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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2002

JUNE 2 THROUGH OCTOBER 2, 2003

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

In *Escambia County* v. *McMillan*, 466 U. S. 48 (1984) *(per curiam)*, it should appear that Thomas R. Santurri argued the motion of certain appellants to dismiss the appeal, *sua sponte*, at the invitation of the Court.

502 U. S. IV, NOTE 1, line 6: add the sentence "He was presented to the Court on November 1, 1991." between "1991" and "See".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

OFFICERS OF THE COURT

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

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[1] Ms. Maslow was appointed Acting Librarian effective June 2, 2003.
[2] Ms. Gaskell was appointed Librarian effective August 11, 2003. See *post*, pp. v and 978.

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.)

RETIREMENT OF LIBRARIAN AND APPOINTMENT OF SUCCESSOR

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 26, 2003

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

THE CHIEF JUSTICE said:

The Court today notes the retirement of Librarian Shelley Dowling. Ms. Dowling served capably as the Court's Librarian for almost fifteen years. The Court thanks her for her dedicated service. We wish her well in her retirement. The Court has appointed Judith A. Gaskell as the Librarian.

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. The opinion reported on page 1301 is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2002

BENEFICIAL NATIONAL BANK ET AL. *v.* ANDERSON ET AL.

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

No. 02–306. Argued April 30, 2003—Decided June 2, 2003

Respondents, who secured loans from petitioner national bank, filed a state-court suit against the bank and two other petitioners, seeking damages on the theory, among others, that the bank's interest rates violated "the common law usury doctrine" and an Alabama usury statute. The complaint did not refer to any federal law. Petitioners removed the case to Federal District Court, asserting that the National Bank Act governs the interest rate that a national bank may charge, see 12 U. S. C. § 85, that the rates charged to respondents complied with § 85, that § 86 provides the exclusive remedies available against a national bank charging excessive interest, and that respondents' action was therefore one "arising under" federal law that could be removed under 28 U. S. C. § 1441. The District Court denied respondents' motion to remand the case to state court, but certified the question whether it had jurisdiction to the Eleventh Circuit. In reversing, the latter court held that under the "well-pleaded complaint" rule, removal is not permitted unless the complaint expressly alleges a federal claim, and that the narrow exception known as the complete pre-emption doctrine did not apply because there was no evidence of clear congressional intent to permit removal under §§ 85 and 86.

Held: Respondents' cause of action arose only under federal law and could, therefore, be removed under § 1441. Pp. 6–11.

Syllabus

(a) As a general rule, absent diversity jurisdiction, a case is not removable if the complaint does not affirmatively allege a federal claim. Potential defenses, including a federal statute's pre-emptive effect, *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, do not provide a basis for removal. One exception to the general rule occurs when a federal statute completely pre-empts a cause of action. Where this Court has found such pre-emption, the federal statutes at issue—the Labor Management Relations Act, 1947, see *Avco Corp.* v. *Machinists*, 390 U. S. 557, and the Employee Retirement Income Security Act of 1974, see *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58—provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. Pp. 6–8.

(b) Because respondents' complaint expressly charged petitioners with usury, *Metropolitan Life*, *Avco*, and *Franchise Tax Bd.* provide the framework for answering the question whether the National Bank Act provides the exclusive cause of action for usury claims against national banks. Section 85 sets substantive limits on the interest rates that national banks may charge, while § 86 prescribes the remedies available to borrowers who are charged higher rates and the procedures governing such claims. If the interest charged here did not violate § 85 limits, the statute pre-empts any common-law or Alabama statutory rule that would treat those rates as usurious and would, thus, provide a federal defense. That defense would not justify removal. Only if Congress intended § 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable to the provisions construed in *Avco* and *Metropolitan Life*. This Court has long construed the National Bank Act as providing the exclusive federal cause of action for usury against national banks. See, *e. g.*, *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29. The Court has also recognized the special nature of federally chartered banks. Uniform rules limiting their liability and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly state legislation. The same federal interest supports the established interpretation of §§ 85 and 86 that gives those provisions the requisite pre-emptive force to provide removal jurisdiction. Pp. 9–11.

287 F. 3d 1038, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 11.

Seth P. Waxman argued the cause for petitioners. With him on the briefs were *Dennis G. Lyons*, *Howard N. Cayne*, *Mary Gabrielle Sprague*, *Brian C. Duffy*, *Christopher R. Lipsett*, *Russell J. Bruemmer*, *Paul R. Q. Wolfson*, *Alan S. Kaplinsky*, and *Burt M. Rublin*.

Matthew D. Roberts 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 Clement*, *Mark B. Stern*, *Julie L. Williams*, *Daniel P. Stipano*, *L. Robert Griffin*, and *Douglas B. Jordan*.

Brian M. Clark argued the cause for respondents. With him on the brief was *Dennis G. Pantazis*.*

JUSTICE STEVENS delivered the opinion of the Court.

The question in this case is whether an action filed in a state court to recover damages from a national bank for allegedly charging excessive interest in violation of both "the common law usury doctrine" and an Alabama usury statute

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**Drew S. Days III*, *Beth S. Brinkmann*, and *Seth M. Galanter* filed a brief for the American Bankers Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, Solicitor General, *Joseph A. Kanefield*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Gregg Renkes* of Alaska, *Richard Blumenthal* of Connecticut, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Peter Heed* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Greg Abbott* of Texas, and *Christine O. Gregoire* of Washington; for AARP et al. by *Deborah M. Zuckerman*, *Stacy J. Canan*, and *Michael R. Schuster;* and for Consumer Attorneys of California by *James C. Sturdevant*.

may be removed to a federal court because it actually arises under federal law. We hold that it may.

I

Respondents are 26 individual taxpayers who made pledges of their anticipated tax refunds to secure short-term loans obtained from petitioner Beneficial National Bank, a national bank chartered under the National Bank Act. Respondents brought suit in an Alabama court against the bank and the two other petitioners that arranged the loans, seeking compensatory and punitive damages on the theory, among others, that the bank's interest rates were usurious. App. 18–30. Their complaint did not refer to any federal law.

Petitioners removed the case to the United States District Court for the Middle District of Alabama. In their notice of removal they asserted that the National Bank Act, Rev. Stat. § 5197, as amended, 12 U. S. C. § 85,[1] is the exclusive provi-

[1] Title 12 U. S. C. § 85 provides:

"Rate of interest on loans, discounts and purchases

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia

sion governing the rate of interest that a national bank may lawfully charge, that the rates charged to respondents complied with that provision, that Rev. Stat. § 5198, 12 U. S. C. § 86, provides the exclusive remedies available against a national bank charging excessive interest,[2] and that the removal statute, 28 U. S. C. § 1441, therefore applied. App. 31–35. The District Court denied respondents' motion to remand the case to state court but certified the question whether it had jurisdiction to proceed with the case to the Court of Appeals pursuant to 28 U. S. C. § 1292(b).

A divided panel of the Eleventh Circuit reversed. *Anderson* v. *H&R Block, Inc.*, 287 F. 3d 1038 (2002). The majority held that under our "well-pleaded complaint" rule, removal is generally not permitted unless the complaint expressly alleges a federal claim and that the narrow exception from that rule known as the "complete preemption doctrine" did not apply because it could "find no clear congressional intent to permit removal under §§ 85 and 86." *Id.*, at 1048. Because this holding conflicted with an Eighth Circuit decision, *Kris-*

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shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

[2] Section 86 provides:

"Usurious interest; penalty for taking; limitations

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

pin v. *May Dept. Stores Co.*, 218 F. 3d 919 (2000), we granted certiorari. 537 U. S. 1169 (2003).

II

A civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law. § 1441(b). To determine whether the claim arises under federal law, we examine the "well pleaded" allegations of the complaint and ignore potential defenses: "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908); see *Taylor* v. *Anderson*, 234 U. S. 74 (1914). Thus, a defense that relies on the preclusive effect of a prior federal judgment, *Rivet* v. *Regions Bank of La.*, 522 U. S. 470 (1998), or the pre-emptive effect of a federal statute, *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1 (1983), will not provide a basis for removal. As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

Congress has, however, created certain exceptions to that rule. For example, the Price-Anderson Act contains an unusual pre-emption provision, 42 U. S. C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. See *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 484–485 (1999).

We have also construed § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185, as not only pre-empting state law but also authorizing removal of ac-

tions that sought relief only under state law. *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968). We later explained that holding as resting on the unusually "powerful" pre-emptive force of § 301:

> "The Court of Appeals held, 376 F. 2d, at 340, and we affirmed, 390 U. S., at 560, that the petitioner's action 'arose under' § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd.*, 463 U. S., at 23–24 (footnote omitted).

Similarly, in *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58 (1987), we considered whether the "complete pre-emption" approach adopted in *Avco* also supported the removal of state common-law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* For two reasons, we held that removal was proper even though the complaint purported to raise only state-law claims. First, the statutory text in § 502(a), 29 U. S. C. § 1132, not only provided an express federal remedy for the plaintiffs' claims, but also in its jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco*, thereby indicating

that the two statutes should be construed in the same way. 481 U. S., at 65. Second, the legislative history of ERISA unambiguously described an intent to treat such actions "as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." *Id.*, at 65–66 (internal quotation marks and emphasis omitted).

Thus, a state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, such as in the Price-Anderson Act, *supra*, at 6, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption.[3] When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U. S. C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court. In the two categories of cases[4] where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. See 29 U. S. C. § 1132 (setting forth procedures and remedies for civil claims under ERISA); § 185 (describing procedures and remedies for suits under the LMRA).

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[3] Of course, a state claim can also be removed through the use of the supplemental jurisdiction statute, 28 U. S. C. § 1367(a), provided that another claim in the complaint is removable.

[4] This Court has also held that federal courts have subject-matter jurisdiction to hear posessory land claims under state law brought by Indian tribes because of the uniquely federal "nature and source of the possessory rights of Indian tribes." *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 667 (1974). Because that case turned on the special historical relationship between Indian tribes and the Federal Government, it does not assist the present analysis.

III

Count IV of respondents' complaint sought relief for "usury violations" and claimed that petitioners "charged . . . excessive interest in violation of the common law usury doctrine" and violated "Alabama Code § 8–8–1, et seq. by charging excessive interest." App. 28. Respondents' complaint thus expressly charged petitioners with usury. *Metropolitan Life*, *Avco*, and *Franchise Tax Board* provide the framework for answering the dispositive question in this case: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable. If not, then the complaint does not arise under federal law and is not removable.

Sections 85 and 86 serve distinct purposes. The former sets forth the substantive limits on the rates of interest that national banks may charge. The latter sets forth the elements of a usury claim against a national bank, provides for a 2-year statute of limitations for such a claim, and prescribes the remedies available to borrowers who are charged higher rates and the procedures governing such a claim. If, as petitioners asserted in their notice of removal, the interest that the bank charged to respondents did not violate § 85 limits, the statute unquestionably pre-empts any common-law or Alabama statutory rule that would treat those rates as usurious. The section would therefore provide the petitioners with a complete federal defense. Such a federal defense, however, would not justify removal. *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 393 (1987). Only if Congress intended § 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable to the provisions that we construed in the *Avco* and *Metropolitan Life* cases.[5]

[5] Because the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable, the fact that these sections

In a series of cases decided shortly after the Act was passed, we endorsed that approach. In *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 32–33 (1875), we rejected the borrower's attempt to have an entire debt forfeited, as authorized by New York law, stating that the various provisions of §§ 85 and 86 "form a system of regulations . . . [a]ll the parts [of which] are in harmony with each other and cover the entire subject," so that "the State law would have no bearing whatever upon the case." We also observed that "[i]n any view that can be taken of [§ 86], the power to supplement it by State legislation is conferred neither expressly nor by implication." *Id.*, at 35. In *Evans* v. *National Bank of Savannah*, 251 U. S. 108, 114 (1919), we stated that "federal law . . . completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate." See also *Barnet* v. *National Bank*, 98 U. S. 555, 558 (1879) (The "statutes of Ohio and Indiana upon the subject of usury . . . cannot affect the case" because the Act "creates a new right" that is "exclusive"); *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 132, 134 (1901) ("[T]he definition of usury and the penalties affixed thereto must be determined by the National Banking Act and not by the law of the State").

In addition to this Court's longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks, this Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from "possible unfriendly State legislation." *Tiffany* v. *National Bank of Mo.*, 18 Wall. 409, 412

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of the National Bank Act were passed in 1864, 11 years prior to the passage of the statute authorizing removal, is irrelevant, contrary to respondents' assertions.

(1874). The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the "power to destroy," *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), supports the established interpretation of §§ 85 and 86 that gives those provisions the requisite pre-emptive force to provide removal jurisdiction. In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today's opinion takes the view that because the National Bank Act, 12 U. S. C. §§ 85, 86, provides the exclusive cause of action for claims of usury against a national bank, all such claims—even if explicitly pleaded under state law—are to be construed as "aris[ing] under" federal law for purposes of our jurisdictional statutes. *Ante* this page. This view finds scant support in our precedents and no support whatever in the National Bank Act or any other Act of Congress. I respectfully dissent.

Unless Congress expressly provides otherwise, the federal courts may exercise removal jurisdiction over state-court actions "of which the district courts of the United States

have original jurisdiction." 28 U. S. C. § 1441(a). In this case, petitioners invoked as the predicate for removal the district courts' original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." § 1331.

This so-called "arising under" or "federal question" jurisdiction has long been governed by the well-pleaded-complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 392 (1987). A federal question "is presented" when the complaint invokes federal law as the basis for relief. It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim. "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Ibid.* See also *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon"). Nor does it even suffice that the facts alleged in support of an asserted state-law claim *do not support* a state-law claim and would *only* support a federal claim. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 809, n. 6 (1986).

Under the well-pleaded-complaint rule, "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, . . . or that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10 (1983). Of critical importance here, the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force

when the defense is one of federal pre-emption. "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 116 (1936). "[A] case may *not* be removed to federal court on the basis of . . . the defense of pre-emption . . . ." *Caterpillar*, *supra*, at 393. To be sure, pre-emption requires a state court to *dismiss* a particular claim that is filed under state law, but it does not, as a general matter, provide grounds for *removal*.

This Court has twice recognized exceptions to the well-pleaded-complaint rule, upholding removal jurisdiction notwithstanding the absence of a federal question on the face of the plaintiff's complaint. First, in *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968), we allowed removal of a state-court action to enforce a no-strike clause in a collective-bargaining agreement. The complaint concededly did not advance a federal claim, but was subject to a defense of pre-emption under § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185. The well-pleaded-complaint rule notwithstanding, we treated the plaintiff's state-law contract claim as one arising under § 301, and held that the case could be removed to federal court. *Avco*, *supra*, at 560.

The only support mustered by the *Avco* Court for its conclusion was a statement wrenched out of context from our decision in *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 457 (1957), that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law and will not be an independent source of private rights." To begin with, this statement is entirely unnecessary to the landmark holding in *Lincoln Mills*—that § 301 not only gives federal courts jurisdiction to decide labor relations cases but also supplies them with authority to create the governing substantive law. *Id.*, at 456. More importantly, understood in the context of that holding, the quoted passage in no way supports the proposition for which it is relied upon in *Avco*—that state-

law claims relating to labor relations necessarily *arise under* § 301. If one reads *Lincoln Mills* with any care, it is clear beyond doubt that the relevant passage merely confirms that when, in deciding cases arising under § 301, courts employ legal rules that overlap with, or are even explicitly borrowed from, state law, such rules are nevertheless rules of federal law. It is in this sense that "[a]ny state law applied [in a § 301 case] will be absorbed as federal law"—in the sense that federally adopted state rules become federal rules, not in the sense that a state-law claim becomes a federal claim.

Other than its entirely misguided reliance on *Lincoln Mills*, the opinion in *Avco* failed to clarify the analytic basis for its unprecedented act of jurisdictional alchemy. The Court neglected to explain *why* state-law claims that are pre-empted by § 301 of the LMRA are exempt from the strictures of the well-pleaded-complaint rule, nor did it explain *how* such a state-law claim can plausibly be said to "arise under" federal law. Our subsequent opinion in *Franchise Tax Board* struggled to prop up *Avco*'s puzzling holding:

> "The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 463 U. S., at 23–24 (footnote omitted).

This passage has repeatedly been relied upon by the Court as an explanation for its decision in *Avco*. See, *e. g.*, *ante*, at 7, *Caterpillar, supra*, at 394; *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 64 (1987). Of course it is not an expla-

nation at all. It provides nothing more than an account of what *Avco* accomplishes, rather than a justification (unless *ipse dixit* is to count as justification) for the radical departure from the well-pleaded-complaint rule, which demands rejection of the defense of federal pre-emption as a basis for federal jurisdiction. *Gully*, *supra*, at 116. Neither the excerpt quoted above, nor any other fragment of the decision in *Franchise Tax Board*, explains how or why the nonviability (due to pre-emption) of the state-law contract claim in *Avco* magically transformed that claim into one "arising under" federal law.

Metropolitan Life Ins. Co. v. *Taylor*, *supra*, was our second departure from the prohibition against resting federal "arising under" jurisdiction upon the existence of a federal defense. In that case, Taylor sued his former employer and its insurer, alleging breach of contract and seeking, *inter alia*, reinstatement of certain disability benefits and insurance coverages. *Id.*, at 61. Though Taylor invoked no federal law in his complaint, we treated his case as one arising under § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1132, and upheld the District Court's exercise of removal jurisdiction. 481 U. S., at 66–67.

In reaching this conclusion, the *Taylor* Court broke no new analytic ground; its opinion follows the exception established in *Avco* and described in *Franchise Tax Board*, but says nothing to commend that exception to logic or reason. Instead, *Taylor* simply relies on the "clos[e] parallels," 481 U. S., at 65, between the language of the pre-emptive provision in ERISA and the language of the LMRA provision deemed in *Avco* to be so dramatically pre-emptive as to summon forth a federal claim where none had been asserted. "No more specific reference to the *Avco* rule can be expected," we said, than what was found in § 502(a); and we accordingly concluded that "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal

court." 481 U. S., at 66. As in *Avco* and *Franchise Tax Board*, no explanation was provided for *Avco*'s abrogation of the rule that "[f]ederal pre-emption is ordinarily a federal defense to the plaintiff's suit[, and as such] it does not appear on the face of a well-pleaded complaint, [nor does it] authorize removal to federal court."[1] 481 U. S., at 63.

It is noteworthy that the straightforward (though similarly unsupported) rule announced in today's opinion—under which (1) removal is permitted "[w]hen [a] federal statute completely pre-empts a state-law cause of action," *ante*, at 8, and (2) a federal statute is completely pre-emptive when it "provide[s] the exclusive cause of action for the claim asserted," *ibid.*—is nowhere to be found in either *Avco* or *Taylor*. To the contrary, the analysis in today's opinion implicitly contradicts (by rendering inexplicable) *Taylor*'s discussion of pre-emption and removal. (*Avco*, as I observed earlier, has no discussion to be contradicted.) Had it thought that today's decision was the law, the *Taylor* Court need not have taken pains to emphasize the "clos[e] parallels" between § 502(a)(1)(B) of ERISA and § 301 of the LMRA and need not have pored over the legislative history of § 502(a) to show that Congress expected ERISA to be treated like the LMRA. See *Taylor*, *supra*, at 65–66 (citing H. R. Conf. Rep. No. 93–1280, p. 327 (1974); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams); *id.*, at 29942 (remarks of Sen. Javits)). Instead, it could have rested after noting the "unique pre-emptive force of ERISA," *Taylor*, *supra*, at 65. Indeed, it could even have spared itself the trouble of add-

[1] This is not to say that *Taylor* was wrongly decided. Having been informed through the *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968), decision that the language of § 301 triggered "arising under" jurisdiction even with respect to certain state-law claims, Congress' subsequent decision to insert language into ERISA that "closely parallels" the text of § 301 can be viewed to be, as we said, a "specific reference to the *Avco* rule." 481 U. S., at 65–66. *Taylor*, in other words, rests upon a sort of statutory incorporation of *Avco*. *Avco* itself, on the other hand, continues to rest upon nothing.

ing the adjective "unique." While there is something unique about statutes whose pre-emptive force is closely patterned after that of the LMRA (which we had held to support removal), there is nothing whatever unique about a federal cause of action that displaces state causes of action. Displacement alone, if today's opinion is to be believed, would have sufficed to establish the existence of removal jurisdiction.

The best that can be said, from a precedential perspective, for the rule of law announced by the Court today is that variations on it have twice appeared in our cases in the purest dicta. *Rivet* v. *Regions Bank of La.*, 522 U. S. 470, 476 (1998) ("[O]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law" (internal quotation marks omitted)); *Caterpillar*, 482 U. S., at 393 ("[I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law" (some internal quotation marks omitted)). Dicta of course have no precedential value, see *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 24 (1994), even when they do not contradict, as they do here, prior holdings of the Court.

The difficulty with today's holding, moreover, is not limited to the flimsiness of its precedential roots. As has been noted already, the holding cannot be squared with bedrock principles of removal jurisdiction. One or another of two of those principles must be ignored: Either (1) the principle that merely setting forth in state court facts that would support a federal cause of action—indeed, even facts that would support a federal cause of action and would *not* support the claimed state cause of action—does not produce a federal question supporting removal, *Caterpillar*, 482 U. S., at 391, or (2) the principle that a federal defense to a state

cause of action does not support federal-question jurisdiction, see *id.*, at 393. Relatedly, today's holding also represents a sharp break from our long tradition of respect for the autonomy and authority of state courts. For example, in *Healy* v. *Ratta*, 292 U. S. 263, 270 (1934), we explained that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." And in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 108 (1941), we insisted on a "strict construction" of the federal removal statutes.[2] Today's decision ignores these venerable principles and effectuates a significant shift in decisional authority from state to federal courts.

In an effort to justify this shift, the Court explains that "[b]ecause [12 U. S. C.] §§ 85 and 86 provide the exclusive cause of action for such claims, there is . . . no such thing as a state-law claim of usury against a national bank." *Ante*, at 11. But the mere fact that a state-law claim is invalid no more deprives it of its character as a state-law claim which does not raise a federal question, than does the fact that a federal claim is invalid deprive it of its character as a federal claim which does raise a federal question. The proper response to the presentation of a nonexistent claim to a state court is *dismissal*, not the "federalize-and-remove" dance authorized by today's opinion. For even if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of

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[2] Our traditional regard for the role played by state courts in interpreting and enforcing federal law has other doctrinal manifestations. We indulge, for example, a "presumption of concurrent [state and federal] jurisdiction," which can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478 (1981).

such a right is transmogrified into the claim of a federal right. Congress's mere act of creating a federal right and eliminating all state-created rights *in no way* suggests an expansion of federal jurisdiction so as to wrest from state courts the authority to decide questions of pre-emption under the National Bank Act.

Petitioners seek to justify their end run around the well-pleaded-complaint rule by insisting that, in determining whether federal jurisdiction exists, we are required to " 'look beyond the pleadings.' " Brief for Petitioners 18 (quoting *Indianapolis* v. *Chase Nat. Bank*, 314 U. S. 63, 69 (1941)). They point out:

> "[A] long line of cases disallow[s] manipulations by plaintiffs designed to create or avoid diversity jurisdiction, such as misaligning the interests of the parties, naming parties (whether plaintiffs or defendants) who have no real interest in or relationship to the controversy, misstating the citizenship of a party (whether plaintiffs or defendants), or misstating the amount in controversy." Brief for Petitioners 17–18.

Petitioners insist that, like the "manipulative" complaints in these diversity cases, "[r]espondents' complaint is disingenuously pleaded, not 'well pleaded' in any respect, for it purports to raise a state law claim that does not exist." *Id.*, at 16. Accordingly, the argument continues, just as federal courts may assert jurisdiction where a plaintiff seeks to hide the true citizenship of the parties, so too they may assert jurisdiction where a plaintiff cloaks a necessarily federal claim in state-law garb.

To begin with, the cases involving diversity jurisdiction are probably distinguishable on the ground that there is a crucial difference between, on the one hand, "looking beyond the pleadings" to determine whether a factual assertion is true, and, on the other hand, doing so in order to determine whether the plaintiff has proceeded on the basis of the "cor-

rect" legal theory. But even assuming that the analogy to the diversity cases is apt, petitioners can derive no support from it in this case. Their argument proceeds from the faulty premise that if one looks behind the pleadings in this case, one discovers that the plaintiffs have, in fact, presented a federal claim. But that begs the question—that is, it assumes the answer to the very question presented. It assumes that whenever a claim of usury is brought against a national bank, that claim is a federal one. As I have discussed above, neither logic nor precedent supports that conclusion; they support, at best, the proposition that the only *viable* claim against a national bank for usury is a federal one. Federal jurisdiction is ordinarily determined—invariably determined, except for *Avco* and *Taylor*—on the basis of what claim is pleaded, rather than on the basis of what claim can prevail.

There may well be good reasons to favor the expansion of removal jurisdiction that petitioners urge and that the Court adopts today. As the United States explains in its *amicus* brief:

> "Absent removal, the state court would have only two legitimate options—to recharacterize the claim in federal-law terms or to dismiss the claim altogether. Any plaintiff who truly seeks recovery on that claim would prefer the first option, which would make the propriety of removal crystal clear. A third possibility, however, is that the state court would err and allow the claim to proceed under state law notwithstanding Congress's decision to make the federal cause of action exclusive. The complete pre-emption rule avoids that potential error." Brief for United States as *Amicus Curiae* 17–18.

