida on July 8, 2002, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. 02A35. MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* KING. Application to vacate stay of execution of sentence of death entered by the Supreme Court of Florida on July 8, 2002, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JULY 17, 2002

Certiorari Denied

No. 02–5240 (02A46). HANSEN *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 23, 2002

Certiorari Denied

No. 02–5376 (02A62). CANNON *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this application and this petition.

JULY 29, 2002

Miscellaneous Order

No. 01–1500. CLAY *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 957.] David W. DeBruin, Esq., of Washington, D. C., is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below.

AUGUST 5, 2002

Miscellaneous Orders

No. D–1943. IN RE DISBARMENT OF KANTOR. Disbarment entered. [For earlier order herein, see 523 U. S. 1092.]

No. D–2288. IN RE DISBARMENT OF FRIESEN. Disbarment entered. [For earlier order herein, see 535 U. S. 902.]

No. D–2289. IN RE DISBARMENT OF TUCKER. Disbarment entered. [For earlier order herein, see 535 U. S. 902.]

No. D–2292. IN RE DISBARMENT OF ALTSCHULER. Disbarment entered. [For earlier order herein, see 535 U. S. 983.]

No. D–2293. IN RE DISBARMENT OF WILCOX. Disbarment entered. [For earlier order herein, see 535 U. S. 984.]

No. D–2294. IN RE DISBARMENT OF ELLIOTT. Disbarment entered. [For earlier order herein, see 535 U. S. 984.]

No. D–2295. IN RE DISBARMENT OF WITTENBERG. Disbarment entered. [For earlier order herein, see 535 U. S. 984.]

No. D–2296. IN RE DISBARMENT OF MAGNOTTI. Disbarment entered. [For earlier order herein, see 535 U. S. 984.]

No. D–2297. IN RE DISBARMENT OF RODRIGUEZ. Disbarment entered. [For earlier order herein, see 535 U. S. 984.]

No. D–2298. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see 535 U. S. 1015.]

No. D–2299. IN RE DISBARMENT OF GAVLICK. Disbarment entered. [For earlier order herein, see 535 U. S. 1015.]

No. D–2302. IN RE DISBARMENT OF GILLILAND. Disbarment entered. [For earlier order herein, see 535 U. S. 1032.]

No. D–2303. IN RE DISBARMENT OF WRIGHT. Disbarment entered. [For earlier order herein, see 535 U. S. 1032.]

No. D–2304. IN RE DISBARMENT OF HALPERN. Disbarment entered. [For earlier order herein, see 535 U. S. 1032.]

No. D–2305. IN RE DISBARMENT OF FREJLICH. Disbarment entered. [For earlier order herein, see 535 U. S. 1033.]

No. D–2307. IN RE DISBARMENT OF O'BRIEN. Disbarment entered. [For earlier order herein, see 535 U. S. 1092.]

No. D–2331. IN RE DISCIPLINE OF STEVENS. Richard Stevens, 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–2332. IN RE DISCIPLINE OF HARLEY. Robert G. Harley, of Brooklyn, 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–2333. IN RE DISCIPLINE OF WEINSTOCK. Israel Weinstock, of Belle Harbor, 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–2334. IN RE DISBARMENT OF LOCKENVITZ. Bradley Harold Lockenvitz, of Linn, Mo., 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. 00–9545. SWOYER *v.* KERCHER ET AL., 534 U. S. 831;

No. 00–9551. SWOYER *v.* MERCHANTS BANK, 534 U. S. 831;

No. 00–9554. SWOYER *v.* REED, 534 U. S. 832;

No. 00–9686. BAEZ *v.* HALL ET AL., 535 U. S. 904;

No. 00–9726. SWOYER *v.* EDGARS ET AL., 534 U. S. 832;

No. 00–10271. JARAMILLO *v.* PINKERTON ET AL., 534 U. S. 849;

No. 00–10422. YON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 534 U. S. 857;

No. 01–144. FULTON COUNTY, GEORGIA, ET AL. *v.* FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, ET AL., *ante*, p. 904;

No. 01–400. BELL, WARDEN *v.* CONE, 535 U. S. 685;

No. 01–1277. KRILICH *v.* UNITED STATES, *ante*, p. 904;

No. 01–1299. WATTS *v.* CITY OF NORMAN, 535 U. S. 1055;

No. 01–1367. BARNETT *v.* DENVER PUBLISHING CO., DBA ROCKY MOUNTAIN NEWS, INC., 535 U. S. 1056;

No. 01–1379. SPANAGEL *v.* SUPPORTIVE CARE SERVICES, INC., 535 U. S. 1078;

No. 01–1391. SMITH *v.* FRIEDMAN ET AL., 535 U. S. 1057;

No. 01–1430. SIENKIEWICZ *v.* HART ET AL., 535 U. S. 1097;

No. 01–1448. HAGENBUCH ET AL. *v.* COMPAQ COMPUTER CORP. ET AL., 535 U. S. 1112;

No. 01–1526. BROWN *v.* CITY OF WILMINGTON ET AL., *ante*, p. 906;

No. 01–1539. SUDARSKY *v.* CITY OF NEW YORK ET AL., *ante*, p. 918;

No. 01–5074. HICKS *v.* SNYDER, WARDEN, 534 U. S. 901;

No. 01–6035. TAYBORN *v.* SCOTT, WARDEN, 534 U. S. 965;

No. 01–7219. MITCHELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 535 U. S. 933;

No. 01–7844. MORENO *v.* METHODIST HOSPITALS, INC., 535 U. S. 957;

No. 01–7926. HEDRICK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 535 U. S. 959;

No. 01–8315. MANLEY *v.* INDIANA, 535 U. S. 998;

No. 01–8404. BEN YISRAYL, AKA CANNON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 535 U. S. 1001;

No. 01–8431. DAVIS *v.* DAVIS, 535 U. S. 1020;

No. 01–8445. OSAYANDE *v.* UNITED STATES, 535 U. S. 962;

No. 01–8596. BARREIRO *v.* UNITED STATES, 535 U. S. 1099;

No. 01–8809. ROWELL *v.* NEVADA, 535 U. S. 1060;

No. 01–8823. ABDULLAH *v.* UNITED STATES, 535 U. S. 1004;