True enough, but inadequate to render today's decision either rational or properly within the authority of this Court. Inadequate for rationality, because there is no more reason

to fear state-court error with respect to federal pre-emption accompanied by creation of a federal cause of action than there is with respect to federal pre-emption unaccompanied by creation of a federal cause of action—or, for that matter, than there is with respect to *any* federal defense to a state-law claim. The rational response to the United States' concern is to eliminate the well-pleaded-complaint rule entirely. And inadequate for judicial authority, because it is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the federal matter. Unless and until we receive instruction from Congress that claims pre-empted under the National Bank Act—in contrast to almost all other claims that are subject to federal pre-emption—"arise under" federal law, we simply lack authority to "avoi[d] . . . potential errors," *id.*, at 18, by permitting removal.

* * *

Today's opinion has succeeded in giving to our *Avco* decision a theoretical foundation that neither *Avco* itself nor *Taylor* provided. Regrettably, that theoretical foundation is itself without theoretical foundation. That is to say, the more general proposition that (1) the existence of a pre-emptive federal cause of action causes the invalid assertion of a state cause of action to raise a federal question, has no more logic or precedent to support it than the very narrow proposition that (2) the LMRA *(Avco)* and statutes modeled after the LMRA *(Taylor)* cause invalid assertions of state causes of action pre-empted by those particular statutes to raise federal questions. Since I believe that, as between an inexplicable narrow holding and an inexplicable broad one, the former is the lesser evil, I would adhere to the approach taken by *Taylor* and on the basis of *stare decisis* simply affirm, without any real explanation, that the LMRA and statutes modeled after it have a "unique pre-emptive force" that

(quite illogically) suspends the normal rules of removal jurisdiction. Since no one asserts that the National Bank Act is modeled after the LMRA, the state-law claim pleaded here cannot be removed, and it is left to the state courts to dismiss it. From the Court's judgment to the contrary, I respectfully dissent.

Syllabus

DASTAR CORP. *v.* TWENTIETH CENTURY FOX FILM CORP. ET AL.

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

No. 02–428. Argued April 2, 2003—Decided June 2, 2003

General Dwight D. Eisenhower's World War II book, Crusade in Europe, was published by Doubleday, which registered the work's copyright and granted exclusive television rights to an affiliate of respondent Twentieth Century Fox Film Corporation (Fox). Fox, in turn, arranged for Time, Inc., to produce a Crusade in Europe television series based on the book, and Time assigned its copyright in the series to Fox. The series was first broadcast in 1949. In 1975, Doubleday renewed the book's copyright, but Fox never renewed the copyright on the television series, which expired in 1977, leaving the series in the public domain. In 1988, Fox reacquired the television rights in the book, including the exclusive right to distribute the Crusade television series on video and to sublicense others to do so. Respondents SFM Entertainment and New Line Home Video, Inc., acquired from Fox the exclusive rights to manufacture and distribute Crusade on video. In 1995, petitioner Dastar released a video set, World War II Campaigns in Europe, which it made from tapes of the original version of the Crusade television series and sold as its own product for substantially less than New Line's video set. Fox, SFM, and New Line brought this action alleging, *inter alia*, that Dastar's sale of Campaigns without proper credit to the Crusade television series constitutes "reverse passing off" in violation of § 43(a) of the Lanham Act. The District Court granted respondents summary judgment. The Ninth Circuit affirmed in relevant part, holding, among other things, that because Dastar copied substantially the entire Crusade series, labeled the resulting product with a different name, and marketed it without attribution to Fox, Dastar had committed a "bodily appropriation" of Fox's series, which was sufficient to establish the reverse passing off.

Held: Section 43(a) of the Lanham Act does not prevent the unaccredited copying of an uncopyrighted work. Pp. 28–38.

(a) Respondents' claim that Dastar has made a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of [its] goods" in violation of § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), would undoubtedly be sustained if Dastar had bought

some of New Line's Crusade videotapes and merely repackaged them as its own. However, Dastar has instead taken a creative work in the public domain, copied it, made modifications (arguably minor), and produced its very own series of videotapes. If "origin" refers only to the manufacturer or producer of the physical "good" that is made available to the public (here, the videotapes), Dastar was the origin. If, however, "origin" includes the creator of the underlying work that Dastar copied, then someone else (perhaps Fox) was the origin of Dastar's product. At bottom, the Court must decide what § 43(a) means by the "origin" of "goods." Pp. 28–31.

(b) Because Dastar was the "origin" of the physical products it sold as its own, respondents cannot prevail on their Lanham Act claim. As dictionary definitions affirm, the most natural understanding of the "origin" of "goods"—the source of wares—is the producer of the tangible product sold in the marketplace, here Dastar's Campaigns videotape. The phrase "origin of goods" in the Lanham Act is incapable of connoting the person or entity that originated the ideas that "goods" embody or contain. The consumer typically does not care about such origination, and § 43(a) should not be stretched to cover matters that are of no consequence to purchasers. Although purchasers *do* care about ideas or communications contained or embodied in a communicative product such as a video, giving the Lanham Act special application to such products would cause it to conflict with copyright law, which is precisely directed to that subject, and which grants the public the right to copy without attribution once a copyright has expired, *e. g.*, *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230. Recognizing a § 43(a) cause of action here would render superfluous the provisions of the Visual Artists Rights Act that grant an artistic work's author "the right . . . to claim authorship," 17 U. S. C. § 106A(a)(1)(A), but carefully limit and focus that right, §§ 101, 106A(b), (d)(1), and (e). It would also pose serious practical problems. Finally, reading § 43(a) as creating a cause of action for, in effect, plagiarism would be hard to reconcile with, *e. g.*, *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 211. Pp. 31–38.

34 Fed. Appx. 312, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except BREYER, J., who took no part in the consideration or decision of the case.

David A. Gerber argued the cause for petitioner. With him on the briefs were *Stewart A. Baker*, *Bennett Evan Cooper*, and *David Nimmer*.

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 Attorney General McCallum*, *Deputy Solicitor General Clement*, *Anthony J. Steinmeyer*, and *Mark S. Davies.*

Dale M. Cendali argued the cause for respondents. With her on the briefs were *Walter E. Dellinger*, *Pamela A. Harris*, *Jonathan D. Hacker*, *Jeremy Maltby*, *Pammela Quinn*, and *Gary D. Roberts.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we are asked to decide whether § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), prevents the unaccredited copying of a work, and if so, whether a court may double a profit award under § 1117(a), in order to deter future infringing conduct.

I

In 1948, three and a half years after the German surrender at Reims, General Dwight D. Eisenhower completed Crusade in Europe, his written account of the allied campaign in Europe during World War II. Doubleday published the book, registered it with the Copyright Office in 1948, and granted exclusive television rights to an affiliate of respondent Twentieth Century Fox Film Corporation (Fox). Fox, in turn, arranged for Time, Inc., to produce a television series, also

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*Briefs of *amici curiae* urging reversal were filed for the International Trademark Association by *Bruce R. Ewing;* and for Malla Pollack et al. by *Ms. Pollack*, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Association for Competitive Technology et al. by *Paul Bender* and *Michael R. Klipper;* and for the Directors Guild of America et al. by *Richard P. Bress.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *William G. Barber*, *Louis T. Pirkey*, and *Ronald E. Myrick;* for the American Library Association et al. by *Jonathan Band* and *Peter Jaszi;* and for Intellectual Property Law Professors by *Tyler T. Ochoa.*

called Crusade in Europe, based on the book, and Time assigned its copyright in the series to Fox. The television series, consisting of 26 episodes, was first broadcast in 1949. It combined a soundtrack based on a narration of the book with film footage from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified "Newsreel Pool Cameramen." In 1975, Doubleday renewed the copyright on the book as the " 'proprietor of copyright in a work made for hire.' " App. to Pet. for Cert. 9a. Fox, however, did not renew the copyright on the Crusade television series, which expired in 1977, leaving the television series in the public domain.

In 1988, Fox reacquired the television rights in General Eisenhower's book, including the exclusive right to distribute the Crusade television series on video and to sublicense others to do so. Respondents SFM Entertainment and New Line Home Video, Inc., in turn, acquired from Fox the exclusive rights to distribute Crusade on video. SFM obtained the negatives of the original television series, restored them, and repackaged the series on videotape; New Line distributed the videotapes.

Enter petitioner Dastar. In 1995, Dastar decided to expand its product line from music compact discs to videos. Anticipating renewed interest in World War II on the 50th anniversary of the war's end, Dastar released a video set entitled World War II Campaigns in Europe. To make Campaigns, Dastar purchased eight beta cam tapes of the *original* version of the Crusade television series, which is in the public domain, copied them, and then edited the series. Dastar's Campaigns series is slightly more than half as long as the original Crusade television series. Dastar substituted a new opening sequence, credit page, and final closing for those of the Crusade television series; inserted new chapter-title sequences and narrated chapter introductions; moved the "recap" in the Crusade television series to the

beginning and retitled it as a "preview"; and removed references to and images of the book. Dastar created new packaging for its Campaigns series and (as already noted) a new title.

Dastar manufactured and sold the Campaigns video set as its own product. The advertising states: "Produced and Distributed by: *Entertainment Distributing*" (which is owned by Dastar), and makes no reference to the Crusade television series. Similarly, the screen credits state "DASTAR CORP presents" and "an ENTERTAINMENT DISTRIBUTING Production," and list as executive producer, producer, and associate producer employees of Dastar. Supp. App. 2–3, 30. The Campaigns videos themselves also make no reference to the Crusade television series, New Line's Crusade videotapes, or the book. Dastar sells its Campaigns videos to Sam's Club, Costco, Best Buy, and other retailers and mail-order companies for $25 per set, substantially less than New Line's video set.

In 1998, respondents Fox, SFM, and New Line brought this action alleging that Dastar's sale of its Campaigns video set infringes Doubleday's copyright in General Eisenhower's book and, thus, their exclusive television rights in the book. Respondents later amended their complaint to add claims that Dastar's sale of Campaigns "without proper credit" to the Crusade television series constitutes "reverse passing off"[1] in violation of § 43(a) of the Lanham Act, 60 Stat. 441, 15 U. S. C. § 1125(a), and in violation of state unfair-competition law. App. to Pet. for Cert. 31a. On cross-motions for summary judgment, the District Court found for respondents on all three counts, *id.*, at 54a–55a, treating its

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[1] Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else's. See, *e. g., O. & W. Thum Co.* v. *Dickinson,* 245 F. 609, 621 (CA6 1917). "Reverse passing off," as its name implies, is the opposite: The producer misrepresents someone else's goods or services as his own. See, *e. g., Williams* v. *Curtiss-Wright Corp.,* 691 F. 2d 168, 172 (CA3 1982).

resolution of the Lanham Act claim as controlling on the state-law unfair-competition claim because "the ultimate test under both is whether the public is likely to be deceived or confused," *id.*, at 54a. The court awarded Dastar's profits to respondents and doubled them pursuant to § 35 of the Lanham Act, 15 U. S. C. § 1117(a), to deter future infringing conduct by petitioner.

The Court of Appeals for the Ninth Circuit affirmed the judgment for respondents on the Lanham Act claim, but reversed as to the copyright claim and remanded. 34 Fed. Appx. 312, 316 (2002). (It said nothing with regard to the state-law claim.) With respect to the Lanham Act claim, the Court of Appeals reasoned that "Dastar copied substantially the entire *Crusade in Europe* series created by Twentieth Century Fox, labeled the resulting product with a different name and marketed it without attribution to Fox[, and] therefore committed a 'bodily appropriation' of Fox's series." *Id.*, at 314. It concluded that "Dastar's 'bodily appropriation' of Fox's original [television] series is sufficient to establish the reverse passing off." *Ibid.*[2] The court also affirmed the District Court's award under the Lanham Act of twice Dastar's profits. We granted certiorari. 537 U. S. 1099 (2003).

II

The Lanham Act was intended to make "actionable the deceptive and misleading use of marks," and "to protect persons engaged in . . . commerce against unfair competition." 15 U. S. C. § 1127. While much of the Lanham Act addresses

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[2] As for the copyright claim, the Ninth Circuit held that the tax treatment General Eisenhower sought for his manuscript of the book created a triable issue as to whether he intended the book to be a work for hire, and thus as to whether Doubleday properly renewed the copyright in 1976. See 34 Fed. Appx., at 314. The copyright issue is still the subject of litigation, but is not before us. We express no opinion as to whether petitioner's product would infringe a valid copyright in General Eisenhower's book.

the registration, use, and infringement of trademarks and related marks, § 43(a), 15 U. S. C. § 1125(a) is one of the few provisions that goes beyond trademark protection. As originally enacted, § 43(a) created a federal remedy against a person who used in commerce either "a false designation of origin, or any false description or representation" in connection with "any goods or services." 60 Stat. 441. As the Second Circuit accurately observed with regard to the original enactment, however—and as remains true after the 1988 revision—§ 43(a) "does not have boundless application as a remedy for unfair trade practices," *Alfred Dunhill, Ltd.* v. *Interstate Cigar Co.*, 499 F. 2d 232, 237 (1974). "[B]ecause of its inherently limited wording, § 43(a) can never be a federal 'codification' of the overall law of 'unfair competition,'" 4 J. McCarthy, Trademarks and Unfair Competition § 27:7, p. 27–14 (4th ed. 2002) (McCarthy), but can apply only to certain unfair trade practices prohibited by its text.

Although a case can be made that a proper reading of § 43(a), as originally enacted, would treat the word "origin" as referring only "to the geographic location in which the goods originated," *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 777 (1992) (STEVENS, J., concurring in judgment),[3] the Courts of Appeals considering the issue, begin-

[3] In the original provision, the cause of action for false designation of origin was arguably "available only to a person doing business in the locality falsely indicated as that of origin," 505 U. S., at 778, n. 3. As adopted in 1946, § 43(a) provided in full:

"Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or the region in which said locality is situated, or by any person who believes that he is or is

ning with the Sixth Circuit, unanimously concluded that it "does not merely refer to geographical origin, but also to origin of source or manufacture," *Federal-Mogul-Bower Bearings, Inc.* v. *Azoff*, 313 F. 2d 405, 408 (1963), thereby creating a federal cause of action for traditional trademark infringement of unregistered marks. See 4 McCarthy § 27:14; *Two Pesos*, *supra*, at 768. Moreover, every Circuit to consider the issue found § 43(a) broad enough to encompass reverse passing off. See, *e. g.*, *Williams* v. *Curtiss-Wright Corp.*, 691 F. 2d 168, 172 (CA3 1982); *Arrow United Indus., Inc.* v. *Hugh Richards, Inc.*, 678 F. 2d 410, 415 (CA2 1982); *F. E. L. Publications, Ltd.* v. *Catholic Bishop of Chicago*, 214 USPQ 409, 416 (CA7 1982); *Smith* v. *Montoro*, 648 F. 2d 602, 603 (CA9 1981); *Bangor Punta Operations, Inc.* v. *Universal Marine Co.*, 543 F. 2d 1107, 1109 (CA5 1976). The Trademark Law Revision Act of 1988 made clear that § 43(a) covers origin of production as well as geographic origin.[4] Its language is amply inclusive, moreover, of reverse passing off—if indeed it does not implicitly adopt the unanimous court-of-appeals jurisprudence on that subject. See, *e. g.*,

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likely to be damaged by the use of any such false description or representation." 60 Stat. 441.

[4] Section 43(a) of the Lanham Act now provides:

"Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

"(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

"(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

"shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U. S. C. § 1125(a)(1).

Alpo Petfoods, Inc. v. *Ralston Purina Co.*, 913 F. 2d 958, 963–964, n. 6 (CADC 1990) (Thomas, J.).

Thus, as it comes to us, the gravamen of respondents' claim is that, in marketing and selling Campaigns as its own product without acknowledging its nearly wholesale reliance on the Crusade television series, Dastar has made a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods." § 43(a). See, *e. g.*, Brief for Respondents 8, 11. That claim would undoubtedly be sustained if Dastar had bought some of New Line's Crusade videotapes and merely repackaged them as its own. Dastar's alleged wrongdoing, however, is vastly different: It took a creative work in the public domain—the Crusade television series—copied it, made modifications (arguably minor), and produced its very own series of videotapes. If "origin" refers only to the manufacturer or producer of the physical "goods" that are made available to the public (in this case the videotapes), Dastar was the origin. If, however, "origin" includes the creator of the underlying work that Dastar copied, then someone else (perhaps Fox) was the origin of Dastar's product. At bottom, we must decide what § 43(a)(1)(A) of the Lanham Act means by the "origin" of "goods."

III

The dictionary definition of "origin" is "[t]he fact or process of coming into being from a source," and "[t]hat from which anything primarily proceeds; source." Webster's New International Dictionary 1720–1721 (2d ed. 1949). And the dictionary definition of "goods" (as relevant here) is "[w]ares; merchandise." *Id.*, at 1079. We think the most natural understanding of the "origin" of "goods"—the source of wares—is the producer of the tangible product sold in the marketplace, in this case the physical Campaigns videotape sold by Dastar. The concept might be stretched (as it was

under the original version of § 43(a))[5] to include not only the actual producer, but also the trademark owner who commissioned or assumed responsibility for ("stood behind") production of the physical product. But as used in the Lanham Act, the phrase "origin of goods" is in our view incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.

Section 43(a) of the Lanham Act prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill. It forbids, for example, the Coca-Cola Company's passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product. But the brand-loyal consumer who prefers the drink that the Coca-Cola Company or PepsiCo sells, while he believes that that company produced (or at least stands behind the production of) that product, surely does not necessarily believe that that company was the "origin" of the drink in the sense that it was the very first to devise the formula. The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is. The words of the Lan-

[5] Under the 1946 version of the Act, § 43(a) was read as providing a cause of action for trademark infringement even where the trademark owner had not itself produced the goods sold under its mark, but had licensed others to sell under its name goods produced by them—the typical franchise arrangement. See, *e. g.*, *My Pie Int'l, Inc.* v. *Debould, Inc.*, 687 F. 2d 919 (CA7 1982). This stretching of the concept "origin of goods" is seemingly no longer needed: The 1988 amendments to § 43(a) now expressly prohibit the use of any "word, term, name, symbol, or device," or "false or misleading description of fact" that is likely to cause confusion as to "affiliation, connection, or association . . . with another person," or as to "sponsorship, or approval" of goods. 15 U. S. C. § 1125(a).

ham Act should not be stretched to cover matters that are typically of no consequence to purchasers.

It could be argued, perhaps, that the reality of purchaser concern is different for what might be called a communicative product—one that is valued not primarily for its physical qualities, such as a hammer, but for the intellectual content that it conveys, such as a book or, as here, a video. The purchaser of a novel is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author). And the author, of course, has at least as much interest in avoiding passing off (or reverse passing off) of his creation as does the publisher. For such a communicative product (the argument goes) "origin of goods" in § 43(a) must be deemed to include not merely the producer of the physical item (the publishing house Farrar, Straus and Giroux, or the video producer Dastar) but also the creator of the content that the physical item conveys (the author Tom Wolfe, or—assertedly—respondents).

The problem with this argument according special treatment to communicative products is that it causes the Lanham Act to conflict with the law of copyright, which addresses that subject specifically. The right to copy, and to copy without attribution, once a copyright has expired, like "the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230 (1964); see also *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 121–122 (1938). "In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying." *TrafFix Devices, Inc.* v. *Marketing Displays, Inc.*, 532 U. S. 23, 29 (2001). The rights of a patentee or copyright holder are part of a "carefully crafted bargain," *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 150–151 (1989), under which, once the patent or copy-

right monopoly has expired, the public may use the invention or work at will and without attribution. Thus, in construing the Lanham Act, we have been "careful to caution against misuse or over-extension" of trademark and related protections into areas traditionally occupied by patent or copyright. *TrafFix*, 532 U. S., at 29. "The Lanham Act," we have said, "does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity." *Id.*, at 34. Federal trademark law "has no necessary relation to invention or discovery," *Trade-Mark Cases*, 100 U. S. 82, 94 (1879), but rather, by preventing competitors from copying "a source-identifying mark," "reduce[s] the customer's costs of shopping and making purchasing decisions," and "helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product," *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 163–164 (1995) (internal quotation marks and citation omitted). Assuming for the sake of argument that Dastar's representation of itself as the "Producer" of its videos amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under § 43(a) for that representation would create a species of mutant copyright law that limits the public's "federal right to 'copy and to use' " expired copyrights, *Bonito Boats*, *supra*, at 165.

When Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of "origin." The Visual Artists Rights Act of 1990, § 603(a), 104 Stat. 5128, provides that the author of an artistic work "shall have the right . . . to claim authorship of that work." 17 U. S. C. § 106A(a)(1)(A). That express right of attribution is carefully limited and focused: It attaches only to specified "work[s] of visual art," § 101, is personal to the artist, §§ 106A(b) and (e), and endures only for "the life of the au-

thor," § 106A(d)(1). Recognizing in § 43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided. *E. g., Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837, and n. 11 (1988).

Reading "origin" in § 43(a) to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word "origin" has no discernable limits. A video of the MGM film Carmen Jones, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of "origin" would be no simple task. Indeed, in the present case it is far from clear that respondents have that status. Neither SFM nor New Line had anything to do with the production of the Crusade television series—they merely were licensed to distribute the video version. While Fox might have a claim to being in the line of origin, its involvement with the creation of the television series was limited at best. Time, Inc., was the principal, if not the exclusive, creator, albeit under arrangement with Fox. And of course it was neither Fox nor Time, Inc., that shot the film used in the Crusade television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified "Newsreel Pool Cameramen." If anyone has a claim to being the *original* creator of the material used in both the Crusade television series and the Campaigns videotapes, it would be those groups, rather than Fox. We do not

think the Lanham Act requires this search for the source of the Nile and all its tributaries.

Another practical difficulty of adopting a special definition of "origin" for communicative products is that it places the manufacturers of those products in a difficult position. On the one hand, they would face Lanham Act liability for *failing* to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for *crediting* the creator if that should be regarded as implying the creator's "sponsorship or approval" of the copy, 15 U. S. C. § 1125(a)(1)(A). In this case, for example, if Dastar had simply "copied [the television series] as Crusade in Europe and sold it as Crusade in Europe," without changing the title or packaging (including the original credits to Fox), it is hard to have confidence in respondents' assurance that they "would not be here on a Lanham Act cause of action," Tr. of Oral Arg. 35.

Finally, reading § 43(a) of the Lanham Act as creating a cause of action for, in effect, plagiarism—the use of otherwise unprotected works and inventions without attribution—would be hard to reconcile with our previous decisions. For example, in *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205 (2000), we considered whether product-design trade dress can ever be inherently distinctive. Wal-Mart produced "knockoffs" of children's clothes designed and manufactured by Samara Brothers, containing only "minor modifications" of the original designs. *Id.*, at 208. We concluded that the designs could not be protected under § 43(a) without a showing that they had acquired "secondary meaning," *id.*, at 214, so that they "'identify the source of the product rather than the product itself,'" *id.*, at 211 (quoting *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 851, n. 11 (1982)). This carefully considered limitation would be entirely pointless if the "original" producer could turn around and pursue a reverse-passing-off claim under exactly the same provision of the Lanham Act. Sa-

mara would merely have had to argue that it was the "origin" of the designs that Wal-Mart was selling as its own line. It was not, because "origin of goods" in the Lanham Act referred to the producer of the clothes, and not the producer of the (potentially) copyrightable or patentable designs that the clothes embodied.

Similarly under respondents' theory, the "origin of goods" provision of § 43(a) would have supported the suit that we rejected in *Bonito Boats*, 489 U. S. 141, where the defendants had used molds to duplicate the plaintiff's unpatented boat hulls (apparently without crediting the plaintiff). And it would have supported the suit we rejected in *TrafFix*, 532 U. S. 23: The plaintiff, whose patents on flexible road signs had expired, and who could not prevail on a trade-dress claim under § 43(a) because the features of the signs were functional, would have had a reverse-passing-off claim for unattributed copying of his design.

In sum, reading the phrase "origin of goods" in the Lanham Act in accordance with the Act's common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. Cf. 17 U. S. C. § 202 (distinguishing between a copyrighted work and "any material object in which the work is embodied"). To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do. See *Eldred* v. *Ashcroft*, 537 U. S. 186, 208 (2003).

The creative talent of the sort that lay behind the Campaigns videos is not left without protection. The original film footage used in the Crusade television series could have been copyrighted, see 17 U. S. C. § 102(a)(6), as was copyrighted (as a compilation) the Crusade television series, even though it included material from the public domain, see

§ 103(a). Had Fox renewed the copyright in the Crusade television series, it would have had an easy claim of copyright infringement. And respondents' contention that Campaigns infringes Doubleday's copyright in General Eisenhower's book is still a live question on remand. If, moreover, the producer of a video that substantially copied the Crusade series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more of the respondents might have a cause of action—not for reverse passing off under the "confusion . . . as to the origin" provision of § 43(a)(1)(A), but for misrepresentation under the "misrepresents the nature, characteristics [or] qualities" provision of § 43(a)(1)(B). For merely saying it is the producer of the video, however, no Lanham Act liability attaches to Dastar.