No. 01–8828. TEAGUE *v.* HOLIDAY INN EXPRESS ET AL., 535 U. S. 1061;

No. 01–8832. COOK *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., 535 U. S. 1024;

No. 01–8843. MORRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION (two judgments), 535 U. S. 1061;

No. 01–8875. BANKS *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., 535 U. S. 1099;

No. 01–8911. METTS *v.* NORTH CAROLINA DEPARTMENT OF REVENUE, 535 U. S. 1062;

No. 01–8970. DUBOSE *v.* KELLY ET AL., 535 U. S. 1064;

No. 01–8983. HORNER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 535 U. S. 1080;

No. 01–9045. MENCHACA *v.* BUTLER, CHIEF DEPUTY WARDEN, ET AL., 535 U. S. 1082;

No. 01–9050. TSHIWALA *v.* MARYLAND, 535 U. S. 1065;

No. 01–9059. WILLIAMS *v.* UNITED STATES, 535 U. S. 1010;

No. 01–9071. MANLEY *v.* MONROE COUNTY SHERIFF'S DEPARTMENT ET AL., 535 U. S. 1082;

No. 01–9075. DOERR *v.* CITY OF REDLANDS ET AL., 535 U. S. 1083;

No. 01–9083. COLE *v.* CARR ET AL., 535 U. S. 1083;

No. 01–9108. TAYLOR *v.* REDDISH, WARDEN, 535 U. S. 1083;

No. 01–9160. HEGWOOD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 535 U. S. 1100;

No. 01–9180. NABELEK *v.* TEXAS (two judgments), 535 U. S. 1101;

No. 01–9223. IN RE WILLIAMS, 535 U. S. 1077;

No. 01–9257. VIVONE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, 535 U. S. 1086;

No. 01–9274. JONES *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 535 U. S. 1066;

No. 01–9283. IN RE NABELEK (three judgments), 535 U. S. 1103;

No. 01–9327. CHAMBERS *v.* TURLEY ET AL., 535 U. S. 1114;

No. 01–9391. TRICE *v.* HALL, WARDEN, 535 U. S. 1116;

No. 01–9393. McDowell *v.* Cornell Corrections et al., 535 U. S. 1116;

No. 01–9416. Moultrie *v.* United States, 535 U. S. 1067;

No. 01–9437. Burnett *v.* Tenet Healthsystem Hospitals, Inc., dba Lutheran Medical Center, 535 U. S. 1104;

No. 01–9475. Carroll *v.* Pfeffer, *ante,* p. 907;

No. 01–9502. Deavault *v.* United States, 535 U. S. 1069;

No. 01–9507. Natera-Sosa *v.* United States, 535 U. S. 1069;

No. 01–9532. Abdur'Rahman *v.* Tennessee, 535 U. S. 1070;

No. 01–9566. McCoy *v.* Indiana, *ante,* p. 925;

No. 01–9567. Nixon *v.* United States, 535 U. S. 1071;

No. 01–9619. Mejias Negron *v.* United States, 535 U. S. 1086;

No. 01–9624. Nicolaison *v.* Milczart et al., *ante,* p. 910;

No. 01–9663. Marcello et ux. *v.* Maine Department of Human Services, *ante,* p. 920;

No. 01–9682. Ashton *v.* United States, 535 U. S. 1087;

No. 01–9731. Armstrong *v.* City of Greensboro et al., *ante,* p. 930;

No. 01–9819. Williams *v.* United States, 535 U. S. 1106;

No. 01–9832. Holub *v.* United States, 535 U. S. 1090;

No. 01–9884. Nagy *v.* United States, 535 U. S. 1107;

No. 01–10013. Blackburn *v.* Ashcroft, Attorney General, et al., *ante,* p. 911;

No. 01–10094. Dix *v.* United States, *ante,* p. 913; and

No. 01–10166. Lockett *v.* United States, *ante,* p. 915. Petitions for rehearing denied.

No. 01–7942. Porter *v.* Diecast Corp. et al., 535 U. S. 960;

No. 01–9316. Oken *v.* Maryland, 535 U. S. 1074; and

No. 01–9317. Borchardt *v.* Maryland, 535 U. S. 1104. Motions for leave to file petitions for rehearing denied.

August 7, 2002

Miscellaneous Order

No. 02A95. In re Federal-Mogul Global, Inc. C. A. 3d Cir. Application for stay, presented to Justice Kennedy, and by him referred to the Court, denied.

Certiorari Denied

No. 02–5698 (02A109). Kutzner *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Di-

VISION. 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. Reported below: 303 F. 3d 333.

AUGUST 8, 2002

Dismissals Under Rule 46

No. 01–1390. ROSMER *v.* PFIZER, INC. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 263 F. 3d 110.

No. 01–1793. DUKE UNIVERSITY ET AL. *v.* MILON ET UX. Sup. Ct. N. C. Certiorari dismissed under this Court's Rule 46.1. Reported below: 355 N. C. 263, 559 S. E. 2d 789.

AUGUST 14, 2002

Dismissal Under Rule 46

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Bill of complaint dismissed under this Court's Rule 46.1. [For earlier decision herein, see, *e. g.*, 497 U. S. 376.]

Miscellaneous Order

No. 02–5827 (02A138). IN RE BASILE. 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. 02–5752 (02A122). SUAREZ MEDINA *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 15, 2002

Miscellaneous Order

No. 02–5823 (02A136). IN RE FUGATE. 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. 02–5822 (02A135). FUGATE *v.* GEORGIA 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 denied. Reported below: 301 F. 3d 1287.

AUGUST 16, 2002

Certiorari Denied

No. 02–5892 (02A147). FUGATE *v.* GEORGIA BOARD OF PARDONS AND PAROLES ET AL. Super. Ct. Fulton County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

AUGUST 20, 2002

Miscellaneous Order

No. 02–5330 (02A71). IN RE ETHERIDGE. 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 23, 2002

Miscellaneous Order

No. 02A159. GREEN *v.* HODGES, GOVERNOR OF SOUTH CAROLINA, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

Certiorari Denied

No. 02–5648 (02A103). GREEN *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 349 S. C. 535, 564 S. E. 2d 83.

AUGUST 26, 2002

Miscellaneous Orders

No. D–2308. IN RE DISBARMENT OF EDMONDS. Disbarment entered. [For earlier order herein, see 535 U. S. 1092.]