* * *

Because we conclude that Dastar was the "origin" of the products it sold as its own, respondents cannot prevail on their Lanham Act claim. We thus have no occasion to consider whether the Lanham Act permitted an award of double petitioner's profits. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

ENTERGY LOUISIANA, INC. *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 02–299. Argued April 28, 2003—Decided June 2, 2003

The Federal Energy Regulatory Commission (FERC), which regulates the sale of electricity at wholesale in interstate commerce, must ensure that wholesale rates are "just and reasonable," 16 U. S. C. § 824d(a). Under the filed rate doctrine, FERC-approved cost allocations between affiliated energy companies may not be subjected to reevaluation in state ratemaking proceedings. *Nantahala Power & Light Co.* v. *Thornburg,* 476 U. S. 953; *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* 487 U. S. 354 *(MP&L).* Petitioner Entergy Louisiana, Inc. (ELI), one of five public utilities owned by Entergy Corporation (Entergy), shares capacity with its corporate siblings in other States, which allows each company to access additional capacity when demand exceeds the supply generated by that company alone. The resulting costs are allocated among the companies; and that allocation is critical to the setting of retail rates by state regulators, such as respondent Louisiana Public Service Commission (LPSC). Entergy allocates costs through a tariff approved by FERC called the system agreement. Service Schedule MSS–1, which is included in the system agreement, provides a formula under which those companies that use more capacity than they contribute make payments to companies that contribute more than their fair share of capacity. ELI has typically made, rather than received, MSS–1 payments. In the 1980's, the operating committee initiated the Extended Reserve Shutdown (ERS) program, which responded to systemwide overcapacity by allowing some generating units not immediately necessary for capacity needs to be effectively mothballed. Because ERS units could be reactivated if needed, they were considered available for purposes of calculating MSS–1 payments. On August 5, 1997, FERC found that Entergy had violated the system agreement in classifying ERS units as available, but determined that a refund was not due to ELI customers as a result of MSS–1 overpayments by ELI to other operating companies. FERC also approved an amendment to the system agreement allowing an ERS unit to be treated as available under MSS–1 if the operating committee determines it intends to return the unit to service at a future date. In 1997, ELI made its annual retail rate filing with the LPSC. One of the contested issues in this proceeding was whether the cost of ERS units should be

considered in setting ELI's retail rates. Confining its review to MSS–1 payments made after August 5, 1997, the LPSC concluded that it was not pre-empted from disallowing MSS–1 related costs as imprudent subsequent to that date. Thus, ELI was not permitted to charge retail rates that reflected the cost of its MSS–1 payments. The State District Court denied ELI's petition for review, and the State Supreme Court upheld the LPSC's decision.

Held: Nantahala and *MP&L* rest on a foundation that is broad enough to require pre-emption of the LPSC's order. Pp. 47–51.

(a) The filed rate doctrine requires "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates," *Nantahala*, *supra*, at 962. In *Nantahala* and *MP&L*, this Court applied the doctrine to hold that FERC-mandated cost allocations could not be second-guessed by state regulators. The state order in *Nantahala*, which involved two corporate siblings, allocated more of Nantahala's purchases to low-cost power than the proportion approved by FERC. By requiring Nantahala to calculate its rates as if it needed to procure less high-cost power than under FERC's order, the state order "trapped" a portion of the costs incurred by Nantahala in procuring its power. This ran counter to the rationale for FERC approval of cost allocations because, when costs under a FERC tariff are categorically excluded from consideration in retail rates, the regulated entity cannot fully recover its costs of purchasing at the FERC-approved rate. In *MP&L*, the Court concluded that, contrary to the Mississippi Supreme Court's ruling, the pre-emptive effect of FERC jurisdiction does not turn on whether a particular matter was actually determined in FERC proceedings. Pp. 47–49.

(b) Applying *Nantahala* and *MP&L* here, the LPSC order impermissibly "traps" costs that have been allocated in a FERC tariff. That the operating committee has discretion to classify ERS units, while *Nantahala* and *MP&L* involved specific mandates, does not provide room for the LPSC's imprudence finding. The Federal Power Act specifically allows for the use of automatic adjustment clauses, and MSS–1 constitutes such a clause. The Louisiana Supreme Court's other basis for upholding the LPSC's order—that FERC had not specifically approved the MSS–1 cost allocation after August 5—revives precisely the same erroneous reasoning advanced by the Mississippi Supreme Court in *MP&L*. It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom the classification should be made. Because the amended system agreement clearly does so, the LPSC's second-guessing of the

classification here is pre-empted. Finally, respondents advance the contention that including ERS units in MSS–1 calculations violated the amended agreement despite the LPSC's own prior holding that it does not have jurisdiction to determine whether the agreement was violated and the State Supreme Court's acceptance of that concession. The question here is whether the LPSC order is pre-empted under *Nantahala* and *MP&L;* that order does not rest on a finding that the system agreement was violated. Consequently, this Court has no occasion to address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated. Pp. 49–51.

815 So. 2d 27, reversed.

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

David W. Carpenter argued the cause for petitioner. With him on the briefs were *Virginia A. Seitz*, *J. Wayne Anderson*, and *Kathryn Ann Washington.*

Austin C. Schlick argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Kneedler*, *Cynthia A. Marlette*, and *Dennis Lane.*

Michael R. Fontham argued the cause for respondents. With him on the brief were *Paul L. Zimmering*, *Noel J. Darce*, *Dana M. Shelton*, and *Jason M. Bilbe.**

JUSTICE THOMAS delivered the opinion of the Court.

The Federal Energy Regulatory Commission (FERC) regulates the sale of electricity at wholesale in interstate commerce. 16 U. S. C. § 824(b). In this capacity, FERC must ensure that wholesale rates are "just and reasonable," § 824d(a). In *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354 (1988) *(MP&L)*, the Court concluded that, under the filed rate doctrine, FERC-approved cost allocations between affiliated energy compa-

**Charles G. Cole*, *Edward H. Comer*, and *Barbara A. Hindin* filed a brief for Edison Electric Institute as *amicus curiae* urging reversal.

nies may not be subjected to reevaluation in state ratemaking proceedings. We consider today whether a FERC tariff that delegates discretion to the regulated entity to determine the precise cost allocation similarly pre-empts an order that adjudges those costs imprudent.

I

Petitioner Entergy Louisiana, Inc. (ELI), is one of five public utilities owned by Entergy Corporation (Entergy), a multistate holding company. ELI operates in the State of Louisiana and shares capacity with its corporate siblings operating in Arkansas, Mississippi, and Texas (collectively, the operating companies). This sharing arrangement allows each operating company to access additional capacity when demand exceeds the supply generated by that company alone. But keeping excess capacity available for use by all is a benefit shared by the operating companies, and the costs associated with this benefit must be allocated among them. State regulators establish the rates each operating company may charge in its retail sales, allowing each company to recover its costs and a reasonable rate of return. Thus, the cost allocation between operating companies is critical to the setting of retail rates.

Entergy allocates costs through the system agreement, a tariff approved by FERC under § 205 of the Federal Power Act (FPA), 41 Stat. 1063, 16 U. S. C. § 824d. The system agreement is administered by the Entergy operating committee, which includes one representative from each operating company and one from Entergy Services, a subsidiary of Entergy that provides administrative services to the system. Service Schedule MSS–1, which is included as § 10 of the system agreement, allows for cost equalization of shared capacity through a formula that dictates that those operating companies contributing less than their fair share, *i. e.*, using more capacity than they contribute, make payments to the others

that contribute more than their fair share of capacity.[1] Those making such payments are known as "short" companies, and those accepting the payments are known as "long" companies. Each operating company's capability is determined monthly, and payments are made on a monthly basis—a long company receives a payment equal to its average cost of generating units multiplied by the number of megawatts the company is long. Because the variables that determine the MSS–1 cost allocation can change monthly, Service Schedule MSS–1 is an automatic adjustment clause under § 205(f) of the FPA, 16 U. S. C. § 824d(f),[2] which exempts it from the FPA's ordinary requirements for tariff changes.

In order to determine whether an operating company is long or short in a given month, one must know how much capacity that operating company is making available to its siblings. The question is not as easy as asking whether the generating facilities are on or off, however, because in the mid-1980's the operating committee initiated the Extended Reserve Shutdown (ERS) program. Responding to system-wide overcapacity, ERS allowed some generating units to be identified as not immediately necessary for capacity needs and effectively mothballed. However, these units could be activated if demand increased, meaning that the capacity they represented was not forever placed out of reach of the operating companies. As a result, ERS units were considered "available" for purposes of calculating MSS–1 cost equalization payments. Counting ERS units as available

[1] Where, as here, public utilities share capacity, the allocation of costs of maintaining capacity and generating power constitutes "the sale of electric energy at wholesale in interstate commerce." 16 U. S. C. § 824(b)(1).

[2] Section 824d(f)(4) provides the definition of "automatic adjustment clause":

"a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate."

has generally had the effect of making ELI, already a short company, even more short, thus increasing its cost equalization payments.

In December 1993, FERC initiated a proceeding under § 206 of the FPA, 16 U. S. C. § 824e, to decide whether the system agreement permitted ERS units to be treated as available. Respondent Louisiana Public Service Commission (LPSC), which regulates ELI's retail rates in Louisiana, participated in the FERC proceeding and argued that customers of ELI were entitled to a refund as a result of MSS–1 overpayments made by ELI after the alleged misclassification of ERS units as available. FERC agreed that Entergy had violated the system agreement in its classification of ERS units as available, but determined that a refund was not supported by the equities because the resultant cost allocations, while violative of the tariff, were not unjust, unreasonable, or unduly discriminatory. *Entergy Servs., Inc.*, 80 FERC ¶ 61,197, pp. 61,786–61,788 (1997) (Order No. 415). FERC also approved, over the objection of the LPSC, an amendment to the system agreement that allows an ERS unit to be treated as available under MSS–1 if the operating committee determines it intends to return the unit to service at a future date.[3] The Court of Appeals for the District of

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[3] Section 10.02 of the system agreement, as amended on August 5, 1997, pursuant to FERC Order No. 415 provides:

"A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service." 80 FERC, at 61,788–61,789 (emphasis deleted).

Columbia Circuit denied the LPSC's petition for review of FERC Order No. 415. *Louisiana Public Service Comm'n* v. *FERC*, 174 F. 3d 218 (1999). With respect to the amendment, the Court of Appeals found that "FERC understandably concluded that [it] set out the parameters of the operating committee's discretion, and that discriminatory implementation of the amendment could be remedied in a proceeding under FPA § 206." *Id.*, at 231.

ELI made its annual retail rate filing with the LPSC in May 1997. One of the contested issues was "whether payments under the System Agreement for the cost of generating units in Extended Reserve Shutdown should be included or excluded from ELI's revenue requirement." App. to Pet. for Cert. 25a. Given FERC's determination that the inclusion of ERS units as available prior to August 5, 1997 (the date FERC Order No. 415 issued), was just and reasonable, the LPSC confined its review to MSS–1 payments made after August 5, 1997. Its own staff argued before the LPSC that after August 5, 1997, ELI and the operating committee violated *amended* § 10.02(a) of the operating agreement by continuing to count ERS units as available. The LPSC concluded, however, that it was "pre-empted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview." *Id.*, at 64a.

Nevertheless, the LPSC held that it was not pre-empted from disallowing MSS–1-related costs as imprudent subsequent to August 5, 1997:

> "[T]hough FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement. In the absence of such FERC determination, this Commission can scrutinize the prudence of the Operating Committee's decision

> without violating the [S]upremacy [C]lause insofar as that decision affects retail rates." *Id.*, at 65a.

The LPSC concluded that the operating committee's treatment of ERS units after August 5, 1997, was imprudent and that ELI's MSS–1 payments would not be considered when setting ELI's retail rates in Louisiana. In other words, though ELI made the MSS–1 payments to its "long" corporate siblings, it would not be allowed to recoup those costs in its retail rates.[4]

ELI petitioned for review of the LPSC's decision in State District Court. That petition was denied, and ELI appealed to the Supreme Court of Louisiana, which upheld the LPSC's decision. 2001–1725 (La. 4/3/02), 815 So. 2d 27. The Supreme Court of Louisiana held that the LPSC's order was not barred by federal pre-emption because the LPSC was not "attempting to regulate interstate wholesale rates" or "challeng[ing] the validity of the FERC's declination to order refunds of amounts paid in violation of the System Agreement prior to the amendment." *Id.*, at 38. Further, the court reasoned, "FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units [after August 5, 1997, was] a prudent one" or made "it mandatory for the [operating committee] to include the ERS units in its MSS–1 calculations." *Ibid.*

We granted ELI's petition for writ of certiorari to address whether the Court's decisions in *Nantahala* and *MP&L* lead to federal pre-emption of the LPSC's order. 537 U. S. 1152 (2003). We hold that *Nantahala* and *MP&L* "res[t] on a foundation that is broad enough," *MP&L*, 487 U. S., at 369, to require pre-emption of the order in this case.

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[4] The MSS–1 payments that were disallowed were, in fact, those made in 1996, which were to be used in calculating 1997–1998 retail rates by the LPSC. App. to Pet. for Cert. 76a.

II

A

The filed rate doctrine requires "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala*, 476 U. S., at 962. When the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 581–582 (1981).

In *Nantahala* and *MP&L*, the Court applied the filed rate doctrine to hold that FERC-mandated cost allocations could not be second-guessed by state regulators. *Nantahala* involved two corporate siblings, Nantahala Power & Light Company and Tapoco, Inc., the former of which served retail customers in North Carolina. Both Nantahala and Tapoco provided power to the Tennessee Valley Authority (TVA), which in turn sold power back to them pursuant to an agreement between all three parties. But the power was not purchased at a uniform price. Low-cost power was made available to both Nantahala and Tapoco in consideration for the right to pour all of their power into the TVA grid. This low-cost power was apportioned 80% to Tapoco, which served exclusively the corporate parent of Tapoco and Nantahala, and 20% to Nantahala. Nantahala purchased the remainder of its power requirements at higher prices. FERC approved this cost allocation with a slight modification, so that Nantahala received 22.5% of the low-cost entitlement power. However, the North Carolina Supreme Court upheld the North Carolina Utilities Commission's (NCUC) determination that Nantahala's share of the low-cost power was properly 24.5%. This resulted in a lower cost computation for Nantahala, and therefore lower rates for North Carolina retail customers, than would have obtained if FERC's cost allocation had been respected by NCUC.

This Court held that the state cost allocation order was pre-empted:

> "Nantahala must under NCUC's order calculate its retail rates as if it received more entitlement power than it does under FERC's order, and as if it needed to procure less of the more expensive purchased power than under FERC's order. A portion of the costs incurred by Nantahala in procuring its power is therefore 'trapped.'" 476 U. S., at 971.

Trapping of costs "runs directly counter," *id.*, at 968, to the rationale for FERC approval of cost allocations, the Court concluded, because when costs under a FERC tariff are categorically excluded from consideration in retail rates, the regulated entity "cannot fully recover its costs of purchasing at the FERC-approved rate . . . ," *id.*, at 970.

In *MP&L*, the Court further defined the scope of filed rate doctrine pre-emption in the cost allocation context. Predecessors of the operating companies concerned here were jointly involved in the construction of the Grand Gulf nuclear power plant in Mississippi. The costs of the project turned out to be significantly higher than had been originally planned, and as a result the wholesale cost of power generated at Grand Gulf was much higher than power available from other system generating units. But the high fixed costs of building Grand Gulf had to be recouped, and the operating companies agreed that each of them would purchase a specific proportion of the high-cost power generated at Grand Gulf. The original allocation was challenged before FERC, which ultimately approved a modified tariff. That tariff required Mississippi Power and Light (MP&L, now Entergy Mississippi) to purchase 33% of the power produced at Grand Gulf.

Mississippi regulators allowed MP&L to pass along these costs to consumers through retail rate increases. The Mississippi Supreme Court, however, reasoned that "FERC's de-

termination that MP&L's assumption of a 33% share of the costs associated with Grand Gulf would be fair to its sister operating companies did not obligate the State to approve a pass-through of those costs to state consumers without a prudence review." *MP&L*, 487 U. S., at 367. The Mississippi Supreme Court distinguished *Nantahala* by limiting the scope of its holding to "matters *actually determined*, whether expressly or impliedly, by the FERC." *Mississippi ex rel. Pittman* v. *Mississippi Public Service Comm'n*, 506 So. 2d 978, 986 (Miss. 1987) (citation omitted).

This Court disagreed, holding that the state court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." *MP&L*, 487 U. S., at 374. Although FERC had not explicitly held that the construction of Grand Gulf was prudent, the cost allocation filed with FERC pre-empted any state prudence review, because "if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *Ibid.*

B

Applying *Nantahala* and *MP&L* to the facts of this case, we conclude that the LPSC's order impermissibly "traps" costs that have been allocated in a FERC tariff. The amended system agreement differs from the tariffs in *MP&L* and *Nantahala* because it leaves the classification of ERS units to the discretion of the operating committee, whereas in *Nantahala* and *MP&L* the cost allocations were specific mandates. The Louisiana Supreme Court concluded that this delegated discretion provided room for the LPSC's finding of imprudence where a mandated cost allocation would not. However, Congress has specifically allowed for the use of automatic adjustment clauses in the FPA, and it is uncontested that the MSS–1 schedule constitutes such an

automatic adjustment clause. We see no reason to create an exception to the filed rate doctrine for tariffs of this type that would substantially limit FERC's flexibility in approving cost allocation arrangements.

The Louisiana Supreme Court's other basis for upholding the LPSC's order was that FERC had not specifically approved the MSS–1 cost allocation after August 5, 1997, when it issued Order No. 415. See 815 So. 2d, at 38 ("The FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one"). In so holding, the Louisiana Supreme Court revived precisely the same erroneous reasoning that was advanced by the Mississippi Supreme Court in *MP&L*. There this Court noted that the "view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings" has been "long rejected." *MP&L*, *supra*, at 374. It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom that classification should be made. The amended system agreement clearly does so, and therefore the LPSC's second-guessing of the classification of ERS units is pre-empted.

Finally, we address respondents' contention that the inclusion of ERS units in MSS–1 calculations was a violation of the amended system agreement and that, consequently, the LPSC's order is shielded from federal pre-emption. Curiously, respondents advance this argument here despite the LPSC's own prior holding that it does not have jurisdiction to determine whether the system agreement was violated and the Louisiana Supreme Court's acceptance of that concession. See App. to Pet. for Cert. 64a; 815 So. 2d, at 35–36. ELI and the United States maintain that the LPSC was correct when it initially held that FERC has exclusive jurisdiction to determine whether a FERC tariff has been violated and that state regulatory agencies may not, consistent with the FPA, disallow costs based on their own assessment of

noncompliance with a FERC tariff. But the question before us is whether the LPSC's order is pre-empted under *Nantahala* and *MP&L*, and that order does not rest on a finding that the system agreement was violated. The LPSC's express statement that it had no jurisdiction to conclude that there had been a violation of the system agreement confirms this. Consequently, we have no occasion to address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated.

For the foregoing reasons, the judgment of the Louisiana Supreme Court is reversed.

It is so ordered.

Syllabus

THE CITIZENS BANK *v.* ALAFABCO, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 02–1295. Decided June 2, 2003

Respondents Alafabco, Inc., and its officers filed suit in Alabama Circuit Court, alleging that Alafabco had incurred massive debt because petitioner bank had unlawfully reneged on an agreement to provide capital sufficient to complete a specific building project. The bank moved to compel arbitration as provided in the parties' debt-restructuring agreements. The court ordered respondents to submit to arbitration, but the State Supreme Court reversed, finding that, because the agreements had no substantial effect on interstate commerce, there was an insufficient nexus with such commerce to establish Federal Arbitration Act (FAA) coverage of the parties' dispute.

Held: There is sufficient nexus with interstate commerce to make the arbitration provision enforceable under the FAA. By applying to a contract "evidencing a transaction involving commerce," 9 U. S. C. § 2, the FAA provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," *Perry* v. *Thomas*, 482 U. S. 483, 490. It is thus perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce." Although the debt-restructuring agreements were executed in Alabama by Alabama residents, they nonetheless satisfy the FAA's "involving commerce" test. First, Alafabco engaged in business throughout the southeastern United States, using substantial loans from the bank that were renegotiated and redocumented in the debt-restructuring agreements. Second, the restructured debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. Third, commercial lending has a broad impact on the national economy. The Alabama Supreme Court's cramped view of Congress' Commerce Clause power appears to rest on a misreading of *United States* v. *Lopez*, 514 U. S. 549, which does not suggest that limits on the power to regulate commerce are breached by applying the FAA to disputes arising out of commercial loan transactions such as these.

Certiorari granted; reversed and remanded.

PER CURIAM.

The question presented is whether the parties' debt-restructuring agreement is "a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA). 9 U. S. C. § 2. As we concluded in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995), there is a sufficient nexus with interstate commerce to make enforceable, pursuant to the FAA, an arbitration provision included in that agreement.

I

Petitioner The Citizens Bank—an Alabama lending institution—seeks to compel arbitration of a financial dispute with respondents Alafabco, Inc.—an Alabama fabrication and construction company—and its officers. According to a complaint filed by respondents in Alabama state court, the dispute among the parties arose out of a series of commercial loan transactions made over a decade-long course of business dealings. In 1986, the complaint alleges, the parties entered into a quasi-contractual relationship in which the bank agreed to provide operating capital necessary for Alafabco to secure and complete construction contracts. That relationship began to sour in 1998, when the bank allegedly encouraged Alafabco to bid on a large construction contract in Courtland, Alabama, but refused to provide the capital necessary to complete the project. In order to compensate for the bank's alleged breach of the parties' implied agreement, Alafabco completed the Courtland project with funds that would otherwise have been dedicated to repaying existing obligations to the bank. Alafabco in turn became delinquent in repaying those existing obligations.

On two occasions, the parties attempted to resolve the outstanding debts. On May 3, 1999, Alafabco and the bank executed "'renewal notes'" in which all previous loans were

restructured and redocumented. 872 So. 2d 798 (Ala. 2002). The debt-restructuring arrangement included an arbitration agreement covering " 'all disputes, claims, or controversies.' " That agreement provided that the FAA " 'shall apply to [its] construction, interpretation, and enforcement.' " *Id.*, at 799. Alafabco defaulted on its obligations under the renewal notes and sought bankruptcy protection in federal court in September 1999.

In return for the dismissal of Alafabco's bankruptcy petition, the bank agreed to renegotiate the outstanding loans in a second debt-restructuring agreement. On December 10, 1999, the parties executed new loan documents encompassing Alafabco's entire outstanding debt, approximately $430,000, which was secured by a mortgage on commercial real estate owned by the individual respondents, by Alafabco's accounts receivable, inventory, supplies, fixtures, machinery, and equipment, and by a mortgage on the house of one of the individual respondents. *Id.*, at 800. As part of the second debt-restructuring agreement, the parties executed an arbitration agreement functionally identical to that of May 3, 1999.

Within a year of the December 1999 debt restructuring, Alafabco brought suit in the Circuit Court of Lawrence County, Alabama, against the bank and its officers. Alafabco alleged, among other causes of action, breach of contract, fraud, breach of fiduciary duties, intentional infliction of emotional distress, and interference with a contractual or business relationship. Essentially, the suit alleged that Alafabco detrimentally " 'incur[red] massive debt' " because the bank had unlawfully reneged on its agreement to provide capital sufficient to complete the Courtland project. *Id.*, at 799. Invoking the arbitration agreements, the bank moved to compel arbitration of the parties' dispute. The Circuit Court ordered respondents to submit to arbitration in accordance with the arbitration agreements.

The Supreme Court of Alabama reversed over Justice See's dissent. Applying a test it first adopted in *Sisters of the Visitation* v. *Cochran Plastering Co.*, 775 So. 2d 759 (2000), the court held that the debt-restructuring agreements were the relevant transactions and proceeded to determine whether those transactions, by themselves, had a "substantial effect on interstate commerce." 872 So. 2d, at 801, 803. Because there was no showing "that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects," *id.*, at 805, the court found an insufficient nexus with interstate commerce to establish FAA coverage of the parties' dispute.

Justice See in dissent explained why, in his view, the court had erred by using the test formulated in *Sisters of the Visitation*, in which the Supreme Court of Alabama read this Court's opinion in *United States* v. *Lopez*, 514 U. S. 549 (1995), to require that "a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce." 872 So. 2d, at 808. Rejecting that stringent test and assessing the evidence with a more generous view of the necessary effect on interstate commerce, Justice See would have found that the bank's loans to Alafabco satisfied the FAA's "involving commerce" requirement.

II

The FAA provides that a

> "written provision in any maritime transaction or a contract *evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall

> be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2 (emphasis added).

The statute further defines "commerce" to include "commerce among the several States." § 1. Echoing Justice See's dissenting opinion, petitioner contends that the decision below gives inadequate breadth to the "involving commerce" language of the statute. We agree.

We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. *Allied-Bruce Terminix Cos.*, 513 U. S., at 273–274. Because the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," *Perry* v. *Thomas*, 482 U. S. 483, 490 (1987), it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"—that is, "within the flow of interstate commerce," *Allied-Bruce Terminix Cos.*, *supra*, at 273 (internal quotation marks, citation, and emphasis omitted).

The Supreme Court of Alabama was therefore misguided in its search for evidence that a "portion of the restructured debt was actually attributable to interstate transactions" or that the loans "originated out-of-state" or that "the restructured debt was inseparable from any out-of-state projects." 872 So. 2d, at 805. Such evidence might be required if the FAA were restricted to transactions actually "'in commerce,'" *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195–196 (1974), but, as we have explained, that is not the limit of the FAA's reach.

Nor is application of the FAA defeated because the individual debt-restructuring transactions, taken alone, did not have a "substantial effect on interstate commerce." 872 So. 2d, at 803. Congress' Commerce Clause power "may be exercised in individual cases without showing any

specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). See also *Perez* v. *United States*, 402 U. S. 146, 154 (1971); *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942). Only that general practice need bear on interstate commerce in a substantial way. *Maryland* v. *Wirtz*, 392 U. S. 183, 196–197, n. 27 (1968); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37–38 (1937).

This case is well within our previous pronouncements on the extent of Congress' Commerce Clause power. Although the debt-restructuring agreements were executed in Alabama by Alabama residents, they nonetheless satisfy the FAA's "involving commerce" test for at least three reasons. First, Alafabco engaged in business throughout the southeastern United States using substantial loans from the bank that were renegotiated and redocumented in the debt-restructuring agreements. Indeed, the gravamen of Alafabco's state-court suit was that it had incurred "'massive debt'" to the bank in order to keep its business afloat, and the bank submitted affidavits of bank officers establishing that its loans to Alafabco had been used in part to finance large construction projects in North Carolina, Tennessee, and Alabama.

Second, the restructured debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach* v. *McClung*, 379 U. S. 294, 304–305 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods.

Third, were there any residual doubt about the magnitude of the impact on interstate commerce caused by the particu-

lar economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the "general practice" those transactions represent. *Mandeville Island Farms*, *supra*, at 236. No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 38–39 (1980) ("[B]anking and related financial activities are of profound local concern. . . . Nonetheless, it does not follow that these same activities lack important interstate attributes"); *Perez*, *supra*, at 154–155 ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce").

The decision below therefore adheres to an improperly cramped view of Congress' Commerce Clause power. That view, first announced by the Supreme Court of Alabama in *Sisters of the Visitation* v. *Cochran Plastering Co.*, 775 So. 2d 759 (2000), appears to rest on a misreading of our decision in *United States* v. *Lopez*, 514 U. S. 549 (1995). *Lopez* did not restrict the reach of the FAA or implicitly overrule *Allied-Bruce Terminix Cos.*—indeed, we did not discuss that case in *Lopez*. Nor did *Lopez* purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity such as the debt-restructuring agreements before us now. 514 U. S., at 561. To be sure, "the power to regulate commerce, though broad indeed, has limits," *Maryland* v. *Wirtz*, *supra*, at 196, but nothing in our decision in *Lopez* suggests that those limits are breached by applying the FAA to disputes arising out of the commercial loan transactions in this case.

Accordingly, the petition for writ of certiorari is granted, the judgment of the Supreme Court of Alabama is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

HILLSIDE DAIRY INC. ET AL. *v.* LYONS, SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

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

No. 01–950. Argued April 22, 2003—Decided June 9, 2003*

In most of the country, but not California, the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders, which guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. California has adopted a similar, although more complex, program to regulate the minimum prices paid by California processors to California producers. Three state statutes create California's milk marketing structure: 1935 and 1967 Acts establish milk pricing and pooling plans, while a 1947 Act governs the composition of milk products sold in the State. Under the state scheme, California processors of fluid milk pay a premium price (part of which goes into a price equalization pool) that is higher than the prices paid to producers. During the 1990's, it became profitable for some California processors to buy raw milk from out-of-state producers. In 1997, the California Department of Food and Agriculture amended its regulations to require contributions to the price equalization pool on some out-of-state purchases. Petitioners, out-of-state dairy farmers, brought these suits, alleging that the 1997 amendment unconstitutionally discriminates against them. Without reaching the merits, the District Court dismissed both cases. The Ninth Circuit affirmed, holding, *inter alia*, that a 1996 federal statute immunized California's milk pricing and pooling laws from Commerce Clause challenge, and that the individual petitioners' Privileges and Immunities Clause claims failed because the 1997 amendment did not, on its face, create classifications based on any individual's residency or citizenship.

Held:

1. California's milk pricing and pooling regulations are not exempted from Commerce Clause scrutiny by § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U. S. C. § 7254, which provides:

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*Together with No. 01–1018, *Ponderosa Dairy et al.* v. *Lyons, Secretary, California Department of Food and Agriculture, et al.*, also on certiorari to the same court.

Syllabus

"Nothing in this Act . . . shall be construed to . . . limit the authority of . . . California . . . to . . . effect any law . . . regarding . . . the percentage of milk solids or solids not fat in fluid milk products sold . . . in [that] State . . . ; or . . . the labeling of such fluid milk products . . . ." Section 144 plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention pricing laws. This Court will not assume that Congress has authorized state regulations that burden or discriminate against interstate commerce unless such an intent is clearly expressed. *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91. Because § 144 does not express such an intent with respect to California's pricing and pooling laws, the Ninth Circuit erred in relying on that section to dismiss petitioners' Commerce Clause challenge. Pp. 64–66.

2. The Ninth Circuit's rejection of the individual petitioners' Privileges and Immunities Clause claims is inconsistent with *Chalker* v. *Birmingham & Northwestern R. Co.*, 249 U. S. 522, 527, in which this Court held that the practical effect of a Tennessee tax—which did not on its face draw any distinction based on citizenship or residence, but did impose a higher rate on persons having their principal offices out of State—was discriminatory, given that an individual's chief office is commonly in the State of which he is a citizen. In these cases as well, the absence of an express statement in the California laws and regulations identifying out-of-state residency or citizenship as a basis for disparate treatment is not a sufficient basis for rejecting petitioners' claim. In so holding, this Court expresses no opinion on the merits of that claim. Pp. 66–67.

259 F. 3d 1148, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, Parts I and III of which were unanimous, and Part II of which was joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 68.

Roy T. Englert, Jr., argued the cause for petitioners in both cases. With him on the briefs were *Lawrence S. Robbins*, *Charles M. English, Jr.*, *Wendy M. Yoviene*, and *Nicholas C. Geale*.

Barbara McDowell 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*, and *Mark B. Stern*.

Mark J. Urban argued the cause for respondents in both cases. With him on the brief were *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *Bruce F. Reeves* and *Mark J. Urban*, Deputy Attorneys General, and *Andrea Hackett Henningsen*.†

JUSTICE STEVENS delivered the opinion of the Court.

In most of the United States, not including California, the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders. Those orders guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 189, n. 1 (1994).

The California Legislature has adopted a similar program to regulate the minimum prices paid by California processors to California producers. In the cases before us today, out-of-state producers are challenging the constitutionality of a 1997 amendment to that program. They present us with two questions: (1) whether § 144 of the Federal Agriculture

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†Briefs of *amici curiae* urging reversal were filed for the State of Nevada et al. by *Brian Sandoval*, Attorney General of Nevada, and by the Attorneys General for their respective States as follows: *Mike Hatch* of Minnesota, *Mike McGrath* of Montana, *Hardy Myers* of Oregon, *Christine O. Gregoire* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for Continental Dairy Products, Inc., et al. by *Benjamin F. Yale;* and for the Dairy Institute of California by *Thomas S. Knox*.

John J. Vlahos filed a brief for Western United Dairymen as *amicus curiae* urging affirmance.

Improvement and Reform Act of 1996, 110 Stat. 917, 7 U. S. C. § 7254, exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause; and (2) whether the individual petitioners' claim under the Privileges and Immunities Clause is foreclosed because those regulations do not discriminate on their face on the basis of state citizenship or state residence.

I

Government regulation of the marketing of raw milk has been continuous since the Great Depression.[1] In California, three related statutes establish the regulatory structure for milk produced, processed, or sold in California. First, in 1935, the State enacted the Milk Stabilization and Marketing Act, Cal. Food & Agric. Code Ann. §§ 61801–62403 (West 2001), "to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk . . . ." § 61802(h). Then, California created requirements for composition of milk products in the Milk and Milk Products Act of 1947. §§ 32501–39912. The standards created under this Act mandate minimum percentages of fat and solids-not-fat in dairy products and often require fortification of milk by adding solids-not-fat. In 1967, California passed another milk pricing Act, the Gonsalves Milk Pooling Act, §§ 62700–62731, to address deficiencies in the existing pricing scheme. Together, these three Acts (including numerous subsequent revisions) create the state milk marketing structure: The 1935 and 1967 Acts establish the milk pricing and pooling plans, while the 1947 Act governs the composition of milk products sold in California.

While it serves the same purposes as the federal marketing orders, California's regulatory program is more complex.

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[1] The history and purpose of federal regulation of milk marketing is described in some detail in *Zuber* v. *Allen*, 396 U. S. 168, 172–187 (1969).

Federal orders typically guarantee all producers the same minimum price and create only two or three classes of end uses to determine the processors' contributions to, or withdrawals from, the equalization pools, whereas under the California scheme some of the farmers' production commands a "quota price" and some receives a lower "overbase price," and the processors' end uses of the milk are divided into five different classes.

The complexities of the California scheme are not relevant to these cases; what is relevant is the fact California processors of fluid milk pay a premium price (part of which goes into a pool) that is higher than either of the prices paid to the producers.[2] During the early 1990's, market conditions made it profitable for some California processors to buy raw milk from out-of-state producers at prices that were higher than either the quota prices or the overbase prices guaranteed to California farmers yet lower than the premium prices they had to pay when making in-state purchases. The regulatory scheme was at least partially responsible for the advantage enjoyed by out-of-state producers because it did not require the processors to make any contribution to the equalization pool on such purchases. In other words, whereas an in-state purchase of raw milk resold as fluid milk required the processor both to pay a guaranteed minimum to the farmer and also to make a contribution to the pool, an out-of-state purchase at a higher price would often be cheaper because it required no pool contribution.

In 1997, the California Department of Food and Agriculture amended its plan to require that contributions to the

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[2] Because processors of fluid milk typically manufacture some other products as well, their respective pool contributions reflect the relative amounts of those end uses. Each processor's mix of end uses produces an individual monthly "blend price" that is multiplied by its total purchases. Under federal orders the term "blend price" has a different meaning; it usually refers to the price that the producer receives. See *West Lynn Creamery, Inc.* v. *Healy,* 512 U. S. 186, 189, n. 1 (1994).

pool be made on some out-of-state purchases.[3] It is the imposition of that requirement that gave rise to this litigation. Petitioners in No. 01–950 operate dairy farms in Nevada; petitioners in No. 01–1018 operate such farms in Arizona. They contend that the 1997 amendment discriminates against them. In response, the California officials contend that it merely eliminated an unfair competitive advantage for out-of-state producers that was the product of the regulatory scheme itself.

Without reaching the merits of petitioners' constitutional claims, the District Court dismissed both cases and the Court of Appeals for the Ninth Circuit affirmed. 259 F. 3d 1148 (2001). Relying on its earlier decision in *Shamrock Farms Co.* v. *Veneman*, 146 F. 3d 1177 (1998), the court held that a federal statute enacted in 1996 had immunized California's milk pricing and pooling laws from Commerce Clause challenge. It also held that the corporate petitioners had no standing to raise a claim under the Privileges and Immunities Clause, and that the individuals' claim under that Clause failed because the 1997 plan amendments did not, "on their face, create classifications based on any individual's residency or citizenship." 259 F. 3d, at 1156. We granted certiorari to review those two holdings, 537 U. S. 1099 (2003), but in doing so we do not reach the merits of either constitutional claim.

II

In some respects, the State's composition standards set forth in the 1947 Act exceed those set by the federal Food and Drug Administration (FDA). For example, California's minimum standard for reduced fat milk requires that it contain at least 10 percent solids-not-fat (which include protein,

[3] After the 1997 amendment, processors whose blend price exceeds the quota price must make contributions to the pool on their out-of-state purchases as well as their in-state purchases.

calcium, lactose, and other nutrients). Cal. Food & Agric. Code Ann. § 38211 (West 2001). Federal standards require that reduced fat milk contain only 8.25 percent solids-not-fat. See 21 CFR §§ 131.110, 101.62 (2002). Some of California's standards were arguably pre-empted by Congress' enactment of the Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, which contains a prohibition against the application of state quality standards to foods moving in interstate commerce. See 21 U. S. C. § 343–1(a). The District Court so held in *Shamrock Farms Co.* v. *Veneman*, No. Civ–S–95–318 (ED Cal., Sept. 25, 1996). In response to that decision, California sought an exemption from both the FDA and Congress. See *Shamrock Farms*, 146 F. 3d, at 1180. Before the FDA acted, Congress responded favorably with the enactment of the statute that governs our disposition of these cases. That statute, § 144 of the Federal Agriculture Improvement and Reform Act of 1996, provides:

> "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> "(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> "(2) the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U. S. C. § 7254.

Thereafter, Shamrock Farms brought another suit against the Secretary of the California Department of Food and Agriculture challenging the validity of both the State's compositional standards and its milk pricing and pooling laws. In that case, the Court of Appeals held that § 144 had immunized California's marketing programs as well as the compositional standards from a negative Commerce Clause chal-

lenge. *Shamrock Farms,* 146 F. 3d, at 1182. In adhering to that ruling in the cases before us today, the Ninth Circuit erred.

The text of the federal statute plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention laws regulating pricing. Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946), but we will not assume that it has done so unless such an intent is clearly expressed. *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U. S. 82, 91–92 (1984). While § 144 unambiguously expresses such an intent with respect to California's compositional and labeling laws, that expression does not encompass the pricing and pooling laws. This conclusion is buttressed by the separate California statutes addressing the composition and labeling of milk products, on the one hand, and the pricing and pooling of milk on the other. See *supra,* at 62–65 and this page. The mere fact that the composition and labeling laws relate to the sale of fluid milk is by no means sufficient to bring them within the scope of § 144. Because § 144 does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge, the Court of Appeals erred in relying on § 144 to dismiss the challenge.

III

Article IV, § 2, of the Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Petitioners, who include both individual dairy farmers and corporate dairies, have alleged that California's milk pricing laws violate that provision. The Court of Appeals held that the corporate petitioners have no standing to advance such

a claim, and it rejected the individual petitioners' claims because the California laws "do not, on their face, create classifications based on any individual's residency or citizenship." 259 F. 3d, at 1156. Petitioners do not challenge the first holding, but they contend that the second is inconsistent with our decision in *Chalker* v. *Birmingham & Northwestern R. Co.*, 249 U. S. 522 (1919). We agree.

In *Chalker*, we held that a Tennessee tax imposed on a citizen and resident of Alabama for engaging in the business of constructing a railroad in Tennessee violated the Privileges and Immunities Clause. The tax did not on its face draw any distinction based on citizenship or residence. It did, however, impose a higher rate on persons who had their principal offices out of State. Taking judicial notice of the fact that "the chief office of an individual is commonly in the State of which he is a citizen," we concluded that the practical effect of the provision was discriminatory. *Id.*, at 527. Whether *Chalker* should be interpreted as merely applying the Clause to classifications that are but proxies for differential treatment against out-of-state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of these cases. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim. In so holding, however, we express no opinion on the merits of petitioners' Privileges and Immunities Clause claim.

* * *

The judgment of the Court of Appeals is vacated, and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion and respectfully dissent from Part II, which holds that § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U. S. C. § 7254, "does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge." *Ante*, at 66. Although I agree that the Court of Appeals erred in its statutory analysis, I nevertheless would affirm its judgment on this claim because "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610 (1997) (THOMAS, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute.

Syllabus

NGUYEN *v.* UNITED STATES

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

No. 01–10873. Argued March 24, 2003—Decided June 9, 2003*

Petitioners were tried, convicted, and sentenced on federal narcotics charges in the District Court of Guam, a territorial court with subject-matter jurisdiction over both federal-law and local-law causes. The Ninth Circuit panel convened to hear their appeals included two judges from that court, both of whom are life-tenured Article III judges, and the Chief Judge of the District Court for the Northern Mariana Islands, an Article IV territorial-court judge appointed by the President and confirmed by the Senate for a 10-year term. Neither petitioner objected to the panel's composition before the cases were submitted for decision, and neither sought rehearing to challenge the panel's authority to decide their appeals after it affirmed their convictions. However, each filed a certiorari petition claiming that the judgment is invalid because a non-Article III judge participated on the panel.

Held: The Ninth Circuit panel did not have the authority to decide petitioners' appeals. Pp. 74–83.

(a) In light of the relevant statutory provisions and historical usage, it is evident that Congress did not contemplate the judges of the District Court for the Northern Mariana Islands to be "district judges" within the meaning of 28 U. S. C. § 292(a), which authorizes the assignment of "one or more district judges within [a] circuit" to sit on the court of appeals "whenever the business of that court so requires." As used throughout Title 28, "district court" means a "'court of the United States'" "constituted by chapter 5 of this title." § 451. Among other things, Chapter 5 creates a "United States District Court" for each judicial district, § 132(a), exhaustively enumerates the districts so constituted, § 133(a), and describes "district judges" as holding office "during good behavior," § 134(a). Significantly, the District Court for the Northern Mariana Islands is not one of the enumerated courts, nor is it even mentioned in Chapter 5. See § 133(a). Because that court's judges are appointed for a term of years and may be removed by the President for cause, they also do not satisfy § 134(a)'s command for district judges to hold office during good behavior. Although the Chief

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*Together with No. 02–5034, *Phan* v. *United States*, also on certiorari to the same court.

Syllabus

Judge of the District Court for the Northern Mariana Islands is literally a "district judge" of a court "within the [Ninth] [C]ircuit," such a reading of § 292(a) is so capacious that it would also justify the designation of "district judges" of any number of *state* courts "within" the Ninth Circuit. Moreover, historically, the term "United States District Court" in Title 28 has ordinarily excluded Article IV territorial courts, even when their jurisdiction is similar to that of an Article III United States District Court. *E. g., Mookini* v. *United States*, 303 U. S. 201, 205. Pp. 74–76.

(b) The Government's three grounds for leaving the judgments below undisturbed are not persuasive. First, this Court's precedents concerning alleged irregularities in the assignment of judges do not compel application here of the *de facto* officer doctrine, which confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient, *Ryder* v. *United States*, 515 U. S. 177, 180. Typically, the Court has found a judge's actions to be valid *de facto* when there is a "merely technical" defect of statutory authority, *McDowell* v. *United States*, 159 U. S. 596, 601–602, but not when, as here, there has been a violation of a statutory provision that embodies weighty congressional policy concerning the proper organization of the federal courts, see, *e. g., American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387. Second, for essentially the same reasons, it is inappropriate to accept the Government's invitation to assess the merits of petitioners' convictions or whether the fairness, integrity, or public reputation of the proceedings were impaired by the composition of the panel. Third, the Government's argument that the presence of a quorum of two otherwise-qualified judges on the panel is sufficient to support the decision below is rejected for two reasons. The federal quorum statute, 28 U. S. C. § 46(d), has been on the books (in relevant part essentially unchanged) for over a century, yet this Court has never doubted its power to vacate a judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal. See, *e. g., United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685. Moreover, the statute authorizing courts of appeals to sit in panels, § 46(b), requires the inclusion of at least three judges in the first instance. Although the two Article III judges who took part below would have constituted a quorum had the original panel been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel. Thus, it is appropriate to return these cases to the Ninth Circuit for fresh consideration by a properly constituted panel. Pp. 77–83.

284 F. 3d 1086, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, GINSBURG, and BREYER, JJ., joined, *post*, p. 83.

Jeffrey T. Green argued the cause for petitioners. With him on the briefs were *Howard Trapp* and *Rawlen T. Mantanona*, both by appointment of the Court, 538 U. S. 920, *Carter G. Phillips*, and *Eric A. Shumsky*.

Patricia A. Millett argued the cause for the United States. With her on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, and *Deputy Solicitor General Dreeben*.†

JUSTICE STEVENS delivered the opinion of the Court.

These cases present the question whether a panel of the Court of Appeals consisting of two Article III judges and one Article IV judge had the authority to decide petitioners' appeals. We conclude it did not, and we therefore vacate the judgments of the Court of Appeals.

I

Petitioners are residents of the island of Guam, which has been a possession of the United States since the end of the Spanish-American War.[1] The Navy administered the island, except for the period of Japanese occupation during World War II, until Congress established Guam as an unincorporated Territory with the passage of the Organic Act of Guam in 1950.[2] Pursuant to Congress' authority under Article IV, § 3, of the Constitution to "make all needful Rules and Regulations respecting the Territory or other Property belonging

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†*Gordon Rhea* filed a brief for Thomas K. Moore as *amicus curiae* urging affirmance.

[1] See Treaty of Paris, Art. II, 30 Stat. 1755 (1899).

[2] 64 Stat. 384. See generally A. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 313, 323 (1989).

to the United States," the Organic Act of Guam created a territorial court, the District Court of Guam, and vested it with subject-matter jurisdiction over causes arising under both federal law and local law.[3] Petitioners were tried before a jury, convicted, and sentenced in the District Court of Guam to lengthy prison terms for federal narcotics offenses. Petitioners do not dispute that court's jurisdiction to conduct their criminal trial and enter judgments of conviction.

As authorized by statute,[4] petitioners appealed their convictions to the Court of Appeals for the Ninth Circuit. The panel convened to hear their appeals included the Chief Judge and a Senior Circuit Judge of the Ninth Circuit, both of whom are, of course, life-tenured Article III judges who serve during "good Behaviour" for compensation that may not be diminished while in office. U. S. Const., Art. III, § 1. The third member of the panel was the Chief Judge of the District Court for the Northern Mariana Islands. That court is not an Article III court but an Article IV territorial court with subject-matter jurisdiction substantially similar

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[3] See Organic Act of Guam § 22, 64 Stat. 389, 48 U. S. C. § 1424. "The 'District Court of Guam' rather than 'United States District Court of Guam' was chosen as the court's title, since it was created under Art. IV, § 3, of the Federal Constitution rather than under Art. III, and since § 22 vested the court with original jurisdiction to decide both local and federal-question matters." *Guam* v. *Olsen*, 431 U. S. 195, 196–197, n. 1 (1977) (citing S. Rep. No. 2109, 81st Cong., 2d Sess., 12 (1950)). The Guam Legislature was authorized as well to create local courts and transfer to them jurisdiction over certain cases that otherwise could be heard by the District Court of Guam. See *Olsen*, 431 U. S., at 200–201 (citing *Agana Bay Dev. Co. (Hong Kong) Ltd.* v. *Supreme Court of Guam*, 529 F. 2d 952, 959 (CA9 1976) (Kennedy, J., dissenting)).

[4] Title 28 U. S. C. § 1294(4) provides:

"[A]ppeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

. . . . . .

"(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit."

to the jurisdiction of the District Court of Guam.[5] The Chief Judge of the District for the Northern Mariana Islands, unlike an Article III judge, is appointed by the President and confirmed by the Senate for a term of 10 years, "unless sooner removed by the President for cause."[6]

The highly unusual presence of a non-Article III judge as a member of the Ninth Circuit panel occurred during special sittings in Guam and the Northern Mariana Islands. When the Court of Appeals heard arguments in Guam, the Chief Judge of the Ninth Circuit invited the Chief Judge of the District Court for the Northern Mariana Islands to participate. A judge of the District Court of Guam was similarly invited to participate in appeals heard while the Ninth Circuit sat in the Northern Mariana Islands.

The panel affirmed petitioners' convictions without dissent. 284 F. 3d 1086 (2002). Neither Nguyen nor Phan objected to the composition of the panel before the cases were submitted for decision; neither petitioner sought rehearing after the Court of Appeals rendered judgment to challenge the panel's authority to decide their appeals. Each did, however, file a petition for certiorari raising the question whether the judgment of the Court of Appeals is invalid because of the participation of a non-Article III judge on the panel. In accordance with this Court's Rule 10(a), we granted the writ, 537 U. S. 999 (2002), to determine whether

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[5] "The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28 and that of a bankruptcy court of the United States.

"The district court shall have original jurisdiction in all causes in the Northern Mariana Islands not described in subsection (a) of this section jurisdiction over which is not vested by the Constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands." 48 U. S. C. § 1822. The text of the statute closely follows the corresponding provisions of the Organic Act of Guam. See S. Rep. No. 95–475, p. 3 (1977).

[6] 48 U. S. C. § 1821(b)(1).

the Court of Appeals had "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers." Pet. for Cert. in No. 01–10873, p. 6; Pet. for Cert. in No. 02–5034, p. 5. For the following reasons, we find these to be appropriate cases for the exercise of that power.

II

We begin with the congressional grant of authority permitting, in certain circumstances, the designation of district judges to serve on the courts of appeals. In relevant part, the designation statute authorizes the chief judge of a circuit to assign "one or more district judges within the circuit" to sit on the court of appeals "whenever the business of that court so requires." 28 U. S. C. § 292(a). Section 292(a) itself does not explicitly define the "district judges" who may be assigned to the court of appeals. However, as other provisions of law make perfectly clear, judges of the District Court for the Northern Mariana Islands are not "district judges" within the meaning of § 292(a).

Outside of § 292(a), Title 28 contains several particularly instructive provisions. The term "district court" as used throughout Title 28 is defined to mean a "'court of the United States'" that is "constituted by chapter 5 of this title." § 451. Chapter 5 of Title 28 in turn creates a "United States District Court" for each judicial district. § 132(a) ("There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district"). And "district judge[s]" are established as the members of those courts. § 132(b) ("Each district court shall consist of the district judge or judges for the district in regular active service"). The judicial districts constituted by Chapter 5 are then exhaustively enumerated. § 133(a) ("The President shall appoint, by and with the advice and consent of the Senate, district judges for the several ju-

dicial districts, as follows [listing districts]"). Lastly, Chapter 5 describes "district judges" as holding office "during good behavior." § 134(a).