No. D–2309. In re Disbarment of Grayson. Disbarment entered. [For earlier order herein, see 535 U. S. 1093.]

No. D–2310. In re Disbarment of Lester. Disbarment entered. [For earlier order herein, see 535 U. S. 1093.]

No. D–2312. In re Disbarment of Riggs. Disbarment entered. [For earlier order herein, see 535 U. S. 1093.]

No. D–2313. In re Disbarment of Shanahan. Disbarment entered. [For earlier order herein, see 535 U. S. 1093.]

No. 01–1067. United States *v.* White Mountain Apache Tribe. C. A. Fed. Cir. [Certiorari granted, 535 U. S. 1016.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 01–1118. Scheidler et al. *v.* National Organization for Women, Inc., et al.; and

No. 01–1119. Operation Rescue *v.* National Organization for Women, Inc., et al. C. A. 7th Cir. [Certiorari granted, 535 U. S. 1016.] Motion of Alan Ernest to represent children unborn and born alive denied.

No. 01–1209. Boeing Co. et al. *v.* United States; and

No. 01–1382. United States *v.* Boeing Sales Corp. et al. C. A. 9th Cir. [Certiorari granted, 535 U. S. 1094.] Motion of Boeing Co. et al. to dispense with printing the joint appendix granted.

No. 01–1243. Borden Ranch Partnership et al. *v.* United States Army Corps of Engineers et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 903.] Motion of petitioners Borden Ranch et al. to dispense with printing the joint appendix granted. Justice Kennedy took no part in the consideration or decision of this motion.

No. 01–1437. Branch et al. *v.* Smith et al. D. C. S. D. Miss. [Probable jurisdiction noted, *ante*, p. 903.] Motion of Nationalist Movement for leave to file a brief as *amicus curiae* granted.

No. 01–1500. Clay *v.* United States. C. A. 7th Cir. [Certiorari granted, *ante*, p. 957.] Motion of the Solicitor General to amend the order granting petition for writ of certiorari and stat-

ing the question presented granted. Order granting petition for writ of certiorari amended to read as follows: Certiorari granted limited to the following question: "Whether petitioner's judgment of conviction became 'final' within the meaning of 28 U. S. C. § 2255, par. 6(1), when the Court of Appeals issued its mandate on direct appeal or when his time for filing a petition for writ of certiorari expired."

Rehearing Denied

No. 00–1852. JETT *v.* WASHINGTON COUNTY SCHOOL BOARD, *ante,* p. 921;

No. 00–9913. INGLE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 837;

No. 00–9976. KING *v.* GEORGIA, *ante,* p. 957;

No. 01–339. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SMITH, *ante,* p. 856;

No. 01–1177. CATERINA ET AL. *v.* UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA ET AL., 535 U. S. 988;

No. 01–1259. GOELZ *v.* PAUL REVERE LIFE INSURANCE CO. ET AL., 535 U. S. 1035;

No. 01–1385. HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BANKS, *ante,* p. 266;

No. 01–1457. CLANTON *v.* GREENWOOD TRUST CO., 535 U. S. 1112;

No. 01–1474. BLEDSOE *v.* NUCOR-YAMATO STEEL CO., *ante,* p. 904;

No. 01–1565. HAWORTH *v.* OFFICE OF PERSONNEL MANAGEMENT, 535 U. S. 1113;

No. 01–1597. DUNN *v.* KEAN, *ante,* p. 940;

No. 01–1615. MCLACHLAN, TRUSTEE OF THE MARY BUTSCHEK LIVING TRUST, ET AL. *v.* SIMON, AN INDIVIDUAL AND FORMER TRUSTEE OF THE NAVELLIER SERIES FUND, ET AL., *ante,* p. 941;

No. 01–8374. VARGAS *v.* JORGENSEN, 535 U. S. 1000;

No. 01–8494. HILTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 535 U. S. 1021;

No. 01–8555. LIVINGSTON *v.* UNITED STATES, 535 U. S. 977;

No. 01–8673. OLIVER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, 535 U. S. 1038;

No. 01–8674. PELLEGRINO *v.* WEBER, WARDEN, ET AL., 535 U. S. 1038;

No. 01–8718. JONES *v.* UNITED STATES, 535 U. S. 979;

No. 01–8719. ZARRILLI *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., 535 U. S. 1002;

No. 01–8860. BLACK *v.* STEWART, WARDEN, 535 U. S. 1080;

No. 01–9104. RHODE *v.* GEORGIA, *ante*, p. 925;

No. 01–9126. RICHARDSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 535 U. S. 1084;

No. 01–9153. GREEN *v.* NEWELL ET AL., *ante*, p. 942;

No. 01–9360. SMITH *v.* UNITED STATES, *ante*, p. 964;

No. 01–9481. IN RE HUBBARD, 535 U. S. 1033;

No. 01–9482. GIBBS *v.* SNYDER, WARDEN, ET AL., *ante*, p. 907;

No. 01–9506. TAYLOR *v.* REYNOLDS ET AL., *ante*, p. 908;

No. 01–9555. LUGO *v.* FLORIDA, *ante*, p. 909;

No. 01–9613. REDIC *v.* MOSKOWITZ ET AL., *ante*, p. 926;

No. 01–9626. BEATON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 927;

No. 01–9658. GONZALEZ LORA *v.* UNITED STATES, 535 U. S. 1087;

No. 01–9672. MILLER *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, *ante*, p. 928;

No. 01–9713. CASTILLE *v.* COMPLIANCE SOLUTIONS, *ante*, p. 910;

No. 01–9774. REED *v.* OHIO, 535 U. S. 1089;

No. 01–9783. IN RE PETERSON, *ante*, p. 938;

No. 01–9839. ENGEL *v.* PENNSYLVANIA ET AL., *ante*, p. 946;

No. 01–9842. DICKERSON *v.* UNITED STATES, 535 U. S. 1106;

No. 01–9864. MILANO *v.* NORTH CAROLINA, *ante*, p. 930;

No. 01–9886. PFEIFFER-EL *v.* JACKSON, SUPERINTENDENT, BROWN CREEK CORRECTIONAL INSTITUTION, *ante*, p. 965;

No. 01–9898. TAYLOR *v.* CAMPBELL, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL., *ante*, p. 965;

No. 01–9906. STEINBRECHER *v.* STEINBRECHER ET AL., *ante*, p. 911;

No. 01–9922. PRICE *v.* CRESTAR SECURITIES CORP. ET AL., *ante*, p. 966;

No. 01–9949. CARPENTER *v.* NORTH CAROLINA, *ante*, p. 967;

No. 01–10060. BECKTEL *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (MORISSETTE, REAL PARTY IN INTEREST), *ante*, p. 967;

No. 01–10071. HAMM *v.* UNITED STATES, *ante*, p. 913; and

No. 01–10248. SHINGLETON *v.* OHIO, *ante*, p. 933. Petitions for rehearing denied.