Taking these provisions together, § 292(a) cannot be read to permit the designation to the court of appeals of a judge of the District Court for the Northern Mariana Islands. Significantly, the District Court for the Northern Mariana Islands is not one of the courts constituted by Chapter 5 of Title 28, nor is that court even mentioned within Chapter 5.[7] See § 133(a). Because the judges of the District Court for the Northern Mariana Islands are appointed for a term of years and may be removed by the President for cause, they also do not satisfy the command for district judges within the meaning of Title 28 to hold office during good behavior. § 134(a).

The Government agrees these statutory provisions are best read together as not permitting the Chief Judge of the Northern Mariana Islands to sit by designation on the Ninth Circuit. The Government maintains, however, that the erroneous designation in these cases was not plainly impermissible because Title 28 does not expressly forbid it or explicitly define the term "district judge" separately from the term "district court." This contention requires an excessively strained interpretation of the statute. To be sure, a literal reading of the words "district judges" in isolation from the rest of the statute might arguably justify assigning the Chief Judge of the District Court for the Northern Mariana Islands for service on the Court of Appeals, for he is called a "district judge" of a court "within the [Ninth] [C]ircuit." But a literal reading of that sort is so capacious that it would also justify the designation of "district judges" of any number of

[7] The District Court for the Northern Mariana Islands is instead established in Chapter 17 of Title 48 ("Territories and Insular Possessions"). See § 1821.

state courts "within" the Ninth Circuit.[8] The statute cannot plausibly be interpreted to authorize the improper panel assignment in these cases.

Moreover, we do not read the designation statute without regard for the "historic significance" of the term "United States District Court" used in Title 28. *Mookini* v. *United States*, 303 U. S. 201, 205 (1938). "[W]ithout an addition expressing a wider connotation," that term ordinarily excludes Article IV territorial courts, even when their jurisdiction is similar to that of a United States District Court created under Article III. *Ibid.* See also *Summers* v. *United States*, 231 U. S. 92, 101–102 (1913) ("[T]he courts of the Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts, but this does not make them circuit and district courts of the United States"); *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 476–477 (1899) ("It must be admitted that the words 'United States District Court' were not accurately used . . . [to refer to] the United States Court in the Indian Territory"). Construing the relevant statutory provisions together with further aid from historical usage, it is evident that Congress did not contemplate the judges of the District Court for the Northern Mariana Islands to be "district judges" within the meaning of § 292(a). It necessarily follows that the appointment of one member of the panel deciding petitioners' appeals was unauthorized.[9]

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[8] Alaska, Hawaii, Idaho, Montana, Nevada, and Washington are all States within the Ninth Circuit whose judiciaries include "district judges." See Alaska Stat. §§ 22.15.010, 22.15.020, 22.20.010 (2002); Haw. Const., Art. VI, § 1; Haw. Rev. Stat. § 604–1 (1993); Idaho Const., Art. V, § 11; Idaho Code § 1–701 (1948–1998); Mont. Const., Art. VII, §§ 1, 4, 6; Nev. Const., Art. 6, §§ 5–6; Nev. Rev. Stat. § 1.010 (1995); Wash. Const., Art. IV, § 6 (West Supp. 2003); Wash. Rev. Code §§ 3.30.015, 3.30.030, 3.34.010, 3.66.010 (1988 and West Supp. 2003).

[9] Petitioners contend that the participation of an Article IV judge on the panel violated structural constitutional guarantees embodied in Article III and in the Appointments Clause, Art. II, § 2, cl. 2, of the Constitu-

III

Although the Government concedes that the panel of the Court of Appeals was improperly constituted, it advances three grounds on which the judgments below may rest undisturbed. Two of the grounds on which we are urged to affirm concern petitioners' failure to object to the panel's composition in the Court of Appeals. Relying on the so-called "*de facto* officer" doctrine, the Government contends petitioners' failure to challenge the panel's composition at the earliest practicable moment completely forecloses relief in this Court. The Government also contends that petitioners do not meet the requirements for relief under plain-error review. The presence of a quorum of two otherwise-qualified judges on the Court of Appeals panel is invoked as the third ground sufficient to support the decision below. We do not find these contentions persuasive.

The *de facto* officer doctrine, we have explained, "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder* v. *United States*, 515 U. S. 177, 180 (1995). Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases.

Typically, we have found a judge's actions to be valid *de facto* when there is a "merely technical" defect of statutory authority. *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 535 (1962) (plurality opinion of Harlan, J.). In *McDowell* v. *United States*, 159 U. S. 596, 601–602 (1895), for example, the Court declined to notice alleged irregularities in a Circuit Judge's designation of a District Judge for temporary service in another district. See also *Ball* v. *United States*, 140 U. S. 118,

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tion. We find it unnecessary to discuss the constitutional questions because the statutory violation is clear.

128–129 (1891) (assigned judge had *de facto* authority to replace a deceased judge even though he had been designated to replace a disabled judge). We observed in *McDowell*, however, that the judge whose assignment had been questioned was otherwise qualified to serve, because he was "a judge of the United States District Court, having all the powers attached to such office," and because the Circuit Judge was otherwise empowered to designate him. 159 U. S., at 601.

By contrast, we have agreed to correct, at least on direct review, violations of a statutory provision that "embodies a strong policy concerning the proper administration of judicial business" even though the defect was not raised in a timely manner. *Glidden*, 370 U. S., at 536 (plurality opinion). In *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893), the case Justice Harlan cited for this proposition in *Glidden*, a judgment of the Circuit Court of Appeals was challenged because one member of that court had been prohibited by statute from taking part in the hearing and decision of the appeal.[10] This Court succinctly observed: "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari.*" 148 U. S., at 387. The *American Constr. Co.* rule was again applied in *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Tur-*

[10] The petitioners in *American Constr. Co.* challenged the participation of a Circuit Judge who, while sitting as a trial judge, had entered an order closely related to the matter under review in the Circuit Court of Appeals. At the time, the relevant statute governing the composition of the circuit courts of appeals provided that "no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." Evarts Act, ch. 517, § 3, 26 Stat. 827.

bine Co., 228 U. S. 645 (1913), even though the parties had consented in the Circuit Court of Appeals to the participation of a District Judge who was not permitted by statute to consider the appeal. *Id.*, at 650. Rather than sift through the underlying merits, we remanded to the Circuit Court of Appeals "so that the case may be heard by a competent court, [organized] conformably to the requirements of the statute." *Id.*, at 651. See also *Moran* v. *Dillingham*, 174 U. S. 153, 158 (1899) ("[T]his court, without considering whether that decree was or was not erroneous in other respects, orders the Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges" (emphasis deleted)).

We are confronted in petitioners' cases with a question of judicial authority more fundamental than whether "some effort has been made to conform with the formal conditions on which [a judge's] particular powers depend." *Johnson* v. *Manhattan R. Co.*, 61 F. 2d 934, 938 (CA2 1932) (L. Hand, J.). The difference between the irregular judicial designations in *McDowell* and *Ball* and the impermissible panel designation in the instant cases is therefore the difference between an action which could have been taken, if properly pursued, and one which could never have been taken at all. Like the statutes in *William Cramp & Sons*, *Moran*, and *American Constr. Co.*, § 292(a) embodies weighty congressional policy concerning the proper organization of the federal courts.[11]

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[11] The Government seeks to distinguish *William Cramp & Sons*, *Moran*, and *American Constr. Co.* on the ground that the statutory provision at issue in each of those cases, unlike § 292(a), "expressly prohibited" the challenged judge's participation. Brief for United States 18. In light of our conclusion that there is no plausible interpretation of § 292(a) permitting the designation in the instant cases, see *supra*, at 74–76, we think this is a distinction without a difference. In any event, there was no "express" prohibition at play in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 690–691 (1960), in which this Court vacated the judgment of a

Section 292(a) does not permit any assignment to service on the courts of appeals of a district judge who does not enjoy the protections set forth in Article III. Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern, cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 57–60 (1982) (plurality opinion), and is entitled to respect. The Chief Judge of the Northern Mariana Islands did not purport to have "all the powers attached to" the position of an Article III judge, *McDowell*, 159 U. S., at 601, nor was the Chief Judge of the Ninth Circuit otherwise permitted by § 292(a) to designate him for service on an Article III court. Accordingly, his participation contravened the statutory requirements set by Congress for the composition of the federal courts of appeals.

For essentially the same reasons, we think it inappropriate to accept the Government's invitation to assess the merits of petitioners' convictions or whether the fairness, integrity, or public reputation of the proceedings were impaired by the composition of the panel. It is true, as the Government observes, that a failure to object to trial error ordinarily limits an appellate court to review for plain error. See 28 U. S. C. § 2111; Fed. Rule Crim. Proc. 52(b). But to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consider-

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Court of Appeals, sitting en banc, because a Senior Circuit Judge who had participated in the decision was not authorized by statute to do so. See also *id.*, at 691 (Harlan, J., dissenting) ("The statute need hardly be read, as the Court now holds it should be, as saying that a case in an *en banc* court shall be 'heard and determined' by the active circuit judges").

ation of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.[12] See *William Cramp & Sons*, 228 U. S., at 650.

More fundamentally, our enforcement of § 292(a)'s outer bounds is not driven so much by concern for the validity of petitioners' convictions at trial but for the validity of the composition of the Court of Appeals. As a general rule, federal courts may not use their supervisory powers to circumvent the obligation to assess trial errors for their prejudicial effect. See *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254–255 (1988). Because the error in these cases involves a violation of a statutory provision that "embodies a strong policy concerning the proper administration of judicial business," however, our exercise of supervisory power is not inconsistent with that general rule.[13] *Glidden*, 370 U. S., at 536 (plurality opinion). Thus, we invalidated the judgment of a Court of Appeals without assessing prejudice, even though urged to do so, when the error alleged was the improper composition of that court. See *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 690–691 (1960) (vacating judgment of en banc Court of Appeals because participation by Senior Circuit Judge was not provided by statute).

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[12] We agree with the Government's submission that the improper composition of the court below was "an isolated, one-time mistake." Brief for United States 5. Countervailing concerns for gamesmanship, which animate the requirement for contemporaneous objection, therefore dissipate in these cases in light of the rarity of the improper panel assignment at issue.

[13] "The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 393 (1974) (REHNQUIST, J., concurring).

It is also true that two judges of a three-judge panel constitute a quorum legally able to transact business.[14] Moreover, settled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified. *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957) (L. Hand, J.). For two reasons, however, the presence of a quorum on the Ninth Circuit panel does not save the judgments below. First, the quorum statute has been on the books (in relevant part essentially unchanged) for over a century,[15] yet this Court has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal. See *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685 (1960); *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645 (1913); *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893).

Second, the statutory authority for courts of appeals to sit in panels, 28 U. S. C. § 46(b), requires the inclusion of at least three judges in the first instance.[16] As the Second Circuit

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[14] Title 28 U. S. C. § 46(d) provides: "A majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum." As used in § 46(d), "*quorum* . . . means such a number of the members of the court as may legally transact judicial business." *Tobin* v. *Ramey*, 206 F. 2d 505, 507 (CA5 1953).

[15] See Act of Mar. 3, 1911, ch. 6, § 117, 36 Stat. 1131:

"There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum . . . ."

The Evarts Act, which established the original circuit courts of appeals, contained essentially the same provision:

"[T]here is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum." Ch. 517, § 2, 26 Stat. 826.

[16] Title 28 U. S. C. § 46(b) provides, in pertinent part: "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority

has noted, Congress apparently enacted § 46(b) in part "to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels." *Murray* v. *National Broadcasting Co.*, 35 F. 3d 45, 47 (1994). It is "clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate," *ibid.*, but it is less clear whether the quorum statute offers postjudgment absolution for the participation of a judge who was not otherwise competent to be part of the panel under § 292(a). Thus, although the two Article III judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel. In light of that doubt, it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized "comformably to the requirements of the statute."[17] *William Cramp & Sons*, 228 U. S., at 651.

Accordingly, we vacate the judgments of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Under Federal Rule of Criminal Procedure 52(b), courts have "a *limited* power to correct errors that were forfeited

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of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified . . . ."

[17] Unlike the dissent, we believe that it *would* "flou[t] the stated will of Congress," *post*, at 84 (opinion of REHNQUIST, C. J.), and call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decision below to stand, for *no one* other than a properly constituted panel of Article III judges was empowered to exercise appellate jurisdiction in these cases.

because [they were] not timely raised" below. *United States* v. *Olano*, 507 U. S. 725, 731 (1993) (emphasis added). Even when an error has occurred that is "'plain'" and "'affect[s] substantial rights,'" *id.*, at 732, "'an appellate court may . . . exercise its discretion to notice a forfeited error . . . *only if* . . . the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings,'" *United States* v. *Cotton*, 535 U. S. 625, 631–632 (2002) (quoting *Johnson* v. *United States*, 520 U. S. 461, 467 (1997)) (emphasis added). By ignoring this well-established limitation of our remedial authority, the Court flouts the stated will of Congress and almost 70 years of our own precedent.

It was undoubtedly a mistake, for the reasons stated by the Court, *ante*, at 74–76, for the appellate panel to include an Article IV judge. Exercise of our certiorari jurisdiction was warranted to review the case and to state the law correctly. To that extent, I agree with the Court's opinion. But I do not agree that that error is a valid basis for vacating petitioners' convictions, because even assuming that the error affected petitioners' substantial rights, it simply did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Petitioners knew of the composition of the panel of the Court of Appeals more than a week before the case was orally argued. App. 7, 9–12. They made no objection then or later in that court, preferring to wait until the panel had decided against them on the merits to raise it. The Court first concedes, as it must, that a failure to object to error limits an appellate court to review for plain error. *Ante*, at 80. But the Court then completely ignores the fact that "the authority created by Rule 52(b) is circumscribed." *Olano*, *supra*, at 732. Indeed, the opinion fails to cite, much less apply, *Olano* or our other recent cases reaffirming that "we exercise our power under Rule 52(b) sparingly," *Jones* v. *United States*, 527 U. S. 373, 389 (1999), and only "'in those circumstances in which a miscarriage of justice would other-

wise result,'" *Olano*, *supra*, at 736 (quoting *United States* v. *Young*, 470 U. S. 1, 15 (1985)).

This failure is baffling in light of our well-established precedent and the clarity of Congress' intent to limit federal courts' authority to correct plain error. As we explained in *Olano*, we articulated the standard that should guide the exercise of remedial discretion under Rule 52(b) almost 70 years ago in *United States* v. *Atkinson*, 297 U. S. 157 (1936). 507 U. S., at 736. Congress then codified that standard in Rule 52(b). *Ibid.* (quoting *Young*, *supra*, at 7). Since then, "we repeatedly have quoted the *Atkinson* language in describing plain-error review." *Olano*, *supra*, at 736 (citing cases). According to this long line of cases, when an error is plain and affects substantial rights, "an appellate court *must* then determine whether the forfeited error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings *before* it may exercise its discretion to correct the error." *Johnson*, *supra*, at 469–470 (quoting *Olano*, *supra*, at 736) (internal quotation marks omitted; emphasis added).

This mandatory inquiry confirms that no "miscarriage of justice" would result if petitioners' convictions were affirmed. Petitioners make no claim that Chief Judge Munson was biased or incompetent. His character and abilities as a jurist, peculiarly experienced in adjudicating matters arising within the United States Territories, stand unimpeached. It is therefore difficult to understand how fairness or the public reputation of the judicial process is advanced by allowing criminal defendants, whose convictions are supported by "'overwhelming'" evidence, *Cotton*, *supra*, at 633, 634, and whose arguments on appeal were meritless, to consume the public resources necessary for a second appellate review.*

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*Drug enforcement agents seized 443.8 grams of methamphetamine in a package that was mailed to Phan and opened in Nguyen's apartment. 284 F. 3d 1086, 1087–1088 (CA9 2002). In that apartment, agents also

The Court proffers several justifications for ignoring our controlling precedents, none of which is persuasive. First, the Court's reliance on *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), is misplaced. See *ante*, at 79–80, n. 11, 81, 82. In that case, Circuit Judge Medina retired three months after the Court of Appeals for the Second Circuit granted a petition for rehearing en banc, but before the court issued its en banc decision. 363 U. S., at 686–687. He nonetheless participated in consideration of the case and subsequently joined the en banc decision. *Id.*, at 687. This Court vacated the judgment because, under the relevant statute, a "court in banc" could consist only of "active circuit judges." *Id.*, at 685 (quoting 28 U. S. C. § 46(c) (internal quotation marks omitted)).

American-Foreign does not speak to the situation here because the petitioner in that case did not forfeit the error. Forfeiture is "'the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Johnson*, 520 U. S., at 465 (quoting *Olano*, 507 U. S., at 731). The petitioner in *American-Foreign* did not so fail. Rather, it objected at the earliest possible moment: immediately after the Court of Appeals issued an en banc decision that Judge Medina joined. It did not know that Judge Medina would retire or then participate in the en banc decision until after the case was briefed and submitted; it availed itself of the earliest opportunity to object to this error by filing a

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discovered drug paraphernalia, "nearly a hundred little plastic zip lock bags," and $6,000 in cash. *Id.*, at 1088, 1091.

All three members of the Ninth Circuit panel agreed that petitioners' challenges—that the District Court abused its discretion in admitting certain evidence, and that the evidence was insufficient to support the convictions—lacked merit. Judge Goodwin, writing for the court, explained that petitioners' evidentiary challenges were "overstate[d]," and that the District Court "clearly performed the necessary" analysis. *Id.*, at 1090. With respect to petitioners' sufficiency of the evidence argument, the judges were also unanimous "[t]here was plenty of evidence," *id.*, at 1091, and "abundant facts," *id.*, at 1090, in support of petitioners' convictions.

motion for further rehearing en banc. Petitioner did not forfeit the error, so Rule 52(b) did not apply.

That is not the case here. Petitioners Nguyen and Phan learned before oral argument that Chief Judge Munson was a member of their Court of Appeals panel. They nonetheless failed to object at oral argument or in a petition for rehearing en banc. This forfeiture requires us to apply the *Olano* test faithfully.

The Court also relies mistakenly on *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645 (1913), and *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893). *Ante*, at 78–79, and n. 11. In both cases, this Court considered an Act of Congress providing that "'no judge before whom a cause or question may have been tried or heard in a district court . . . shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'" 228 U. S., at 649; 148 U. S., at 387. This Court held that, when a district judge sat in contravention of that "comprehensive and inflexible" prohibition, 228 U. S., at 650, the court of appeals was statutorily unable to act. See also *American Construction*, *supra*, at 387.

But these cases do not control here because, as the Court fails to note, both cases predate our adoption of the standard for plain-error review in *Atkinson* in 1936, and Congress' codification of that standard in Rule 52(b) in 1944. This, and not some broader principle, explains the Court's failure in those cases to apply our modern plain-error analysis. The Court has no such excuse. The cases can also easily be distinguished from this litigation on the facts: They held only that courts constituted "in violation of the *express prohibitions* of [a] statute" lack the authority to act. *Cramp*, 228 U. S., at 650 (emphasis added). In contrast, the Ninth Circuit panel in this litigation did not run afoul of any "comprehensive and inflexible" statutory "prohibition." *Ibid.* Rather, the error must be deduced by negative implication,

from a series of statutes that describe the proper use of district judges in panels of the Courts of Appeals. See *ante*, at 75–76.

The Court also says that "to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Ante*, at 80. But proper affirmance of petitioners' convictions on the ground that the error did not affect the fairness, integrity, or public reputation of judicial proceedings would not so suggest. The Government has conceded the error, and the Court's opinion properly makes clear to the Courts of Appeals that Chief Judge Munson's participation constituted plain error. Indeed, the Court unwittingly explains why its own holding is mistaken: By ignoring the limits that Congress has imposed on appellate courts' discretion via Rule 52(b), the Court "create[s]" for itself and exercises "authority [that] Congress has quite carefully withheld." *Ibid.*

On this record, there is no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No miscarriage of justice will result from deciding not to notice the plain error here. Accordingly, I would proceed to address petitioners' constitutional claims. Petitioners argue that the designation of a non-Article III judge to sit on the Ninth Circuit panel violated the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2, and the structural guarantees embodied in Article III. I would decline to address the first question because it was "neither raised nor decided below, and [was] not presented in the petition for certiorari." *Blessing* v. *Freestone*, 520 U. S. 329, 340, n. 3 (1997).

Petitioners' second constitutional claim, like their statutory one, is subject to plain-error review. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before

a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U. S. 414, 444 (1944); *Johnson*, 520 U. S., at 465. See also *Cotton*, 535 U. S., at 631–633 (applying plain-error review to a claimed violation of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000)); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases"); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 848–849 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried").

Assuming, *arguendo*, that petitioners could satisfy the first three elements of the plain-error inquiry, see *Olano*, 507 U. S., at 732; *supra*, at 84–85, their constitutional claim fails for the same reason as does their statutory claim: Petitioners have not shown that the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *supra*, at 85. I would therefore affirm the judgment of the Court of Appeals.

Syllabus

DESERT PALACE, INC., DBA CAESARS PALACE HOTEL & CASINO *v.* COSTA

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

No. 02–679. Argued April 21, 2003—Decided June 9, 2003

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . , because of . . . sex." 42 U. S. C. § 2000e–2(a)(1). In *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, this Court considered whether an employment decision is made "because of" sex in a "mixed-motive" case, *i. e.*, where both legitimate and illegitimate reasons motivated the decision. Although the Court concluded that an employer had an affirmative defense if it could prove that it would have made the same decision had gender not played a role, it was divided on the question of when the burden of proof shifts to an employer to prove the defense. JUSTICE O'CONNOR, concurring in the judgment, concluded that the burden would shift only where a disparate treatment plaintiff could show by "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Id.*, at 276. Congress subsequently passed the Civil Rights Act of 1991 (1991 Act), which provides, among other things, that (1) an unlawful employment practice is established "when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice," 42 U. S. C. § 2000e–2(m), and (2) if an individual proves a violation under § 2000e–2(m), the employer can avail itself of a limited affirmative defense that restricts the available remedies if it demonstrates that it would have taken the same action absent the impermissible motivating factor, § 2000e–5(g)(2)(B). Respondent, who was petitioner's only female warehouse worker and heavy equipment operator, had problems with management and her co-workers, which led to escalating disciplinary sanctions and her ultimate termination. She subsequently filed this lawsuit, asserting, *inter alia*, a Title VII sex discrimination claim. Based on the evidence she presented at trial, the District Court denied petitioner's motion for judgment as a matter of law and submitted the case to the jury. The District Court instructed the jury, as relevant here, that if respondent proved by a preponderance of the evidence that sex was a motivating factor in the adverse work conditions imposed on her, but petitioner's conduct was also motivated by lawful

reasons, she was entitled to damages unless petitioner proved by a preponderance of the evidence that it would have treated her similarly had gender played no role. Petitioner unsuccessfully objected to this instruction, claiming that respondent had not adduced "direct evidence" that sex was a motivating factor in petitioner's decision. The jury awarded respondent backpay and compensatory and punitive damages, and the District Court denied petitioner's renewed motion for judgment as a matter of law. A Ninth Circuit panel vacated and remanded, agreeing with petitioner that the District Court had erred in giving the mixed-motive instruction. The en banc court, however, reinstated the judgment, finding that the 1991 Act does not impose any special evidentiary requirement.

Held: Direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under Title VII. The starting point for this Court's analysis is the statutory text. See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254. Where, as here, the statute's words are unambiguous, the judicial inquiry is complete. *Id.*, at 254. Section 2000e–2(m) unambiguously states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to any employment practice. On its face, it does not mention that a plaintiff must make a heightened showing through direct evidence. Moreover, Congress explicitly defined "demonstrates" as to "mee[t] the burdens of production and persuasion." § 2000e–2(m). Had Congress intended to require direct evidence, it could have included language to that effect in § 2000e–2(m), as it has unequivocally done when imposing heightened proof requirements in other circumstances. See, *e. g.*, 42 U. S. C. § 5851(b)(3)(D). Title VII's silence also suggests that this Court should not depart from the conventional rule of civil litigation generally applied in Title VII cases, which requires a plaintiff to prove his case by a preponderance of the evidence using direct or circumstantial evidence. This Court has often acknowledged the utility of circumstantial evidence in discrimination cases and has never questioned its adequacy in criminal cases, even though proof beyond a reasonable doubt is required. Finally, the use of the term "demonstrates" in other Title VII provisions tends to show that § 2000e–2(m) does not incorporate a direct evidence requirement. See *e. g.*, § 2000e–2(k)(1)(A)(i). Pp. 98–102.

299 F. 3d 838, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, *post*, p. 102.

Mark J. Ricciardi argued the cause for petitioner. With him on the briefs were *Roger K. Quillen*, *Paul A. Ades*, and *Corbett N. Gordon.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae.* On the brief were *Solicitor General Olson*, *Assistant Attorneys General McCallum* and *Boyd*, *Deputy Solicitor General Clement*, *Dennis J. Dimsey*, and *Teresa Kwong.*

Robert N. Peccole argued the cause for respondent. With him on the brief was *Eric Schnapper.**

JUSTICE THOMAS delivered the opinion of the Court.

The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (1991 Act). We hold that direct evidence is not required.