No. 01–1566. HAWKINS, INDIVIDUALLY, AND AS TRUSTEE, HAWKINS FAMILY TRUST *v.* VASTAR RESOURCES, INC., *ante*, p. 934. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

AUGUST 28, 2002

Miscellaneous Order. (See No. 02–6017, *infra.*)

Certiorari Denied

No. 02–6010 (02A164). PATTERSON *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 02–6017 (02A165). IN RE PATTERSON. Applications for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Petition for writ of habeas corpus denied.

JUSTICE STEVENS, dissenting.

Petitioner was convicted of capital murder and sentenced to death for a crime he committed when he was 17 years old. In his dissenting opinion in *Stanford* v. *Kentucky*, 492 U. S. 361, 382 (1989), Justice Brennan, writing for four Members of the Court, explained why the Eighth Amendment prohibits the taking of the life of a person as punishment for a crime committed when below the age of 18. I joined that opinion and remain convinced that it correctly interpreted the law. Since that opinion was written, the issue has been the subject of further debate and discussion both in this country and in other civilized nations. Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity. I would therefore grant a stay of this execution to give the Court an opportunity to confront the question at its next scheduled conference in September. Accordingly, I respectfully dissent from the denial of a stay.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

This Court's decision in *Atkins* v. *Virginia*, *ante*, p. 304, made it tenable for a petitioner to urge reconsideration of *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), in which the Court rejected an Eighth Amendment challenge to the execution of a person as punishment for a crime committed while under the age of 18. For the reasons stated by JUSTICE STEVENS, I think it appropriate to revisit the issue at this time. I therefore join JUSTICE STEVENS in dissenting from the denial of a stay.

SEPTEMBER 6, 2002

Appointment Orders

It is ordered that Christopher W. Vasil be appointed Chief Deputy Clerk of this Court to succeed Francis J. Lorson effective at the commencement of business September 3, 2002, and that he take the oath of office as required by statute.

It is ordered that Cynthia J. Rapp be appointed Deputy Clerk of this Court, effective at the commencement of business September 3, 2002, and that she take the oath of office as required by statute.

Miscellaneous Orders

No. 01–800. HOWSAM, INDIVIDUALLY AND AS TRUSTEE FOR THE E. RICHARD HOWSAM, JR., IRREVOCABLE LIFE INSURANCE TRUST DATED MAY 14, 1982 *v.* DEAN WITTER REYNOLDS, INC. C. A. 10th Cir. [Certiorari granted, 534 U. S. 1161.] Motion of Competitive Enterprise Institute for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 01–1231. CONNECTICUT DEPARTMENT OF PUBLIC SAFETY ET AL. *v.* DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 2d Cir. [Certiorari granted, 535 U. S. 1077.] Motion of Reporters Committee for Freedom of the Press for leave to file a brief as *amicus curiae* granted.

No. 01–1572. COOK COUNTY, ILLINOIS *v.* UNITED STATES EX REL. CHANDLER. C. A. 7th Cir. [Certiorari granted, *ante*,

p. 956.] Motion of the parties to dispense with printing the joint appendix granted.

Certiorari Denied

No. 02–5543 (02A173). SHAMBURGER *v.* COCKRELL, 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: 34 Fed. Appx. 962.

Rehearing Denied

No. 00–10375. JOHNSON *v.* DUNCAN, WARDEN, ET AL., 534 U. S. 854;

No. 01–7992. SHAW *v.* PERRY, GOVERNOR OF TEXAS, ET AL., 535 U. S. 973;

No. 01–8619. BOWEN *v.* NORTH CAROLINA, 535 U. S. 1023;

No. 01–9079. WALKER *v.* UNITED STATES, 535 U. S. 1011;

No. 01–9091. DIXON *v.* CITY OF MINNEAPOLIS WATER DEPARTMENT, 535 U. S. 1065;

No. 01–9092. DIXON *v.* HARDIMON, 535 U. S. 1083;

No. 01–9103. POUND *v.* WILLIAMS, INSURANCE COMMISSIONER OF DELAWARE, AS RECEIVER OF NATIONAL HERITAGE LIFE INSURANCE CO. IN LIQUIDATION, ET AL., 535 U. S. 1083;

No. 01–9430. LEE, AKA CAMPBELL *v.* BERGE, WARDEN, 535 U. S. 1117;

No. 01–9521. LEWIS *v.* RADER, WARDEN, *ante*, p. 908;

No. 01–9544. MILLER *v.* HALL, WARDEN, *ante*, p. 909;

No. 01–9703. TAYLOR *v.* KOTECKI, *ante*, p. 929;

No. 01–9717. EPPS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 535 U. S. 1073;

No. 01–9822. WEATHERSPOON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 945;

No. 01–9836. TYLER *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., *ante*, p. 945;

No. 01–9897. WRIGHT *v.* KNOX COUNTY BOARD OF EDUCATION, *ante*, p. 965;

No. 01–9900. KOCH *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 911;

No. 01–10016. BAD WOUND *v.* UNITED STATES, *ante*, p. 911;

No. 01–10102. CASTRO *v.* CHANDLER, WARDEN, *ante*, p. 914;
No. 01–10331. IN RE WARREN, *ante*, p. 938; and
No. 01–10358. IN RE CALLEN, *ante*, p. 938. Petitions for rehearing denied.

No. 01–529. HOOVER ET AL. *v.* UNITED STATES, *ante*, p. 958. Motions of Adrian Bradd and Darrell Branch for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 01–1769. WAYNE *v.* UNITED STATES, *ante*, p. 961. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 01–9592. BOETTNER *v.* KIRKWOOD ET AL., *ante*, p. 925. Motion for leave to file petition for rehearing denied.