I

A

Since 1964, Title VII has made it an "unlawful employment practice for an employer . . . to discriminate against any indi-

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**Ann Elizabeth Reesman*, *Katherine Y. K. Cheung*, *Stephen A. Bokat*, and *Ellen D. Bryant* 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 American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* for the Association of Trial Lawyers of America by *Jeffrey L. Needle;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael C. Subit*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Kristin M. Dadey*, *Thomas W. Osborne*, *Laurie A. McCann*, *Daniel B. Kohrman*, *Melvin Radowitz*, *Lenora M. Lapidus*, *Vincent A. Eng*, *Judith L. Lichtman*, *Jocelyn C. Frye*, and *Dennis C. Hayes;* and for Ann B. Hopkins by *Douglas B. Huron.*

Ronald B. Schwartz and *Jenifer Bosco* filed a brief for the National Employment Lawyers Association as *amicus curiae.*

vidual . . . , *because of* such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U. S. C. § 2000e–2(a)(1) (emphasis added). In *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), the Court considered whether an employment decision is made "because of" sex in a "mixed-motive" case, *i. e.*, where both legitimate and illegitimate reasons motivated the decision. The Court concluded that, under § 2000e–2(a)(1), an employer could "avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.*, at 244; see *id.*, at 261, n. (White, J., concurring in judgment); *id.*, at 261 (O'Connor, J., concurring in judgment). The Court was divided, however, over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense.

Justice Brennan, writing for a plurality of four Justices, would have held that "when a plaintiff . . . proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.*, at 258 (emphasis added). The plurality did not, however, "suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision." *Id.*, at 251–252.

Justice White and Justice O'Connor both concurred in the judgment. Justice White would have held that the case was governed by *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), and would have shifted the burden to the employer only when a plaintiff "show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action." *Price Waterhouse*, *supra*, at 259. Justice O'Connor, like Justice White, would have required the plaintiff to show that an illegitimate consideration was a "substantial factor" in the employment decision. 490 U. S., at 276. But, under Justice O'Connor's view, "the burden on the issue

of causation" would shift to the employer only where "a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision." *Ibid.* (emphasis added).

Two years after *Price Waterhouse*, Congress passed the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 250 (1994). In particular, § 107 of the 1991 Act, which is at issue in this case, "respond[ed]" to *Price Waterhouse* by "setting forth standards applicable in 'mixed motive' cases" in two new statutory provisions.[1] 511 U. S., at 251. The first establishes an alternative for proving that an "unlawful employment practice" has occurred:

> "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U. S. C. § 2000e–2(m).

The second provides that, with respect to "a claim in which an individual proves a violation under section 2000e–2(m)," the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs. § 2000e–5(g)(2)(B).[2] In order to avail itself of

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[1] This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context.

[2] Title 42 U. S. C. § 2000e–5(g)(2)(B) provides in full:

"On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly

the affirmative defense, the employer must "demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor." *Ibid.*

Since the passage of the 1991 Act, the Courts of Appeals have divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a "motivating factor" in an adverse employment action. See 42 U. S. C. § 2000e–2(m). Relying primarily on JUSTICE O'CONNOR's concurrence in *Price Waterhouse*, a number of courts have held that direct evidence is required to establish liability under § 2000e–2(m). See, *e. g.*, *Mohr* v. *Dustrol, Inc.*, 306 F. 3d 636, 640–641 (CA8 2002); *Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F. 3d 572, 580 (CA1 1999); *Trotter* v. *Board of Trustees of Univ. of Ala.*, 91 F. 3d 1449, 1453–1454 (CA11 1996); *Fuller* v. *Phipps*, 67 F. 3d 1137, 1142 (CA4 1995). In the decision below, however, the Ninth Circuit concluded otherwise. See *infra*, at 97–98.

B

Petitioner Desert Palace, Inc., dba Caesar's Palace Hotel & Casino of Las Vegas, Nevada, employed respondent Catharina Costa as a warehouse worker and heavy equipment operator. Respondent was the only woman in this job and in her local Teamsters bargaining unit.

Respondent experienced a number of problems with management and her co-workers that led to an escalating series of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension. Petitioner finally terminated respondent after she was involved in a physical altercation in a warehouse elevator with fellow Teamsters member Herbert Gerber. Petitioner disciplined both employees because the facts surrounding the incident were in dispute, but

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attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."

Gerber, who had a clean disciplinary record, received only a 5-day suspension.

Respondent subsequently filed this lawsuit against petitioner in the United States District Court for the District of Nevada, asserting claims of sex discrimination and sexual harassment under Title VII. The District Court dismissed the sexual harassment claim, but allowed the claim for sex discrimination to go to the jury. At trial, respondent presented evidence that (1) she was singled out for "intense 'stalking'" by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men in the assignment of overtime, and (4) supervisors repeatedly "stack[ed]" her disciplinary record and "frequently used or tolerated" sex-based slurs against her. 299 F. 3d 838, 845–846 (CA9 2002).

Based on this evidence, the District Court denied petitioner's motion for judgment as a matter of law, and submitted the case to the jury with instructions, two of which are relevant here. First, without objection from petitioner, the District Court instructed the jury that "'[t]he plaintiff has the burden of proving . . . by a preponderance of the evidence'" that she "'suffered adverse work conditions'" and that her sex "'was a motivating factor in any such work conditions imposed upon her.'" *Id.*, at 858.

Second, the District Court gave the jury the following mixed-motive instruction:

> "'You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> "'However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled

> to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.'" *Ibid.*

Petitioner unsuccessfully objected to this instruction, claiming that respondent had failed to adduce "direct evidence" that sex was a motivating factor in her dismissal or in any of the other adverse employment actions taken against her. The jury rendered a verdict for respondent, awarding backpay, compensatory damages, and punitive damages. The District Court denied petitioner's renewed motion for judgment as a matter of law.

The Court of Appeals initially vacated and remanded, holding that the District Court had erred in giving the mixed-motive instruction because respondent had failed to present "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus." 268 F. 3d 882, 884 (CA9 2001). In addition, the panel concluded that petitioner was entitled to judgment as a matter of law on the termination claim because the evidence was insufficient to prove that respondent was "terminated because she was a woman." *Id.*, at 890.

The Court of Appeals reinstated the District Court's judgment after rehearing the case en banc. 299 F. 3d 838 (CA9 2002). The en banc court saw no need to decide whether JUSTICE O'CONNOR's concurrence in *Price Waterhouse* controlled because it concluded that JUSTICE O'CONNOR's references to "direct evidence" had been "wholly abrogated" by the 1991 Act. 299 F. 3d, at 850. And, turning "to the language" of § 2000e–2(m), the court observed that the statute "imposes no special [evidentiary] requirement and does not reference 'direct evidence.'" *Id.*, at 853. Accordingly, the court concluded that a "plaintiff . . . may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a moti-

vating factor.'" *Id.*, at 853–854 (footnote omitted). Based on that standard, the Court of Appeals held that respondent's evidence was sufficient to warrant a mixed-motive instruction and that a reasonable jury could have found that respondent's sex was a "motivating factor in her treatment." *Id.*, at 859. Four judges of the en banc panel dissented, relying in large part on "the reasoning of the prior opinion of the three-judge panel." *Id.*, at 866.

We granted certiorari. 537 U. S. 1099 (2003).

II

This case provides us with the first opportunity to consider the effects of the 1991 Act on jury instructions in mixed-motive cases. Specifically, we must decide whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under 42 U. S. C. § 2000e–2(m). Petitioner's argument on this point proceeds in three steps: (1) JUSTICE O'CONNOR's opinion is the holding of *Price Waterhouse;* (2) JUSTICE O'CONNOR's *Price Waterhouse* opinion requires direct evidence of discrimination before a mixed-motive instruction can be given; and (3) the 1991 Act does nothing to abrogate that holding. Like the Court of Appeals, we see no need to address which of the opinions in *Price Waterhouse* is controlling: the third step of petitioner's argument is flawed, primarily because it is inconsistent with the text of § 2000e–2(m).

Our precedents make clear that the starting point for our analysis is the statutory text. See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). And where, as here, the words of the statute are unambiguous, the "'judicial inquiry is complete.'" *Id.*, at 254 (quoting *Rubin* v. *United States*, 449 U. S. 424, 430 (1981)). Section 2000e–2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff

make a heightened showing through direct evidence. Indeed, petitioner concedes as much. Tr. of Oral Arg. 9.

Moreover, Congress explicitly defined the term "demonstrates" in the 1991 Act, leaving little doubt that no special evidentiary showing is required. Title VII defines the term "'demonstrates'" as to "mee[t] the burdens of production and persuasion." §2000e(m). If Congress intended the term "'demonstrates'" to require that the "burdens of production and persuasion" be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in §2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42. See, *e. g.*, 8 U. S. C. §1158(a)(2)(B) (stating that an asylum application may not be filed unless an alien "demonstrates by clear and convincing evidence" that the application was filed within one year of the alien's arrival in the United States); 42 U. S. C. §5851(b)(3)(D) (providing that "[r]elief may not be ordered" against an employer in retaliation cases involving whistleblowers under the Atomic Energy Act where the employer is able to "*demonstrat[e] by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of such behavior" (emphasis added)); cf. *Price Waterhouse*, 490 U. S., at 253 (plurality opinion) ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief").

In addition, Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." *Ibid.* That rule requires a plaintiff to prove his case "by a preponderance of the evidence," *ibid.*, using "direct or circumstantial evidence," *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). We have often acknowledged

the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133 (2000), we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." *Id.*, at 147 (emphasis added). The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508, n. 17 (1957).

The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required. See *Holland* v. *United States*, 348 U. S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"). And juries are routinely instructed that "[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence." 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 12.04 (5th ed. 2000); see also 4 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, Modern Federal Jury Instructions ¶ 74.01 (2002) (model instruction 74–2). It is not surprising, therefore, that neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute. Tr. of Oral Arg. 13.

Finally, the use of the term "demonstrates" in other provisions of Title VII tends to show further that § 2000e–2(m) does not incorporate a direct evidence requirement. See, *e. g.*, 42 U. S. C. §§ 2000e–2(k)(1)(A)(i), 2000e–5(g)(2)(B). For instance, § 2000e–5(g)(2)(B) requires an employer to "demon-

strat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor" in order to take advantage of the partial affirmative defense. Due to the similarity in structure between that provision and § 2000e–2(m), it would be logical to assume that the term "demonstrates" would carry the same meaning with respect to both provisions. But when pressed at oral argument about whether direct evidence is required before the partial affirmative defense can be invoked, petitioner did not "agree that . . . the defendant or the employer has any heightened standard" to satisfy. Tr. of Oral Arg. 7. Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue. See *Commissioner* v. *Lundy*, 516 U. S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning"'" (quoting *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990))).

For the reasons stated above, we agree with the Court of Appeals that no heightened showing is required under § 2000e–2(m).[3]

* * *

In order to obtain an instruction under § 2000e–2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Because direct evidence of discrimination is not required in mixed-motive

[3] Of course, in light of our conclusion that direct evidence is not required under § 2000e–2(m), we need not address the second question on which we granted certiorari: "What are the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed-motive' cases under Title VII?" Pet. for Cert. i.

cases, the Court of Appeals correctly concluded that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. In my view, prior to the Civil Rights Act of 1991, the evidentiary rule we developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff "demonstrated by direct evidence that an illegitimate factor played a substantial role" in an adverse employment decision. *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 275 (1989) (O'CONNOR, J., concurring in judgment). This showing triggered "the deterrent purpose of the statute" and permitted a reasonable factfinder to conclude that "absent further explanation, the employer's discriminatory motivation 'caused' the employment decision." *Id.*, at 265.

As the Court's opinion explains, in the Civil Rights Act of 1991, Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII. *Ante*, at 98–101. I therefore agree with the Court that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury.

Syllabus

FITZGERALD, TREASURER OF IOWA *v.* RACING ASSOCIATION OF CENTRAL IOWA ET AL.

CERTIORARI TO THE SUPREME COURT OF IOWA

No. 02–695. Argued April 29, 2003—Decided June 9, 2003

An Iowa law that, among other things, authorized racetracks to operate slot machines and imposed a graduated tax upon racetrack slot machine adjusted revenues, with a top rate that started at 20 percent and would automatically rise over time to 36 percent, left a 20 percent tax rate on riverboat slot machine adjusted revenues in place. Respondents, racetracks and a dog owners' association, filed a state-court suit challenging the law on the ground that the 20 percent/36 percent tax rate difference violated the Equal Protection Clause, U. S. Const., Amdt. 14, § 1. The District Court upheld the statute, but the Iowa Supreme Court reversed.

Held:

1. This Court has jurisdiction to review the state court's judgment, which does not rest independently upon state law. The state court's opinion says that Iowa courts should apply the same analysis in considering either state or federal equal protection claims. In such circumstances, this Court considers a state-court decision as resting upon federal grounds sufficient to support jurisdiction. P. 106.

2. Iowa's differential tax rate does not violate the Federal Equal Protection Clause. A law, such as Iowa's, which distinguishes for tax purposes among revenues obtained within a State by two enterprises conducting business in the State, is subject to rational-basis review. See *Nordlinger* v. *Hahn*, 505 U. S. 1, 11–12. The Iowa law, like most laws, might predominantly serve one general objective, *e. g.*, rescuing racetracks from economic distress, while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole. And this law, *seen as a whole*, does what the state court says it seeks to do, namely, advance the racetracks' economic interests. A rational legislator might believe that the law's grant to the racetracks of authority to operate slot machines should help the racetracks economically—even if its simultaneous imposition of a tax on revenues means less help than respondents might like—and the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help

with their tax laws and how much help those laws should provide. Once one realizes that not every provision in a single law must share a single objective, one has no difficulty finding the necessary rational support for the difference in tax rates here. Though harmful to the racetracks, it is helpful to the riverboats, which were also facing financial peril. This is not a case where the facts preclude any plausible inference that the reason for the different tax rates is to help the riverboat industry. Cf. *Nordlinger*, *supra*, at 16. *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336, distinguished. Pp. 106–110.

648 N. W. 2d 555, reversed and remanded.

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

Thomas J. Miller, Attorney General of Iowa, argued the cause for petitioner. With him on the briefs were *Julie F. Pottorff*, Deputy Attorney General, and *Jeffrey D. Farrell* and *Jean M. Davis*, Assistant Attorneys General.

Kent L. Jones argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General O'Connor*, *David English Carmack*, and *Judith A. Hagley.*

Mark McCormick argued the cause for respondents. With him on the brief were *Thomas L. Flynn*, *Edward M. Mansfield*, *Stephen C. Krumpe*, and *Lawrence P. McLellan.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Missouri et al. by *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *James R. Layton*, State Solicitor, *Alana M. Barragán-Scott*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.*, of Alabama, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Patricia A. Madrid* of New Mexico, *Anabelle Rodríguez* of Puerto Rico, *Larry Long* of South Dakota, *Paul G. Summers* of Tennessee, and *William H. Sorrell* of Vermont; and for the City of Bettendorf, Iowa, et al. by *Thomas D. Waterman*, *Dennis W. Johnson*, and *Robert N. Johnson III.*

Briefs of *amici curiae* urging affirmance were filed for the City of Dubuque, Iowa, by *Barry A. Lindahl;* for Polk County, Iowa, by *John P. Sarcone;* and for the Institute for Justice by *Clint Bolick*, *William H. Mellor*, *Dana Berliner*, and *Clark M. Neily.*

JUSTICE BREYER delivered the opinion of the Court.

Iowa taxes adjusted revenues from slot machines on excursion riverboats at a maximum rate of 20 percent. Iowa Code § 99F.11 (2003). Iowa law provides for a maximum tax rate of 36 percent on adjusted revenues from slot machines at racetracks. §§ 99F.4A(6), 99F.11. The Iowa Supreme Court held that this 20 percent/36 percent difference in tax rates violates the Federal Constitution's Equal Protection Clause, Amdt. 14, § 1. 648 N. W. 2d 555 (2002). We disagree and reverse the Iowa Supreme Court's determination.

I

Before 1989, Iowa permitted only one form of gambling—parimutuel betting at racetracks—the proceeds of which it taxed at a six percent rate. Iowa Code § 99D.15 (1984). In 1989, it authorized other forms of gambling, including slot machines and other gambling games on riverboats, though it limited bets to $5 and losses to $200 per excursion. 1989 Iowa Acts ch. 67, §§ 3, 9(2); Iowa Code § 99F.3 (1996). Iowa taxed adjusted revenues from slot machine gambling at graduated rates, with a top rate of 20 percent. 1989 Iowa Acts ch. 67, § 11; Iowa Code § 99F.11 (1996).

In 1994, Iowa enacted a law that, among other things, removed the riverboat gambling $5/$200 bet/loss limits, 1994 Iowa Acts ch. 1021, § 19, authorized racetracks to operate slot machines, § 13; Iowa Code §§ 99F.1(9), 99F.4A (1996), and imposed a graduated tax upon racetrack slot machine adjusted revenues with a top rate that started at 20 percent and would automatically rise over time to 36 percent, 1994 Iowa Acts ch. 1021, § 25; Iowa Code § 99F.11 (1996). The Act did not alter the tax rate on riverboat slot machine adjusted revenues, thereby leaving the existing 20 percent rate in place. *Ibid.*

Respondents, a group of racetracks and an association of dog owners, brought this lawsuit in state court challenging the 1994 legislation on the ground that the 20 percent/36 per-

cent tax rate difference that it created violated the Federal Constitution's Equal Protection Clause, Amdt. 14, § 1. The State District Court upheld the statute. The Iowa Supreme Court disagreed and, by a 4-to-3 vote, reversed the District Court. The majority wrote that the "differential tax completely defeats the alleged purpose" of the statute, namely, "to help the racetracks recover from economic distress," that there could "be no rational reason for this differential tax," and that the Equal Protection Clause consequently forbids its imposition. 648 N. W. 2d, at 560–562. We granted certiorari to review this determination.

II

Respondents initially claim that the Iowa Supreme Court's decision rests independently upon state law. And they argue that this state-law holding bars review of the federal issue. We disagree. The Iowa Supreme Court's opinion, after setting forth the language of both State and Federal Equal Protection Clauses, says that "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.'" *Id.*, at 558. We have previously held that, in such circumstances, we shall consider a state-court decision as resting upon federal grounds sufficient to support this Court's jurisdiction. See *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (no adequate and independent state ground where the court says that state and federal constitutional protections are "'identical'"). Cf. *Michigan* v. *Long*, 463 U. S. 1032, 1041–1042 (1983) (jurisdiction exists where federal cases are not "being used only for the purpose of guidance" and instead are "compel[ling] the result"). We therefore find that this Court has jurisdiction to review the Iowa Supreme Court's determination.

III

We here consider whether a difference in state tax rates violates the Fourteenth Amendment's mandate that "[n]o

State shall . . . deny to any person . . . the equal protection of the laws," § 1. The law in question does not distinguish on the basis of, for example, race or gender. See, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1 (1967); *United States* v. *Virginia*, 518 U. S. 515 (1996). It does not distinguish between in-state and out-of-state businesses. See, *e. g.*, *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869 (1985). Neither does it favor a State's long-time residents at the expense of residents who have more recently arrived from other States. Cf. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985). Rather, the law distinguishes for tax purposes among revenues obtained within the State of Iowa by two enterprises, each of which does business in the State. Where that is so, the law is subject to rational-basis review:

> "[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger* v. *Hahn*, 505 U. S. 1, 11–12 (1992) (citations omitted).

See also *id.*, at 11 (rational-basis review "is especially deferential in the context of classifications made by complex tax laws"); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 527 (1959) (the Equal Protection Clause requires States, when enacting tax laws, to "proceed upon a rational basis" and not to "resort to a classification that is palpably arbitrary").

The Iowa Supreme Court found that the 20 percent/36 percent tax rate differential failed to meet this standard because, in its view, that difference "frustrated" what it saw as the law's basic objective, namely, rescuing the racetracks from economic distress. 648 N. W. 2d, at 561. And

no rational person, it believed, could claim the contrary. *Id.*, at 561–562.

The Iowa Supreme Court could not deny, however, that the Iowa law, like most laws, might predominantly serve one general objective, say, helping the racetracks, while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole. See *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 181 (1980) (STEVENS, J., concurring in judgment) (legislation is often the "product of multiple and somewhat inconsistent purposes that led to certain compromises"). After all, if *every* subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then (since any tax rate hurts the racetracks when compared with a lower rate) there could be no taxation of the racetracks at all.

Neither could the Iowa Supreme Court deny that the 1994 legislation, *seen as a whole*, can rationally be understood to do what that court says it seeks to do, namely, advance the racetracks' economic interests. Its grant to the racetracks of authority to operate slot machines should help the racetracks economically to some degree—even if its simultaneous imposition of a tax on slot machine adjusted revenues means that the law provides less help than respondents might like. At least a rational legislator might so believe. And the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide. "The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.*, at 179 (citation omitted). See also *ibid.* (judicial review is "at

an end" once the court identifies a plausible basis on which the legislature may have relied); *Nordlinger*, *supra*, at 17–18.

Once one realizes that not every provision in a law must share a single objective, one has no difficulty finding the necessary rational support for the 20 percent/36 percent differential here at issue. That difference, harmful to the racetracks, is helpful to the riverboats, which, as respondents concede, were also facing financial peril, Brief for Respondents 8. See also 648 N. W. 2d, at 557. These two characterizations are but opposite sides of the same coin. Each reflects a rational way for a legislator to view the matter. And aside from simply aiding the financial position of the riverboats, the legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States. See Gaming Study Committee Report (Sept. 3, 1993), reprinted in App. 76–84, 86. Alternatively, they may have wanted to protect the reliance interests of riverboat operators, whose adjusted slot machine revenue had previously been taxed at the 20 percent rate. All these objectives are rational ones, which lower riverboat tax rates could further and which suffice to uphold the different tax rates. See *Allied Stores*, *supra*, at 528; *Nordlinger*, *supra*, at 12. See also *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940) (imposing burden on respondents to "negative every conceivable basis" that might support different treatment).

Respondents argue that *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336 (1989), holds to the contrary. Brief for Respondents 21. In that case, the Court held that substantial differences in the level of property tax assessments that West Virginia imposed upon similar properties violated the Federal Equal Protection Clause. But the Court later stated, when it upheld in *Nordlinger* a California statute creating similar differences in property taxes, that "an obvious and critical factual difference be-

tween this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the . . . unequal assessment." 505 U. S., at 14–15. The Court in *Nordlinger* added that "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Id.*, at 16–17, and n. 7. Here, "the facts" do not "preclud[e]" an inference that the reason for the different tax rates was to help the riverboat industry or the river communities. *Id.*, at 16.

IV

We conclude that there is "a plausible policy reason for the classification," that the legislature "rationally may have . . . considered . . . true" the related justifying "legislative facts," and that the "relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.*, at 11. Consequently the State's differential tax rate does not violate the Federal Equal Protection Clause. The Iowa Supreme Court's judgment to the contrary is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Syllabus

DOW CHEMICAL CO. ET AL. *v.* STEPHENSON ET AL.

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

No. 02–271. Argued February 26, 2003—Decided June 9, 2003

273 F. 3d 249, vacated and remanded in part, and affirmed by an equally divided Court in part.

Seth P. Waxman argued the cause for petitioners. With him on the briefs were *Louis R. Cohen*, *Andrew L. Frey*, *Philip Allen Lacovara*, *Charles A. Rothfeld*, *Richard B. Katskee*, *Michele L. Odorizzi*, *Steven Brock*, and *John C. Sabetta.*

Gerson H. Smoger argued the cause for respondents. With him on the brief were *Mark R. Cuker* and *Ronald Simon.**

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*Briefs of *amici curiae* urging reversal were filed for the American Insurance Association et al. by *Herbert M. Wachtell*, *Jeffrey M. Wintner*, *Craig A. Berrington*, *Lynda S. Mounts*, *Jan S. Amundson*, *Quentin Riegel*, and *Robin S. Conrad;* for the Product Liability Advisory Council by *John H. Beisner;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *Richard P. Ieyoub*, Attorney General of Louisiana, and by the Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, and *Mike McGrath* of Montana; for the American Legion et al. by *William A. Rossbach* and *P. B. Onderdonk, Jr.;* for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for Law Professors by *David L. Shapiro*, *John Leubsdorf,* and *Henry P. Monaghan;* for the Lymphoma Foundation of America et al. by *Raphael Metzger;* for Public Citizen by *Brian Wolfman;* and for Trial Lawyers for Public Justice by *Brent M. Rosenthal*, *Leslie Brueckner*, and *Misty A. Farris.*

Patrick Lysaught filed a brief for the Defense Research Institute as *amicus curiae.*

PER CURIAM.

With respect to respondents Joe Isaacson and Phyllis Lisa Isaacson, the judgment of the Court of Appeals for the Second Circuit is vacated, and the case is remanded for further consideration in light of *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U. S. 28 (2002).

With respect to respondents Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, and Emily Elizabeth Stephenson, the judgment is affirmed by an equally divided Court.

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

Syllabus

VIRGINIA *v.* HICKS

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 02–371. Argued April 30, 2003—Decided June 16, 2003

The Richmond Redevelopment and Housing Authority (RRHA), a political subdivision of Virginia, owns and operates Whitcomb Court, a low-income housing development. In 1997, the Richmond City Council conveyed Whitcomb Court's streets to the RRHA in an effort to combat crime and drug dealing by nonresidents. In accordance with the terms of conveyance, the RRHA enacted a policy authorizing the Richmond police to serve notice on any person lacking "a legitimate business or social purpose" for being on the premises and to arrest for trespassing any person who remains or returns after having been so notified. The RRHA gave respondent Hicks, a nonresident, written notice barring him from Whitcomb Court. Subsequently, he trespassed there and was arrested and convicted. At trial, he claimed that RRHA's policy was, among other things, unconstitutionally overbroad. The Virginia Court of Appeals vacated his conviction. In affirming, the Virginia Supreme Court found the policy unconstitutionally overbroad in violation of the First Amendment because an unwritten rule that leafleting and demonstrating require advance permission vested too much discretion in Whitcomb Court's manager.

Held: The RRHA's trespass policy is not facially invalid under the First Amendment's overbreadth doctrine. Pp. 118–124.

(a) Under that doctrine, a showing that a law punishes a "substantial" amount of protected free speech, "in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615, suffices to invalidate all enforcement of that law "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," *id.*, at 613. Only substantial overbreadth supports such facial invalidation, since there are significant social costs in blocking a law's application to constitutionally unprotected conduct. Pp. 118–120.

(b) This Court has jurisdiction to review the First Amendment merits question here. Virginia's actual injury in fact—the inability to prosecute Hicks for trespass—is sufficiently distinct and palpable to confer Article III standing. Pp. 120–121.

(c) Even assuming the invalidity of the "unwritten" rule for leafleters and demonstrators, Hicks has not shown that the RRHA policy prohibits a substantial amount of protected speech in relation to its many legit-

imate applications. Both the notice-barment rule and the "legitimate business or social purpose" rule apply to all persons entering Whitcomb Court's streets, not just to those seeking to engage in expression. Neither the basis for the barment sanction (a prior trespass) nor its purpose (preventing future trespasses) implicates the First Amendment. An overbreadth challenge rarely succeeds against a law or regulation that is not specifically addressed to speech or conduct necessarily associated with speech. Any applications of the RRHA's policy that violate the First Amendment can be remedied through as-applied litigation. Pp. 121–124.

264 Va. 48, 563 S. E. 2d 674, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 124.

William H. Hurd, State Solicitor of Virginia, argued the cause for petitioner. With him on the briefs were *Jerry W. Kilgore*, Attorney General, *Maureen Riley Matsen* and *William E. Thro*, Deputy State Solicitors, and *Christy A. McCormick* and *A. Cameron O'Brion*, Assistant Attorneys General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorneys General Chertoff* and *McCallum*, *James A. Feldman*, *Michael Jay Singer*, and *Stephanie R. Marcus.*

Steven D. Benjamin argued the cause for respondent. With him on the brief were *Amanda Frost*, *Brian Wolfman*, and *Alan B. Morrison.**

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*Briefs of *amici curiae* urging reversal were filed for the City of Richmond et al. by *William G. Broaddus*, *Jonathan T. Blank*, *William H. Baxter II*, *Godfrey T. Pinn*, *Jr.*, and *John A. Rupp;* for the Council of Large Public Housing Authorities et al. by *Robert A. Graham*, *William F. Maher*, and *Carl A. S. Coan III;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the National League of Cities et al. by *Richard Ruda* and *James I. Crowley.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Mark J. Lopez*, *Steven R. Shapiro*, *Rebecca Glenberg*, and *David M. Porter;* for the DKT Liberty Project by *Julia M. Carpenter;* for the Richmond Tenants Organization et al. by *Catherine*

JUSTICE SCALIA delivered the opinion of the Court.

The issue presented in this case is whether the Richmond Redevelopment and Housing Authority's trespass policy is facially invalid under the First Amendment's overbreadth doctrine.

I

A

The Richmond Redevelopment and Housing Authority (RRHA) owns and operates a housing development for low-income residents called Whitcomb Court. Until June 23, 1997, the city of Richmond owned the streets within Whitcomb Court. The city council decided, however, to "privatize" these streets in an effort to combat rampant crime and drug dealing in Whitcomb Court—much of it committed and conducted by nonresidents. The council enacted Ordinance No. 97–181–197, which provided, in part:

> "'§ 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100–2300 Block of Sussex Street and the 2700–2800 Block of Magnolia Street, in Whitcomb Court . . . be and are hereby closed to public

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M. Bishop; for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler* and *Robert M. O'Neil;* and for Watchtower Bible and Tract Society of New York, Inc., by *Paul D. Polidoro* and *Philip Brumley.*

A brief of *amici curiae* was filed for the State of Alabama et al. by *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *James R. Layton*, State Solicitor, *Erwin O. Switzer III*, and *Michele L. Jackson*, Assistant Attorney General of Alabama, and by the Attorneys General for their respective jurisdictions as follows: *Gregg D. Renkes* of Alaska, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Steve Carter* of Indiana, *Charlie J. Crist, Jr.*, of Florida, *Mike Moore* of Mississippi, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Anabelle Rodríguez* of Puerto Rico, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, and *Mark L. Shurtleff* of Utah.

> use and travel and abandoned as streets of the City of Richmond.'" App. to Pet. for Cert. 93–94.

The city then conveyed these streets by a recorded deed to the RRHA (which is a political subdivision of the Commonwealth of Virginia). This deed required the RRHA to "'give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.'" *Id.*, at 95. To this end, the RRHA posted red-and-white signs on each apartment building—and every 100 feet along the streets—of Whitcomb Court, which state: "'NO TRESPASSING[.] PRIVATE PROPERTY[.] YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA. UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION. UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNERS EXPENSE.'" Pet. for Cert. 5. The RRHA also enacted a policy authorizing the Richmond police

> "'to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate *a legitimate business or social purpose* for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.'" App. to Pet. for Cert. 98–99 (emphasis added).

Persons who trespass after being notified not to return are subject to prosecution under Va. Code Ann. § 18.2–119 (1996):

> "If any person without authority of law goes upon or remains upon the lands, buildings or premises of an-

> other, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be guilty of a Class 1 misdemeanor."

B

Respondent Kevin Hicks, a nonresident of Whitcomb Court, has been convicted on two prior occasions of trespassing there and once of damaging property there. Those convictions are not at issue in this case. While the property-damage charge was pending, the RRHA gave Hicks written notice barring him from Whitcomb Court, and Hicks signed this notice in the presence of a police officer.[1] Twice after receiving this notice Hicks asked for permission to return; twice the Whitcomb Court housing manager said "no." That did not stop Hicks; in January 1999 he again trespassed at Whitcomb Court and was arrested and convicted under § 18.2–119.

At trial, Hicks maintained that the RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness. On appeal of his conviction, a three-judge panel of the Court of Appeals of Virginia initially rejected Hicks' contentions, but the en banc Court of Appeals reversed. That court held that the streets of Whitcomb Court were a "traditional public forum," notwithstanding the city ordinance declaring them closed, and vacated Hicks' conviction on the ground that RRHA's policy violated the First Amendment. 36 Va. App. 49, 56, 548 S. E. 2d 249, 253 (2001). The Virginia Supreme Court affirmed the en

[1] The letter stated, in part: " 'This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police.' " 264 Va. 48, 53, 563 S. E. 2d 674, 677 (2002).

banc Court of Appeals, but for different reasons. Without deciding whether the streets of Whitcomb Court were a public forum, the Virginia Supreme Court concluded that the RRHA policy was unconstitutionally overbroad. While acknowledging that the policy was "designed to punish activities that are not protected by the First Amendment," 264 Va. 48, 58, 563 S. E. 2d 674, 680 (2002), the court held that "the policy also prohibits speech and conduct that are clearly protected by the First Amendment," *ibid.* The court found the policy defective because it vested too much discretion in Whitcomb Court's manager to determine whether an individual's presence at Whitcomb Court is "authorized," allowing her to "prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment." *Id.*, at 60, 563 S. E. 2d, at 680–681. We granted the Commonwealth's petition for certiorari. 537 U. S. 1169 (2003).

II

A

Hicks does not contend that he was engaged in constitutionally protected conduct when arrested; nor does he challenge the validity of the trespass *statute* under which he was convicted. Instead he claims that the RRHA *policy* barring him from Whitcomb Court is overbroad under the First Amendment, and cannot be applied to him—or anyone else.[2] The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 796 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legiti-

[2] As noted, the Virginia Supreme Court held that invalidity of the RRHA policy entitled Hicks to vacatur of his conviction under the unquestionably valid trespass statute, which Hicks unquestionably violated. We do not reach the question whether federal law compels this result.

mate sweep," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973), suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," *id.*, at 613. See also *Virginia* v. *Black*, 538 U. S. 343, 367 (2003); *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, and n. 7, 497 (1965).

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 380 (1977); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, *Dombrowski*, *supra*, at 486–487—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U. S., at 615. For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech

be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, *ibid.*, before applying the "strong medicine" of overbreadth invalidation, *id.*, at 613.

B

Petitioner asks this Court to impose restrictions on "the use of overbreadth standing," limiting the availability of facial overbreadth challenges to those whose *own conduct* involved some sort of expressive activity. Brief for Petitioner 13, 24–31. The United States as *amicus curiae* makes the same proposal, Brief for United States as *Amicus Curiae* 14–17, and urges that Hicks' facial challenge to the RRHA trespass policy "should not have been entertained," *id.*, at 10. The problem with these proposals is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims. "[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 617 (1989). Whether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law.

This Court may, however, review the Virginia Supreme Court's holding that the RRHA policy violates the First Amendment. We may examine, in particular, whether the claimed overbreadth in the RRHA policy is sufficiently "substantial" to produce facial invalidity. These questions involve not standing, but "the determination of [a] First Amendment challenge on the merits." *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 958–959 (1984). Because it is the Commonwealth of Virginia, not Hicks, that has invoked the authority of the federal courts by petitioning for a writ of certiorari, our jurisdiction to review the First Amendment merits question is clear under *ASARCO,* 490 U. S., at 617–618. The Commonwealth has suffered, as a consequence of the Virginia Supreme Court's "final judgment

altering tangible legal rights," *id.*, at 619, an actual injury in fact—inability to prosecute Hicks for trespass—that is sufficiently "distinct and palpable" to confer standing under Article III, *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). We accordingly proceed to that merits inquiry, leaving for another day the question whether our ordinary rule that a litigant may not rest a claim to relief on the legal rights or interests of third parties, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474 (1982), would exclude a case such as this from initiation in federal court.

C

The Virginia Supreme Court found that the RRHA policy allowed Gloria S. Rogers, the manager of Whitcomb Court, to exercise "unfettered discretion" in determining who may use the RRHA's property. 264 Va., at 59, 563 S. E. 2d, at 680. Specifically, the court faulted an "unwritten" rule that persons wishing to hand out flyers on the sidewalks of Whitcomb Court need to obtain Rogers' permission. *Ibid.* This unwritten portion of the RRHA policy, the court concluded, unconstitutionally allows Rogers to "prohibit speech that she finds personally distasteful or offensive." *Id.*, at 60, 563 S. E. 2d, at 681.

Hicks, of course, was not arrested for leafleting or demonstrating without permission. He violated the RRHA's *written* rule that persons who receive a barment notice must not return to RRHA property. The Virginia Supreme Court, based on its objection to the "unwritten" requirement that demonstrators and leafleters obtain advance permission, declared the *entire* RRHA trespass policy overbroad and void—including the written rule that those who return after receiving a barment notice are subject to arrest. Whether these provisions are severable is of course a matter of state law, see *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) *(per curiam)*, and the Virginia Supreme Court has implicitly de-

cided that they are not—that all components of the RRHA trespass policy must stand or fall together. It could not properly decree that they fall by reason of the overbreadth doctrine, however, unless the trespass policy, *taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep.[3] See *Broadrick*, 413 U. S., at 615. The overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact," that substantial overbreadth exists. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 14 (1988).

Hicks has not made such a showing with regard to the RRHA policy taken as a whole—even assuming, *arguendo*, the unlawfulness of the policy's "unwritten" rule that demonstrating and leafleting at Whitcomb Court require permission from Gloria Rogers. Consider the "no-return" notice served on nonresidents who have no "legitimate business or social purpose" in Whitcomb Court: Hicks has failed to demonstrate that this notice would even be given to anyone engaged in constitutionally protected speech. Gloria Rogers testified that leafleting and demonstrations *are* permitted at Whitcomb Court, so long as permission is obtained in advance. App. to Pet. for Cert. 100–102. Thus, "legitimate business or social purpose" evidently includes leafleting and demonstrating; otherwise, Rogers would lack authority to permit those activities on RRHA property. Hicks has failed to demonstrate that *any* First Amendment activity falls outside the "legitimate business or social purpose[s]" that permit entry. As far as appears, until one receives a barment

[3] Contrary to JUSTICE SOUTER's suggestion, *post*, at 124 (concurring opinion), the Supreme Court of Virginia did not focus solely on the "unwritten" element of the RRHA trespass policy "[i]n comparing invalid applications against valid ones for purposes of the First Amendment overbreadth doctrine." The fact is that its opinion contains *no* "comparing" of valid and invalid applications *whatever;* the proportionality aspect of our overbreadth doctrine is simply ignored. Since, however, the Virginia Supreme Court struck down the *entire* RRHA trespass policy, the question presented here is whether the *entire* policy is substantially overbroad.

notice, entering for a First Amendment purpose is not a trespass.

As for the written provision authorizing the police to arrest those who return to Whitcomb Court after receiving a barment notice: That certainly does not violate the First Amendment as applied to persons whose postnotice entry is not for the purpose of engaging in constitutionally protected speech. And Hicks has not even established that it would violate the First Amendment as applied to persons whose postnotice entry *is* for that purpose. Even assuming the streets of Whitcomb Court are a public forum, the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser.

Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to *all* persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct—a group that would seemingly far outnumber First Amendment speakers. Even assuming invalidity of the "unwritten" rule that requires leafleters and demonstrators to obtain advance permission from Gloria Rogers, Hicks has not shown, based on the record in this

case, that the RRHA trespass policy as a whole prohibits a "substantial" amount of protected speech in relation to its many legitimate applications. That is not surprising, since the overbreadth doctrine's concern with "chilling" protected speech "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." *Broadrick*, *supra*, at 615. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating). Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the "strong medicine" of overbreadth to invalidate the entire RRHA trespass policy. Whether respondent may challenge his conviction on other grounds—and whether those claims have been properly preserved—are issues we leave open on remand.

* * *

For these reasons, we reverse the judgment of the Virginia Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion and add this afterword to flag an issue of no consequence here, but one on which a future case might turn. In comparing invalid applications against valid ones for purposes of the First Amendment overbreadth doctrine, the Supreme Court of Virginia apparently assumed that the appropriate focus of the analysis was the "unwritten" element of the housing authority's trespass policy, that is, the requirement that nonresidents distributing literature or demonstrating on the property obtain prior authorization.

264 Va. 48, 58–60, 563 S. E. 2d 674, 680–681 (2002) (finding that the "unwritten" portion of the policy, although designed to punish unprotected activities, allowed the housing manager to prohibit protected speech "that she finds personally distasteful or offensive" and "speech that is political or religious in nature"). We, on the other hand, take a broader view of the relevant law, by looking to the potential applications of the entire trespass policy, written and unwritten. *Ante*, at 121–124. It does not matter here, however, which position one takes on the appropriate "law" whose overbreadth is to be assessed, for there is no substantial overbreadth either way. Regardless of the scope of the law that forms the denominator of the fraction here, the numerator of potential invalid applications is too small to result in a finding of substantial overbreadth. But in other circumstances, the scope of the law chosen for comparison with invalid applications might decide the case. It might be dispositive whether, say, a city's speech ordinance for a public park is analyzed alone or as one element of the combined policies governing expression in public schoolyards, municipal cemeteries, and the city council chamber. Suffice it to say that today's decision does not address how to go about identifying the scope of the relevant law for purposes of overbreadth analysis.

Syllabus

OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* BAZZETTA ET AL.

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

No. 02–94. Argued March 26, 2003—Decided June 16, 2003

Responding to concerns about prison security problems caused by the increasing number of visitors to Michigan's prisons and about substance abuse among inmates, the Michigan Department of Corrections (MDOC) promulgated new regulations limiting prison visitation. An inmate may be visited by qualified clergy and attorneys on business and by persons placed on an approved list, which may include an unlimited number of immediate family members and 10 others; minor children are not permitted to visit unless they are the children, stepchildren, grandchildren, or siblings of the inmate; if the inmate's parental rights are terminated, the child may not visit; a child visitor must be accompanied by a family member of the child or inmate or the child's legal guardian; former prisoners are not permitted to visit except that a former prisoner who is an immediate family member of an inmate may visit if the warden approves. Prisoners who commit two substance-abuse violations may receive only clergy and attorneys, but may apply for reinstatement of visitation privileges after two years. Respondents—prisoners, their friends, and family members—filed a 42 U. S. C. § 1983 action, alleging that the regulations as they pertain to noncontact visits violate the First, Eighth, and Fourteenth Amendments. The District Court agreed, and the Sixth Circuit affirmed.

Held:

1. The fact that the regulations bear a rational relation to legitimate penological interests suffices to sustain them regardless of whether respondents have a constitutional right of association that has survived incarceration. This Court accords substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining a corrections system's legitimate goals and determining the most appropriate means to accomplish them. The regulations satisfy each of four factors used to decide whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge. See *Turner* v. *Safley*, 482 U. S. 78, 89–91. First, the regulations bear a rational relationship to a legitimate penological interest. The restrictions on children's visitation are related to MDOC's valid interests in maintaining internal security and

protecting child visitors from exposure to sexual or other misconduct or from accidental injury. They promote internal security, perhaps the most legitimate penological goal, by reducing the total number of visitors and by limiting disruption caused by children. It is also reasonable to ensure that the visiting child is accompanied and supervised by adults charged with protecting the child's best interests. Prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crime. Restricting visitation for inmates with two substance-abuse violations serves the legitimate goal of deterring drug and alcohol use within prison. Second, respondents have alternative means of exercising their asserted right of association with those prohibited from visiting. They can send messages through those who are permitted to visit, and can communicate by letter and telephone. Visitation alternatives need not be ideal; they need only be available. Third, accommodating the associational right would have a considerable impact on guards, other inmates, the allocation of prison resources, and the safety of visitors by causing a significant reallocation of the prison system's financial resources and by impairing corrections officers' ability to protect all those inside a prison's walls. Finally, respondents have suggested no alternatives that fully accommodate the asserted right while not imposing more than a *de minimis* cost to the valid penological goals. Pp. 131–136.

2. The visitation restriction for inmates with two substance-abuse violations is not a cruel and unusual confinement condition violating the Eighth Amendment. Withdrawing visitation privileges for a limited period in order to effect prison discipline is not a dramatic departure from accepted standards for confinement conditions. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety, or involve the infliction of pain or injury or deliberate indifference to their risk. Pp. 136–137.

286 F. 3d 311, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 137. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 138.

Thomas L. Casey, Solicitor General of Michigan, argued the cause for petitioners. With him on the briefs were *Mike Cox*, Attorney General, and *Leo H. Friedman*, *Mark Matus*, and *Lisa C. Ward*, Assistant Attorneys General.

Jeffrey A. Lamken argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Olson, Assistant Attorney General McCallum, Deputy Solicitor General Clement,* and *Robert M. Loeb.*

Deborah LaBelle argued the cause for respondents. With her on the brief were *Barbara R. Levine* and *Patricia A. Streeter.**

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Michigan, by regulation, places certain restrictions on visits with prison inmates. The question before the Court is whether the regulations violate the substantive due process mandate of the Fourteenth Amendment, or the First or Eighth Amendments as applicable to the States through the Fourteenth Amendment.

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Ken Salazar,* Attorney General of Colorado, *Alan J. Gilbert,* Solicitor General, and *Juliana M. Zolynas,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.,* of Alabama, *Charlie Crist* of Florida, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *Steve Carter* of Indiana, *J. Joseph Curran, Jr.,* of Maryland, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Elizabeth Alexander, David C. Fathi, Steven R. Shapiro, Lenora M. Lapidus, Daniel L. Greenberg, John Boston, Michael J. Steinberg,* and *Kary L. Moss;* for the National Council on Crime and Delinquency et al. by *Jill M. Wheaton;* and for the Public Defender Service for the District of Columbia et al. by *Paul Denenfeld* and *Giovanna Shay.*

Roderick M. Hills, Jr., filed a brief for the National Council of La Raza et al. as *amici curiae.*

I

The population of Michigan's prisons increased in the early 1990's. More inmates brought more visitors, straining the resources available for prison supervision and control. In particular, prison officials found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs. Special problems were encountered with the increase in visits by children, who are at risk of seeing or hearing harmful conduct during visits and must be supervised with special care in prison visitation facilities.

The incidence of substance abuse in the State's prisons also increased in this period. Drug and alcohol abuse by prisoners is unlawful and a direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order, and the prevention of violence in the prisons.

In response to these concerns, the Michigan Department of Corrections (MDOC or Department) revised its prison visitation policies in 1995, promulgating the regulations here at issue. One aspect of the Department's approach was to limit the visitors a prisoner is eligible to receive, in order to decrease the total number of visitors.

Under MDOC's regulations, an inmate may receive visits only from individuals placed on an approved visitor list, except that qualified members of the clergy and attorneys on official business may visit without being listed. Mich. Admin. Code Rule 791.6609(2) (1999); Director's Office Mem. 1995–59 (effective date Aug. 25, 1995). The list may include an unlimited number of members of the prisoner's immediate family and 10 other individuals the prisoner designates, subject to some restrictions. Rule 791.6609(2). Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. Rule 791.6609(2)(b); Mich. Comp. Laws Ann. § 791.268a (West Supp. 2003). If an inmate's parental rights

have been terminated, the child may not be a visitor. Rule 791.6609(6)(a) (1999). A child authorized to visit must be accompanied by an adult who is an immediate family member of the child or of the inmate or who is the legal guardian of the child. Rule 791.6609(5); Mich. Dept. of Corrections Procedure OP–SLF/STF–05.03.140, p. 9 (effective date Sept. 15, 1999). An inmate may not place a former prisoner on the visitor list unless the former prisoner is a member of the inmate's immediate family and the warden has given prior approval. Rule 791.6609(7).

The Department's revised policy also sought to control the widespread use of drugs and alcohol among prisoners. Prisoners who commit multiple substance-abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. Rule 791.6609(11)(d). An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. Rule 791.6609(12). Reinstatement is within the warden's discretion. *Ibid.*

Respondents are prisoners, their friends, and their family members. They brought this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the restrictions upon visitation violate the First, Eighth, and Fourteenth Amendments. It was certified as a class action under Federal Rule of Civil Procedure 23.

Inmates who are classified as the highest security risks, as determined by the MDOC, are limited to noncontact visitation. This case does not involve a challenge to the method for making that determination. By contrast to contact visitation, during which inmates are allowed limited physical contact with their visitors in a large visitation room, inmates restricted to noncontact visits must communicate with their visitors through a glass panel, the inmate and the visitor being on opposite sides of a booth. In some facilities the booths are located in or at one side of the same room used for contact visits. The case before us concerns the regulations as they pertain to noncontact visits.

The United States District Court for the Eastern District of Michigan agreed with the prisoners that the regulations pertaining to noncontact visits were invalid. *Bazzetta* v. *McGinnis*, 148 F. Supp. 2d 813 (2001). The Sixth Circuit affirmed, 286 F. 3d 311 (2002), and we granted certiorari, 537 U. S. 1043 (2002).

II

The Court of Appeals agreed with the District Court that the restrictions on noncontact visits are invalid. This was error. We first consider the contention, accepted by the Court of Appeals, that the regulations infringe a constitutional right of association.

We have said that the Constitution protects "certain kinds of highly personal relationships," *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618, 619–620 (1984). And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents. See *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

This is not an appropriate case for further elaboration of those matters. The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 125 (1977); *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001). And, as our cases have established, freedom of association is among the rights least compatible with incarceration. See *Jones*, *supra*, at 125–126; *Hewitt* v. *Helms*, 459 U. S. 460 (1983). Some curtailment of that freedom must be expected in the prison context.

We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We

need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question. See *Turner* v. *Safley,* 482 U. S. 78, 89 (1987). We have taken a similar approach in previous cases, such as *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974), which we cited with approval in *Turner.* In *Pell,* we found it unnecessary to decide whether an asserted First Amendment right survived incarceration. Prison administrators had reasonably exercised their judgment as to the appropriate means of furthering penological goals, and that was the controlling rationale for our decision. We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them. See, *e. g.*, *Pell*, *supra*, at 826–827; *Helms*, *supra*, at 467; *Thornburgh* v. *Abbott,* 490 U. S. 401, 408 (1989); *Jones*, *supra*, at 126, 128; *Turner*, *supra*, at 85, 89; *Block* v. *Rutherford,* 468 U. S. 576, 588 (1984); *Bell* v. *Wolfish,* 441 U. S. 520, 562 (1979). The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it. See *Jones*, *supra*, at 128; *O'Lone* v. *Estate of Shabazz,* 482 U. S. 342, 350 (1987); *Shaw, supra,* at 232. Respondents have failed to do so here.

In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "'valid, rational connection'" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation. 482 U. S., at 89–91.

Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals, see, *e. g.*, *Pell*, *supra*, at 823, by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal, see, *e. g.*, *Block*, *supra*, at 586–587. The logical connection between this interest and the regulations is demonstrated by trial testimony that reducing the number of children allows guards to supervise them better to ensure their safety and to minimize the disruptions they cause within the visiting areas.