SEPTEMBER 11, 2002

Dismissal Under Rule 46

No. 01–1839. CANAL INSURANCE CO. *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 12, 2002

Certiorari Denied

No. 02–5047. MAYS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 832.

No. 02–5203 (02A195). PATRICK *v.* COCKRELL, 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: 34 Fed. Appx. 150.

SEPTEMBER 13, 2002

Miscellaneous Order

No. 01–896. FORD MOTOR CO. ET AL. *v.* MCCAULEY ET AL. C. A. 9th Cir. [Certiorari granted, 534 U. S. 1126.] The parties

are directed to file supplemental briefs addressing the following questions: "Is there appellate jurisdiction when petitioners, as the nominally prevailing party in the District Court, appeal the District Court's dismissal of a complaint for lack of subject matter jurisdiction?" Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, September 26, 2002. Twenty copies of the briefs prepared under this Court's Rule 33.2 may be filed initially in order to meet the September 26 filing date. Rule 29.2 does not apply. Forty copies of the briefs prepared under Rule 33.1 are to be filed as soon as possible thereafter.

SEPTEMBER 16, 2002

Miscellaneous Order

No. 02A172. MCCLURE *v.* GALVIN, SECRETARY OF COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Application for stay and injunctive relief, addressed to JUSTICE STEVENS and referred to the Court, denied.

SEPTEMBER 17, 2002

Miscellaneous Order

No. 02–6384 (02A244). IN RE PATRICK. 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. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

Certiorari Denied

No. 02–6377 (02A241). PATRICK *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

SEPTEMBER 18, 2002

Miscellaneous Order

No. 02–6386 (02A246). IN RE SHAMBURGER. 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.

SEPTEMBER 25, 2002

Miscellaneous Order

No. 02–6525 (02A260). IN RE BUELL. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 01–10584 (02A250). KING *v.* COCKRELL, 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: 33 Fed. Appx. 703.

No. 02–6513 (02A257). BUELL *v.* ANDERSON, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 48 Fed. Appx. 491.

SEPTEMBER 26, 2002

Dismissal Under Rule 46

No. 02–282. HINCKLEY TOWNSHIP TRUSTEES ET AL. *v.* WERSHING. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 36 Fed. Appx. 179.

OCTOBER 1, 2002

Miscellaneous Order

No. 01–653. FEDERAL COMMUNICATIONS COMMISSION *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL.; and

No. 01–657. ARCTIC SLOPE REGIONAL CORP. ET AL. *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL. C. A. D. C. Cir. [Certiorari granted, 535 U. S. 904.] Motion of respondents NextWave Personal Communications Inc. et al. for leave to file supplemental appendix denied.

Certiorari Granted

No. 01–1435. CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. C. *v.* WELLS. C. A. 9th Cir. Certiorari granted. Reported below: 271 F. 3d 903.

No. 01–1559. MASSARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 27 Fed. Appx. 26.

No. 01–1766. ZAPATA INDUSTRIES, INC. *v.* W. R. GRACE & CO.-CONN. C. A. Fed. Cir. Certiorari granted. Reported below: 34 Fed. Appx. 688.

No. 01–1862. WOODFORD, WARDEN *v.* GARCEAU. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 275 F. 3d 769.

Certiorari Denied

No. 02–5735 (02A249). POWELL *v.* COCKRELL, 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: 35 Fed. Appx. 386.

OCTOBER 3, 2002

Dismissal Under Rule 46

No. 02–5574. GALLEGOS *v.* PUEBLO OF TESUQUE, DBA CAMEL ROCK GAMING CENTER, ET AL. Sup. Ct. N. M. Certiorari dismissed under this Court's Rule 46. Reported below: 132 N. M. 207, 46 P. 3d 668.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1999, 2000, AND 2001

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1999	**2000**	**2001**	**1999**	**2000**	**2001**	**1999**	**2000**	**2001**	**1999**	**2000**	**2001**
Number of cases on dockets	8	9	8	2,413	2,305	2,210	6,024	6,651	6,958	8,445	8,965	9,176
Number disposed of during term	0	2	1	2,062	1,981	1,889	5,270	5,730	6,135	7,332	7,713	8,025
Number remaining on dockets	8	7	7	351	324	321	754	921	823	1,113	1,252	1,151

	TERMS		
	1999	**2000**	**2001**
Cases argued during term	[1] 83	86	88
Number disposed of by full opinions	[2] 74	83	85
Number disposed of by per curiam opinions	2	[3] 4	3
Number set for reargument	1	0	0
Cases granted review this term	93	99	[4] 88
Cases reviewed and decided without oral argument	54	[3] 127	[4] 72
Total cases to be available for argument at outset of following term	37	49	47

[1] Includes reargument in 98–6322.

[2] Includes 98–942 question certified to Supreme Court of Pennsylvania.

[3] Includes 98–942 argued October 12, 1999.

[4] Includes 01–339.

JUNE 28, 2002

INDEX

ACCESS TO COURTS. See **Constitutional Law,** I.

ADMINISTRATIVE LAW. See **Americans with Disabilities Act of 1990; Labor.**

AGGRAVATING FACTOR DETERMINATIONS. See **Constitutional Law,** X.

ALABAMA. See **Qualified Immunity from Suit.**

ALIENAGE DIVERSITY JURISDICTION. See **Jurisdiction.**

AMERICANS WITH DISABILITIES ACT OF 1990. See also **Punitive Damages.**

Equal Employment Opportunity Commission regulation—Refusal-to-hire defense—Endangerment of applicant's own health.—Act permits an EEOC regulation authorizing an employer to refuse to hire a disabled individual because his performance on job would endanger his own health. Chevron U. S. A. Inc. v. Echazabal, p. 73.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. See **Habeas Corpus,** 2, 3.

ARIZONA. See **Habeas Corpus,** 1.

ASSISTANCE OF COUNSEL. See **Habeas Corpus,** 1.

BRANDISHING FIREARMS. See **Constitutional Law,** IX, 2; **Criminal Law,** 2.

BREACH OF CONTRACT. See **Emergency Low Income Housing Preservation Act of 1987.**

BRITISH VIRGIN ISLANDS. See **Jurisdiction.**

BUS PASSENGER SEARCHES. See **Constitutional Law,** XI, 1.

CALIFORNIA. See **Habeas Corpus,** 3.

CAPITAL MURDER. See **Constitutional Law,** III; X; **Criminal Law,** 1.

CENSUS. See also **Constitutional Law,** II.

Population determination—"Hot-deck imputation."—Census Bureau's use of "hot-deck imputation" to fill census information gaps and resolve conflicts in data does not violate 13 U. S. C. § 195, which forbids use of "statistical method known as 'sampling'" in determining population for purposes of apportioning congressional Representatives. Utah v. Evans, p. 452.

CIVIL RIGHTS ACT OF 1871.

Family Educational Rights and Privacy Act of 1974—Private causes of action.—Damages action by student against a private university for releasing his education records to unauthorized persons in violation of FERPA is foreclosed because FERPA creates no personal rights to enforce under 42 U. S. C. § 1983. Gonzaga Univ. v. Doe, p. 273.

CIVIL RIGHTS ACT OF 1964.

Title VII—Hostile work environment—Filing of charge—Limitations period.—A plaintiff raising Title VII claims of discrete discriminatory or retaliatory acts must file his Equal Employment Opportunity Commission charge within statutory filing period, but a charge alleging a hostile work environment will not be time barred if all acts constituting claim are part of same unlawful practice and at least one act falls within filing period; in neither instance is a court precluded from applying equitable doctrines to toll or limit time period. National Railroad Passenger Corporation v. Morgan, p. 101.

CLASS ACTIONS. See **Federal Rules of Civil Procedure.**

COLLEGE RECORDS. See **Civil Rights Act of 1871.**

CONSTITUTIONAL LAW.

I. Access to Courts.

Government officials' claimed deception—Statement of claim.—Respondent did not state an actionable claim when she alleged that she was denied access to courts by Government officials who intentionally deceived her in concealing information that her husband had been tortured and killed by Guatemalan army. Christopher v. Harbury, p. 403.

II. Census Clause.

Population determination—"Hot-deck imputation."—Census Bureau's use of "hot-deck imputation" to fill census information gaps and resolve conflicts in data is not inconsistent with Constitution's Census Clause, which requires an "actual Enumeration" of each State's population. Utah v. Evans, p. 452.

CONSTITUTIONAL LAW—Continued.

III. Cruel and Unusual Punishment.

Executions—Mentally retarded criminals.—Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by Eighth Amendment. Atkins v. Virginia, p. 304.

IV. Establishment of Religion.

Tuition aid program—Payments to religious schools.—Ohio's Pilot Project Scholarship Program, which provides, *inter alia,* tuition aid for Cleveland schoolchildren to attend a participating public or private, religious or nonreligious school of their parent's choosing, does not offend Establishment Clause. Zelman v. Simmons-Harris, p. 639.

V. Freedom of Speech.

1. *Door-to-door advocacy—Advance registration requirement.*—A village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with mayor and receiving a permit violates First Amendment as it applies to anonymous political speech. Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton, p. 150.

2. *Judicial elections—Restrictions on candidates' speech.*—Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates First Amendment. Republican Party of Minn. v. White, p. 765.

VI. Freedom of the Press.

Door-to-door advocacy—Advance registration requirement.—A village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with mayor and receiving a permit violates First Amendment as it applies to handbill distribution. Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton, p. 150.

VII. Free Exercise of Religion.

Door-to-door advocacy—Village ordinance requiring advance registration.—A village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with mayor and receiving a permit violates First Amendment as it applies to religious proselytizing. Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton, p. 150.

VIII. Privilege Against Self-Incrimination.

Sexual abuse treatment program—Forced participation.—Tenth Circuit's judgment—that Kansas prison officials' threat to reduce respondent inmate's privilege status and transfer him to maximum security if he refused to participate in a sexual abuse treatment program constituted com-

CONSTITUTIONAL LAW—Continued.
pelled self-incrimination in violation of Fifth Amendment—is reversed. McKune v. Lile, p. 24.

IX. Right to Fair Trial.

1. *Plea agreement—Material evidence disclosure.*—Fifth and Sixth Amendments do not require Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. United States v. Ruiz, p. 622.

2. *Sentencing—Judicial finding of brandishing a weapon.*—Title 18 U. S. C. § 924(c)(1)(A)(ii)—which increases by two years minimum sentence for using or carrying a firearm in relation to a drug trafficking crime upon a judicial finding of brandishing—does not evade Fifth and Sixth Amendment requirements. Harris v. United States, p. 545.

X. Right to Jury Trial.

Capital sentencing—Determining aggravating factors.—*Walton* v. *Arizona*, 497 U. S. 639, is irreconcilable with *Apprendi* v. *New Jersey*, 530 U. S. 466, and is, accordingly, overruled to extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of death penalty; because Arizona's enumerated aggravating factors operate as functional equivalent of an element of a greater offense, Sixth Amendment requires that they be found by a jury. Ring v. Arizona, p. 584.

XI. Searches and Seizures.

1. *Bus passengers—Consent to search.*—Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. United States v. Drayton, p. 194.

2. *Drug testing—Students participating in extracurricular activities.*—School district's drug testing policy for students participating in extracurricular activities is a reasonable means of furthering district's important interest in preventing and deterring drug use among its schoolchildren and does not violate Fourth Amendment. Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls, p. 822.

3. *Warrantless entry, arrest, and search—Absence of exigent circumstances.*—Louisiana Court of Appeal's conclusion that exigent circumstances were not required to justify police officers' warrantless entry of petitioner's home and their arrest and search of petitioner violates *Payton* v. *New York*, 445 U. S. 573, 590. Kirk v. Louisiana, p. 635.

CORPORATIONS. See **Jurisdiction.**

CRIMINAL LAW. See also **Constitutional Law,** III; IX; X; XI, 1, 3.

1. *Discovery—Selective prosecution based on race.*—Because respondent failed to submit relevant evidence that Government did not seek death

CRIMINAL LAW—Continued.

penalty for similarly situated persons of a different race, he was not entitled to discovery of information relating to Government's capital charging practices under *United States* v. *Armstrong*, 517 U. S. 456. United States v. Bass, p. 862.

2. *Firearm usage in relation to a crime—Effect on sentencing.*—Title 18 U. S. C. § 924(c)(1)(A)—which provides that a person who uses or carries a firearm in relation to a drug trafficking crime shall have minimum sentence for underlying crime increased as specified in three subsections—defines a single offense, in which brandishing and discharging of a weapon are sentencing factors to be found by judge, not offense elements to be found by jury. Harris v. United States, p. 545.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** III; **Qualified Immunity from Suit.**

DEATH PENALTY. See **Constitutional Law,** III; X; **Criminal Law,** 1.

DENIAL OF ACCESS TO COURTS. See **Constitutional Law,** I.

DISCLOSURE OF MATERIAL EVIDENCE. See **Constitutional Law,** IX, 1.

DISCOVERY. See **Criminal Law,** 1.

DISCRIMINATION BASED ON DISABILITY. See **Americans with Disabilities Act of 1990.**

DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1964; Criminal Law,** 1.

DIVERSITY JURISDICTION. See **Jurisdiction.**

DOOR-TO-DOOR ADVOCACY. See **Constitutional Law,** V, 1; VI; VII.

DRUG TESTING. See **Constitutional Law,** XI, 2.

DRUG TRAFFICKING. See **Constitutional Law,** IX, 2; **Criminal Law,** 2.

EDUCATION. See **Constitutional Law,** IV; XI, 2; **Civil Rights Act of 1871.**

EDUCATION RECORDS. See **Civil Rights Act of 1871.**

EFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus,** 1.

EIGHTH AMENDMENT. See **Constitutional Law,** III; **Qualified Immunity from Suit.**

ELECTIONS. See **Constitutional Law,** V, 2.

EMERGENCY LOW INCOME HOUSING PRESERVATION ACT OF 1987.

Housing Act of 1949 loans—Breach of contract—Loan prepayment.—Because 1987 Act qualified as a repudiation of immediate-prepayment provision of petitioners' loan agreements with Farmers Home Administration under 1949 Act, breach would occur, and 6-year limitations period would commence to run, when a borrower tendered prepayment and Government then dishonored its obligation to accept tender and released its control over use of property securing loan. Franconia Associates v. United States, p. 129.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Pre-emption—Illinois Health Maintenance Organization Act.—ERISA does not pre-empt § 4–10 of Illinois HMO Act—which provides recipients of health coverage by an HMO with a right to independent medical review of certain benefit denials—as applied to health benefits provided by an HMO under contract with an employee welfare benefit plan. Rush Prudential HMO, Inc. v. Moran, p. 355.

EMPLOYER AND EMPLOYEES. See **Americans with Disabilities Act of 1990; Civil Rights Act of 1964.**

EMPLOYMENT DISCRIMINATION. See **Americans with Disabilities Act of 1990; Civil Rights Act of 1964.**

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** IV.

EXECUTIONS. See **Constitutional Law,** III.

EXIGENT CIRCUMSTANCES JUSTIFYING ENTRY, ARREST, AND SEARCH. See **Constitutional Law,** XI, 3.

FAIR TRIAL. See **Constitutional Law,** IX.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974. See **Civil Rights Act of 1871.**

FEDERAL INSURANCE CONTRIBUTIONS ACT. See **Taxes.**

FEDERAL RULES OF CIVIL PROCEDURE.

Class action—Objections to settlement—Nonnamed member's right to appeal.—Nonnamed class members who have objected in a timely manner to a settlement's approval at a fairness hearing may appeal without first intervening in lawsuit. Devlin v. Scardelletti, p. 1.

FEDERAL-STATE RELATIONS. See **Habeas Corpus**; **Interstate Commerce Act.**

FEDERAL TAXES. See **Taxes.**

FIFTH AMENDMENT. See **Constitutional Law,** VIII; IX.

FIREARMS. See **Constitutional Law,** IX, 2; **Criminal Law,** 2.

FIRST AMENDMENT. See **Constitutional Law,** IV–VII.

FOURTH AMENDMENT. See **Constitutional Law,** XI.

FREEDOM OF SPEECH. See **Constitutional Law,** V.

FREEDOM OF THE PRESS. See **Constitutional Law,** VI.

FREE EXERCISE OF RELIGION. See **Constitutional Law,** VII.

GUATEMALA. See **Constitutional Law,** I.

HABEAS CORPUS.

1. *Federal petition—Independent state ground.*—Because Arizona Superior Court's determination that respondent waived his ineffective-assistance-of-counsel claim under Ariz. Rule Crim. Proc. 32.2(a)(3) did not require an examination of that claim's merits, it was independent of federal law and thus not reviewable on federal habeas. Stewart v. Smith, p. 856.

2. *Federal petition—Teague analysis.*—In addition to performing any analysis required by Antiterrorism and Effective Death Penalty Act of 1996, a federal court considering a habeas petition must address a threshold *Teague* v. *Lane*, 489 U. S. 288, issue properly raised by State. Horn v. Banks, p. 266.

3. *Limitations period for filing federal petition—Tolling while state petition is "pending."*—As used in 28 U. S. C. § 2244(d)(2), which tolls limitations period for filing federal habeas petitions while a state collateral relief petition is "pending," "pending" covers time between a lower state court's decision and filing of a notice of appeal to a higher state court; that rule applies to California's collateral review system. Carey v. Saffold, p. 214.

HEALTH MAINTENANCE ORGANIZATIONS. See **Employee Retirement Income Security Act of 1974.**

HITCHING POST USE AS PUNISHMENT FOR PRISONERS. See **Qualified Immunity from Suit.**

HOSTILE WORK ENVIRONMENT. See **Civil Rights Act of 1964.**

HOT-DECK IMPUTATION. See **Census; Constitutional Law,** II.

HOUSING ACT OF 1949. See **Emergency Low Income Housing Preservation Act of 1987.**

ILLINOIS. See **Employee Retirement Income Security Act of 1974.**

IMMUNITY FROM SUIT. See **Qualified Immunity from Suit.**

IMPEACHMENT EVIDENCE. See **Constitutional Law,** IX, 1.

INDEPENDENT STATE GROUND FOR DECISION. See **Habeas Corpus,** 1.

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus,** 1.

INTERSTATE COMMERCE ACT.

Safety regulations for tow trucks—State's delegation of regulatory authority to municipalities—Pre-emption.—Title 49 U. S. C. § 14501(c)(2)(A)—which excepts "safety regulatory authority of a State with respect to motor vehicles" from § 14501(c)(1)'s general pre-emption rule—does not bar a State from delegating to local goverments State's authority to establish safety regulations governing tow trucks and other motor carriers. Columbus v. Ours Garage & Wrecker Service, Inc., p. 424.

JUDICIAL ACCESS. See **Constitutional Law,** I.

JUDICIAL ELECTIONS. See **Constitutional Law,** V, 2.

JURISDICTION.

Federal courts—Alienage diversity jurisdiction.—A corporation organized under British Virgin Islands law is a "citize[n] or subjec[t] of a foreign state" for purposes of alienage diversity jurisdiction. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., p. 88.

JURY TRIALS. See **Constitutional Law,** X.

KANSAS. See **Constitutional Law,** VIII.

LABOR.

National Labor Relations Board—Authority to assess liability.—NLRB lacked authority to find that petitioner violated federal labor law by prosecuting against respondent unions an unsuccessful lawsuit with a retaliatory motive. BE&K Constr. Co. v. NLRB, p. 516.

LIMITATIONS PERIODS. See **Civil Rights Act of 1964; Emergency Low Income Housing Preservation Act of 1987; Habeas Corpus,** 3.

LOAN PREPAYMENTS. See **Emergency Low Income Housing Preservation Act of 1987.**

LOUISIANA. See **Constitutional Law,** XI, 3.

MEDICAL REVIEW OF HMO'S BENEFIT DENIAL DECISIONS. See **Employee Retirement Income Security Act of 1974.**

MENTALLY RETARDED CRIMINALS. See **Constitutional Law,** III.

MINNESOTA. See **Constitutional Law,** V, 2.

MOTOR VEHICLE REGULATION. See **Interstate Commerce Act.**

MURDER. See **Constitutional Law,** III; X; **Criminal Law,** 1.

OHIO. See **Constitutional Law,** IV.

PLEA AGREEMENTS. See **Constitutional Law,** IX, 1.

POPULATION OF UNITED STATES. See **Census; Constitutional Law,** II.

PRE-EMPTION. See **Employee Retirement Income Security Act of 1974; Interstate Commerce Act.**

PREPAYMENT OF LOANS. See **Emergency Low Income Housing Preservation Act of 1987.**

PRISONERS. See **Qualified Immunity from Suit.**

PRIVATE CAUSES OF ACTION. See **Civil Rights Act of 1871.**

PUNITIVE DAMAGES.

Private causes of action under federal laws.—Punitive damages may not be awarded in private suits brought under § 202 of Americans with Disabilities Act of 1990 or § 504 of Rehabilitation Act of 1973. Barnes v. Gorman, p. 181.

QUALIFIED IMMUNITY FROM SUIT.

Prison guards—Prisoner punishment—Hitching post use.—Respondent Alabama prison guards were not entitled to qualified immunity at summary judgment phase where reasonable officers would have known that using a hitching post to punish a prisoner under circumstances alleged by petitioner inmate violated Eighth Amendment prohibition against cruel and unusual punishment. Hope v. Pelzer, p. 730.

RACE DISCRIMINATION. See **Criminal Law,** 1.

REHABILITATION ACT OF 1973. See **Punitive Damages.**

RELIGIOUS SCHOOLS. See **Constitutional Law,** IV.

RESTAURANT WORKERS' TAXES. See **Taxes.**

RIGHT TO APPEAL. See **Federal Rules of Civil Procedure.**

RIGHT TO COUNSEL. See **Habeas Corpus,** 1.

RIGHT TO FAIR TRIAL. See **Constitutional Law,** IX.

RIGHT TO JURY TRIAL. See **Constitutional Law,** IX, 2; X.

RULEMAKING AUTHORITY. See **Americans with Disabilities Act of 1990.**

SCHOOLS. See **Constitutional Law,** IV; XI, 2; **Civil Rights Act of 1871.**

SCHOOL RECORDS. See **Civil Rights Act of 1871.**

SEARCHES AND SEIZURES. See **Constitutional Law,** XI.

SELF-INCRIMINATION. See **Constitutional Law,** VIII.

SENTENCING. See **Constitutional Law,** IX, 2; X; **Criminal Law,** 2.

SETTLEMENT AGREEMENTS. See **Federal Rules of Civil Procedure.**

SEXUAL ABUSE TREATMENT PROGRAM. See **Constitutional Law,** VIII.

SIXTH AMENDMENT. See **Constitutional Law,** IX; X; **Habeas Corpus,** 1.

STATISTICAL SAMPLING. See **Census; Constitutional Law,** II.

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964; Emergency Low Income Housing Preservation Act of 1987; Habeas Corpus,** 3.

SUPREME COURT.

Term statistics, p. 991.

TAXES.

Federal Insurance Contributions Act—Estimating tips.—In assessing a restaurant for FICA taxes based upon tips that its employees may have received but did not report, Internal Revenue Service is authorized to use an aggregate estimate of all tips that restaurant's customers paid its employees. United States v. Fior D'Italia, Inc., p. 238.

TIP INCOME. See **Taxes.**

TOW TRUCK REGULATION. See **Interstate Commerce Act.**

TRIAL BY JURY. See **Constitutional Law,** IX, 2; X.

TUITION AID PROGRAMS. See **Constitutional Law,** IV.

UNIONS. See **Labor.**

UNITED STATES POPULATION. See **Census; Constitutional Law,** II.

UNIVERSITY RECORDS. See **Civil Rights Act of 1871.**

VIRGIN ISLANDS. See **Jurisdiction.**

VOUCHERS. See **Constitutional Law,** IV.

WARRANTLESS ENTRY, ARREST, AND SEARCH. See **Constitutional Law,** XI, 3.

WELFARE BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974.**

WORDS AND PHRASES.

1. "*Citize[n] or subjec[t] of a foreign state.*" 28 U. S. C. § 1332(a)(2). JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., p. 88.

2. "*Pending.*" Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. § 2244(d)(2). Carey v. Saffold, p. 214.

3. "*Statistical method known as 'sampling.'*" 13 U. S. C. § 195. Utah v. Evans, p. 452.

4. "*The safety regulatory authority of a State with respect to motor vehicles.*" Interstate Commerce Act, 49 U. S. C. § 14501(c)(2)(A). Columbus v. Ours Garage & Wrecker Service, Inc., p. 424.