As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Respondents argue that excluding minor nieces and nephews and children as to whom parental rights have been terminated bears no rational relationship to these penological interests. We reject this contention, and in all events it would not suffice to invalidate the regulations as to all noncontact visits. To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her—children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.

MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes.

We have recognized that "communication with other felons is a potential spur to criminal behavior." *Turner*, *supra*, at 91–92.

Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. Drug smuggling and drug use in prison are intractable problems. See, *e. g.*, *Bell*, *supra*, at 559; *Block*, *supra*, at 586–587; *Hudson* v. *Palmer*, 468 U. S. 517, 527 (1984). Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose. In this regard we note that numerous other States have implemented similar restrictions on visitation privileges to control and deter substance-abuse violations. See Brief for State of Colorado et al. as *Amici Curiae* 4–9.

Respondents argue that the regulation bears no rational connection to preventing substance abuse because it has been invoked in certain instances where the infractions were, in respondents' view, minor. Even if we were inclined, though, to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations, the individual cases respondents cite are not sufficient to strike down the regulations as to all noncontact visits. Respondents also contest the 2-year bar and note that reinstatement of visitation is not automatic even at the end of two years. We agree the restriction is severe. And if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction on noncontact visits in all instances.

Having determined that each of the challenged regulations bears a rational relationship to a legitimate penological interest, we consider whether inmates have alternative means of exercising the constitutional right they seek to assert. *Turner*, 482 U. S., at 90. Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable. That showing, however, cannot be made. Respondents here do have alternative means of associating with those prohibited from visiting. As was the case in *Pell*, inmates can communicate with those who may not visit by sending messages through those who are allowed to visit. 417 U. S., at 825. Although this option is not available to inmates barred all visitation after two violations, they and other inmates may communicate with persons outside the prison by letter and telephone. Respondents protest that letter writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available. Here, the alternatives are of sufficient utility that they give some support to the regulations, particularly in a context where visitation is limited, not completely withdrawn.

Another relevant consideration is the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors. See *Turner*, *supra*, at 90; *Hudson*, *supra*, at 526 (visitor safety). Accommodating respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls. When such consequences are present, we are "particularly deferential" to prison administrators' regulatory judgments. *Turner*, *supra*, at 90.

Finally, we consider whether the presence of ready alternatives undermines the reasonableness of the regulations. *Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal. 482 U. S., at 90–91. Respondents have not suggested alternatives meeting this high standard for any of the regulations at issue. We disagree with respondents' suggestion that allowing visitation by nieces and nephews or children for whom parental rights have been terminated is an obvious alternative. Increasing the number of child visitors in that way surely would have more than a negligible effect on the goals served by the regulation. As to the limitation on visitation by former inmates, respondents argue the restriction could be time limited, but we defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions. Respondents suggest the duration of the restriction for inmates with substance-abuse violations could be shortened or that it could be applied only for the most serious violations, but these alternatives do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner*'s high standard. These considerations cannot justify the decision of the Court of Appeals to invalidate the regulation as to all noncontact visits.

III

Respondents also claim that the restriction on visitation for inmates with two substance-abuse violations is a cruel and unusual condition of confinement in violation of the Eighth Amendment. The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of

what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Cf. *Sandin* v. *Conner*, 515 U. S. 472, 485 (1995). Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur. See, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976); *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid.

* * *

The judgment of the Court of Appeals is reversed.

It is so ordered.

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

Our decision today is faithful to the principle that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner* v. *Safley*, 482 U. S. 78, 84 (1987). As we explained in *Turner:*

> "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government for the redress of grievances, *Johnson* v. *Avery*, 393 U. S. 483 (1969); they

> are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment, *Lee* v. *Washington*, 390 U. S. 333 (1968); and they enjoy the protections of due process, *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Haines* v. *Kerner*, 404 U. S. 519 (1972). Because prisoners retain these rights, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.' *Procunier* v. *Martinez*, 416 U. S., at 405–406." *Ibid.*

It was in the groundbreaking decision in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), in which we held that parole revocation is a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment, that the Court rejected the view once held by some state courts that a prison inmate is a mere slave. See *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 711–713 (CA7 1973). Under that rejected view, the Eighth Amendment's proscription of cruel and unusual punishment would have marked the outer limit of the prisoner's constitutional rights. It is important to emphasize that nothing in the Court's opinion today signals a resurrection of any such approach in cases of this kind. See *ante*, at 131. To the contrary, it remains true that the "restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual." 479 F. 2d, at 712.

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

I concur in the judgment of the Court because I would sustain the challenged regulations on different grounds from those offered by the majority.

I

A

The Court is asked to consider "[w]hether prisoners have a right to non-contact prison visitation protected by the First and Fourteenth Amendments." Brief for Petitioners i. In my view, the question presented, as formulated in the order granting certiorari, draws attention to the wrong inquiry. Rather than asking in the abstract whether a certain right "survives" incarceration, *ante*, at 132, the Court should ask whether a particular prisoner's lawful sentence took away a right enjoyed by free persons.

The Court's precedents on the rights of prisoners rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.* Under this view, the Court's precedents on prisoner "rights" bear some reexamination.

When faced with a prisoner asserting a deprivation of constitutional rights in this context, the Court has asked first whether the right survives incarceration, *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974), and then whether a prison restriction on that right "bear[s] a rational relation to legitimate penological interests." *Ante*, at 132 (citing *Turner* v. *Safley*, 482 U. S. 78, 89 (1987)).

Pell and its progeny do not purport to impose a substantive limitation on the power of a State to sentence a person convicted of a criminal offense to a deprivation of the right at issue. For example, in *Turner*, the Court struck down a prison regulation that prohibited inmates from marrying absent permission from the superintendent. 482 U. S., at 89, 94–99. *Turner* cannot be properly understood, however, as holding that a State may not sentence those convicted to both impris-

onment and the denial of a constitutional right to marry.* The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishments Clause of the Eighth Amendment, and *Turner* cited neither that Clause nor the Court's precedents interpreting it. Prisoners challenging their sentences must, absent an unconstitutional procedural defect, rely solely on the Eighth Amendment.

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations. See, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law [and] fixing punishments for the commission of these crimes . . . rests with the States"); see also *Ewing* v. *California*, 538 U. S. 11, 24 (2003) (opinion of O'CONNOR, J.) ("[O]ur tradition of deferring to state legislatures in making and implementing such important [sentencing] policy decisions is longstanding").

Turner is therefore best thought of as implicitly deciding that the marriage restriction was not within the scope of the State's lawfully imposed sentence and that, therefore, the regulation worked a deprivation of a constitutional right without sufficient process. Yet, when the resolution of a federal constitutional issue may be rendered irrelevant by

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*A prisoner's sentence is the punishment imposed pursuant to state law. Sentencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence.

the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue. *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941). Here, if the prisoners' lawful sentences encompassed the extinction of any right to intimate association as a matter of state law, all that would remain would be respondents' (meritless, see Part II, *infra*) Eighth Amendment claim. Petitioners have not asked this Court to abstain under *Pullman*, and the issue of *Pullman* abstention was not considered below. As a result, petitioners have, in this case, submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry. Here, furthermore, *Pullman* abstention seems unnecessary because respondents make no effort to show that the sentences imposed on them *did not* extinguish the right they now seek to enforce. And for good reason.

It is highly doubtful that, while sentencing each respondent to imprisonment, the State of Michigan intended to permit him to have any right of access to visitors. Such access seems entirely inconsistent with Michigan's goal of segregating a criminal from society, see *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972) (incarceration by design intrudes on the freedom "to be with family and friends and to form the other enduring attachments of normal life"); cf. *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) (upholding incarceration several hours of flight away from home).

B

Though the question whether the State of Michigan intended to confer upon respondents a right to receive visitors is ultimately for the State itself to answer, it must nonetheless be confronted in this case. The Court's *Turner* analysis strongly suggests that the asserted rights were extinguished by the State of Michigan in incarcerating respondents. Restrictions that are rationally connected to the running of a prison, that are designed to avoid adverse impacts on guards,

inmates, or prison resources, that cannot be replaced by "ready alternatives," and that leave inmates with alternative means of accomplishing what the restrictions prohibit, are presumptively included within a sentence of imprisonment. Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. From the time prisons began to be used as places where criminals served out their sentences, they were administered much in the way Michigan administers them today.

Incarceration in the 18th century in both England and the Colonies was virtually nonexistent as a form of punishment. L. Friedman, Crime and Punishment in American History 48 (1993) (hereinafter Friedman) ("From our standpoint, what is most obviously missing, as a punishment [in the colonial system of corrections], is imprisonment"). Colonial jails had a very limited function of housing debtors and holding prisoners who were awaiting trial. See *id.*, at 49. These institutions were generally characterized by "[d]isorder and neglect." McGowen, The Well-Ordered Prison: England, 1780–1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds. 1995) (hereinafter McGowen). It is not therefore surprising that these jails were quite permeable. A debtor could come and go as he pleased, as long as he remained within a certain area ("'prison bounds'") and returned to jail to sleep. Friedman 49. Moreover, a prisoner with connections could get food and clothing from the outside, *id.*, at 50; see also W. Lewis, From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796–1848, p. 49 (1965) (hereinafter Lewis) ("Many visitors brought the felons such items of contraband as rum, tools, money, and unauthorized messages"). In sum, "[t]here was little evidence of authority," McGowen 79, uniformity, and discipline.

Prison as it is known today and its part in the penitentiary system were "basically a nineteenth-century invention."

Friedman 48. During that time, the prison became the centerpiece of correctional theory, while whipping, a traditional form of punishment in colonial times, fell into disrepute. The industrialization produced rapid growth, population mobility, and large cities with no well-defined community; as a result, public punishments resulting in stigma and shame wielded little power, as such methods were effective only in small closed communities. *Id.*, at 77.

The rise of the penitentiary and confinement as punishment was accompanied by the debate about the Auburn and Pennsylvania systems, both of which imposed isolation from fellow prisoners and the outside. D. Rothman, The Discovery of the Asylum 82 (1971) (hereinafter Rothman) ("As both schemes placed maximum emphasis on preventing the prisoners from communicating with anyone else, the point of dispute was whether convicts should work silently in large groups or individually within solitary cells"); *id.*, at 95. Although there were several justifications for such isolation, they all centered around the belief in the necessity of constructing a special setting for the "deviant" (*i. e.*, criminal), where he would be placed in an environment targeted at rehabilitation, far removed from the corrupting influence of his family and community. *Id.*, at 71; A. Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America 17, 19, 23 (1992); cf. Friedman 77 (describing the changing attitudes toward the origin of crime). Indeed, every feature of the design of a penitentiary—external appearance, internal arrangement, and daily routine—were aimed at achieving that goal. Rothman 79–80; see also *id.*, at 83.

Whatever the motives for establishing the penitentiary as the means of combating crime, confinement became standardized in the period between 1780 and 1865. McGowen 79. Prisons were turned into islands of "undeviating regularity," Lewis 122, with little connection to the outside, McGowen 108. Inside the prisons, there were only prisoners and jailers; the difference between the two groups was conspicu-

ously obvious. *Id.*, at 79. Prisoners' lives were carefully regulated, including the contacts with the outside. They were permitted virtually no visitors; even their letters were censored. Any contact that might resemble normal sociability among prisoners or with the outside world became a target for controls and prohibitions. *Id.*, at 108.

To the extent that some prisons allowed visitors, it was not for the benefit of those confined, but rather to their detriment. Many prisons offered tours in order to increase revenues. During such tours, visitors could freely stare at prisoners, while prisoners had to obey regulations categorically forbidding them to so much as look at a visitor. Lewis 124. In addition to the general "burden on the convict's spirit" in the form of "the galling knowledge that he was in all his humiliation subject to the frequent gaze of visitors, some of whom might be former friends or neighbors," presence of women visitors made the circumstances "almost unendurable," prompting a prison physician to complain about allowing women in. *Ibid.*

Although by the 1840's some institutions relaxed their rules against correspondence and visitations, the restrictions continued to be severe. For example, Sing Sing allowed convicts to send one letter every six months, provided it was penned by the chaplain and censored by the warden. Each prisoner was permitted to have one visit from his relatives during his sentence, provided it was properly supervised. No reading materials of any kind, except a Bible, were allowed inside. S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998). With such stringent regimentation of prisoners' lives, the prison "had assumed an unmistakable appearance," McGowen 79, one which did not envision any entitlement to visitation.

Although any State is free to alter its definition of incarceration to include the retention of constitutional rights previously enjoyed, it appears that Michigan sentenced

respondents against the backdrop of this conception of imprisonment.

II

In my view, for the reasons given in *Hudson* v. *McMillian*, 503 U. S. 1, 18–19 (1992) (THOMAS, J., dissenting), regulations pertaining to visitations are not punishment within the meaning of the Eighth Amendment. Consequently, respondents' Eighth Amendment challenge must fail.

Syllabus

FEDERAL ELECTION COMMISSION *v.* BEAUMONT ET AL.

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

No. 02–403. Argued March 25, 2003—Decided June 16, 2003

A corporation is prohibited from making "a contribution or expenditure in connection with" certain federal elections, 2 U. S. C. § 441b(a), but not from establishing, administering, and soliciting contributions to a separate fund to be used for political purposes, § 441b(b)(2)(C). Such a PAC (so called after the political action committee that runs it) is free to make contributions and other expenditures in connection with federal elections. Respondents, a nonprofit advocacy corporation known as North Carolina Right to Life, Inc., and others (collectively NCRL), sued petitioner Federal Election Commission (FEC), challenging the constitutionality of § 441b and its implementing regulations as applied to NCRL. As relevant here, the District Court granted NCRL summary judgment as to the ban on direct contributions, and the Fourth Circuit affirmed.

Held: Applying the direct contribution prohibition to nonprofit advocacy corporations is consistent with the First Amendment. Pp. 152–163.

(a) An attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially deleterious influences on federal elections. Since 1907, federal law has barred such direct corporate contributions. Much of the subsequent congressional attention to corporate political activity has been meant to strengthen the original, core prohibition on such contributions. *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197. As in 1907, current law focuses on the corporate structure's special characteristics that threaten the integrity of the political process. *Id.*, at 209. In barring corporate earnings from turning into political "war chests," the ban was and is intended to "preven[t] corruption or the appearance of corruption." *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 496–497. The ban also protects individuals who have paid money into a corporation or union for other purposes from having their money used to support political candidates to whom they may be opposed, *National Right to Work*, *supra*, at 208, and hedges

against use of corporations as conduits for circumventing "valid contribution limits," *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 456, and n. 18. Pp. 152–156.

(b) *National Right to Work* all but decided against NCRL's position that § 441b's ban on direct contributions is unconstitutional as applied to nonprofit advocacy corporations. There, this Court upheld the part of § 441b restricting a nonstock corporation to its membership when soliciting PAC contributions, concluding that the congressional judgment to regulate corporate political involvement warrants considerable deference and reflects a permissible assessment of the dangers that corporations pose to the electoral process. 459 U. S., at 207–211. It would be hard to read this conclusion, except on the practical understanding that the corporation's capacity to make contributions was legitimately limited to indirect donations within the scope allowed to PACs. And the Court specifically rejected the argument made here, that deference to congressional judgments about corporate contribution limits turns on details of corporate form or the affluence of particular corporations. *National Right to Work* has repeatedly been read as approving § 441b's prohibition on direct contributions, even by nonprofit corporations without great financial resources. Equal significance must be accorded to *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, on which NCRL and the Fourth Circuit have relied. In holding § 441b's prohibition on independent expenditures unconstitutional as applied to a nonprofit advocacy corporation, the Court there distinguished *National Right to Work* on the ground that it addressed regulation of contributions, not expenditures. Pp. 156–159.

(c) This Court could not hold for NCRL without recasting its understanding of the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them. NCRL's efforts do not unsettle existing law on these points. Its argument that *Massachusetts Citizens for Life*-type corporations pose no potential threat to the political system is rejected. Concern about the corrupting potential underlying the corporate ban may be implicated by advocacy corporations, which, like their for-profit counterparts, benefit from state-created advantages and may be able to amass substantial political war chests. Also rejected is NCRL's argument that the application of the ban on direct contributions should be subject to strict scrutiny because § 441b bars, rather than limits, contributions based on their source. When reviewing political financial restrictions, the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association, and restrictions on political

Syllabus

contributions have long been treated as marginal speech restrictions subject to relatively complaisant First Amendment review because contributions lie closer to the edges than to the core of political expression. Thus, a contribution limit passes muster if it is closely drawn to match a sufficiently important interest. The time to consider the difference between a ban and a limit is when applying scrutiny at the level selected, not in selecting the standard of review itself. But even NCRL's argument that § 441b is not closely drawn rests on the false premise that the provision is a complete ban. In fact, the provision allows corporate political participation through PACs. And this Court does not think that regulatory burdens on PACs, including restrictions on their ability to solicit funds, renders a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions. See *National Right to Work*, *supra*, at 201–202. Pp. 159–163.

278 F. 3d 261, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 163. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 164.

Deputy Solicitor General Clement argued the cause for petitioner. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Gregory G. Garre*, *Douglas N. Letter*, *Edward Himmelfarb*, and *Jonathan H. Levy.*

James Bopp, Jr., argued the cause for respondents. With him on the brief were *Richard E. Coleson* and *Thomas J. Marzen.**

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*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for the Brennan Center for Justice at New York University School of Law by *Burt Neuborne*, *Frederick A. O. Schwarz*, and *Deborah Goldberg;* and for Public Citizen, Inc., et al. by *Scott L. Nelson*, *Alan B. Morrison*, and *David C. Vladeck*.

Briefs of *amici curiae* urging affirmance were filed for the American Taxpayers Alliance by *Alan P. Dye;* for the Pacific Legal Foundation by *Deborah J. La Fetra;* and for RealCampaignReform.org, Inc., et al. by *William J. Olson*, *John S. Miles*, and *Herbert W. Titus.*

JUSTICE SOUTER delivered the opinion of the Court.

Since 1907, federal law has barred corporations from contributing directly to candidates for federal office. We hold that applying the prohibition to nonprofit advocacy corporations is consistent with the First Amendment.

I

The current statute makes it "unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with" certain federal elections, 90 Stat. 490, as renumbered and amended, 2 U. S. C. § 441b(a), "contribution or expenditure" each being defined to include "anything of value," § 441b(b)(2). The prohibition does not, however, forbid "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." § 441b(b)(2)(C); see § 431(4)(B). Such a PAC (so called after the political action committee that runs it) may be wholly controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions. See §§ 441b(b)(4)(B)–(C); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 200, n. 4 (1982). While federal law requires PACs to register and disclose their activities, §§ 432–434; see *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 253–254 (1986), the law leaves them free to make contributions as well as other expenditures in connection with federal elections, § 441b(b)(2)(C).

Respondents are a corporation known as North Carolina Right to Life, Inc., three of its officers, and a North Carolina voter (here, together, NCRL), who have sued the Federal Election Commission, the independent agency set up to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal electoral laws. § 437c

(b)(1). NCRL challenges the constitutionality of § 441b and the FEC's regulations implementing that section, 11 CFR §§ 114.2(b), 114.10 (2003), but only so far as they apply to NCRL. The corporation is organized under the laws of North Carolina to provide counseling to pregnant women and to urge alternatives to abortion, and as a nonprofit advocacy corporation it is exempted from federal taxation by § 501(c)(4) of the Internal Revenue Code, 26 U. S. C. § 501(c)(4).[1] It has no shareholders and, although it receives some donations from traditional business corporations, it is "overwhelmingly funded by private contributions from individuals." App. 14. NCRL has made contributions and expenditures in connection with state elections, but not federal, owing to 2 U. S. C. § 441b. Instead, it has established a PAC, the North Carolina Right to Life, Inc., Political Action Committee, which has contributed to federal candidates. See *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F. 3d 705, 709 (CA4 1999), cert. denied, 528 U. S. 1153 (2000).

The District Court granted summary judgment to NCRL and held § 441b unconstitutional as applied to the corporation, both as to direct contributions and independent expenditures. 137 F. Supp. 2d 648 (EDNC 2000). A divided Court of Appeals for the Fourth Circuit affirmed, 278 F. 3d 261 (2002), relying primarily on *Massachusetts Citizens for Life*, in which this Court held it unconstitutional to apply the statute to independent expenditures by Massachusetts Citizens for Life, Inc., a nonprofit advocacy corporation in some re-

[1] Section 501(c)(4)(A) grants exemption to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." An organization "may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare." Rev. Rul. 81–95, 1981–1 Cum. Bull. 332. Unlike contributions to § 501(c)(3) organizations, donations to those recognized under § 501(c)(4) are not tax deductible. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 543 (1983).

spects like NCRL. The Court of Appeals ruled, first, that the prohibition on independent expenditures may not be applied to NCRL. Although the panel acknowledged that Massachusetts Citizens for Life, unlike NCRL, had a formal policy against accepting corporate donations, see *Massachusetts Citizens for Life*, *supra*, at 263–264 (describing this feature of the organization as "essential to our holding"), it nevertheless treated NCRL as materially indistinguishable from Massachusetts Citizens for Life.

To the point for present purposes, the Court of Appeals went on to hold the ban on direct contributions likewise unconstitutional as applied to NCRL. While the majority of the divided court recognized that regulation of campaign contributions has received greater deference under First Amendment cases than regulation of independent expenditures, 278 F. 3d, at 274 (citing *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386–388 (2000)), it held the ban on direct contributions unjustified as applied to "*[Massachusetts Citizens for Life]*-type corporations," which it thought "pose[d] no risk of 'unfair deployment of wealth for political purposes.'" 278 F. 3d, at 275 (quoting *Massachusetts Citizens for Life*, *supra*, at 259). The Court of Appeals reasoned that "[t]he rationale utilized by the Court in *[Massachusetts Citizens for Life]* to declare prohibitions on independent expenditures unconstitutional as applied to [the advocacy corporation involved there] is equally applicable in the context of direct contributions." 278 F. 3d, at 275. Judge Gregory dissented from the others on this point, since he saw no way to square their conclusion with this Court's reasoning in *National Right to Work*. 278 F. 3d, at 282.

After the Fourth Circuit divided 7 to 4 in denying rehearing en banc, the FEC petitioned for certiorari solely as to the constitutionality of the ban on direct contributions.[2] Be-

[2] We thus have no occasion to say whether the Court of Appeals correctly held NCRL entitled to the so-called "*Massachusetts Citizens for Life* exception" to the statute's ban on independent expenditures.

cause on that issue the Fourth Circuit is in conflict with the Sixth, see *Kentucky Right to Life, Inc.* v. *Terry,* 108 F. 3d 637, 645–646 (1997) (upholding a provision of Kentucky law analogous to § 441b), we granted certiorari, 537 U. S. 1027 (2002). We now reverse.

II

A

Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially "deleterious influences on federal elections," which we have canvassed a number of times before. *United States* v. *Automobile Workers,* 352 U. S. 567, 585 (1957); see *id.,* at 570–584; see also *National Right to Work,* 459 U. S., at 208–209; *Pipefitters* v. *United States,* 407 U. S. 385, 402–412 (1972); *United States* v. *CIO,* 335 U. S. 106, 113–115 (1948). The current law grew out of a "popular feeling" in the late 19th century "that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Automobile Workers, supra,* at 570. A demand for congressional action gathered force in the campaign of 1904, which made a national issue of the political leverage exerted through corporate contributions, and after the election and new revelations of corporate political overreaching, President Theodore Roosevelt made banning corporate political contributions a legislative priority. R. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 1–8 (1988); see *Automobile Workers,* 352 U. S., at 571–575. Although some congressional proposals would have "prohibited political contributions by [only] certain classes of corporations," *id.,* at 573, the momentum was "for elections 'free from the power of money,'" *id.,* at 575 (citation omitted), and Congress acted on the President's call for an outright ban, not with half measures, but with the Tillman Act, ch. 420, 34 Stat. 864. This "first federal campaign finance law," Mutch, *supra,* at

xvii, banned "any corporation whatever" from making "a money contribution in connection with" federal elections, 34 Stat. 864–865.

Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul.[3] One feature, however, has stayed intact throughout this "careful legislative adjustment of the federal electoral laws," *National Right to Work*, *supra*, at 209, and much of the periodic amendment was meant to strengthen the original, core prohibition on direct corporate contributions. The Foreign Corrupt Practices Act of 1925, for example, broadened the ban on contributions to include "anything of value," and criminalized the act of receiving a contribution to match the criminality of making one. Ch. 368, §§302, 313, 43 Stat. 1070, 1074. So, in another instance, the 1947 Labor Management Relations Act drew labor unions permanently within the law's reach and invigorated the earlier prohibition to include "expenditure[s]" as well. Ch. 120, §304, 61 Stat. 159; see *Pipefitters*, *supra*, at 402.

Today, as in 1907, the law focuses on the "special characteristics of the corporate structure" that threaten the integrity of the political process. *National Right to Work*, 459 U. S., at 209; see *id.*, at 207; see also *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 658–659 (1990); *Massachusetts Citizens for Life*, 479 U. S., at 257–258; *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 500–501 (1985). As we explained it in *Austin*,

[3] See, *e. g.*, Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; Federal Corrupt Practices Act, 1925, ch. 368, 43 Stat. 1070; Act of July 19, 1940 (Hatch Act), 54 Stat. 767; War Labor Disputes Act, 1943, ch. 144, §9, 57 Stat. 167; Labor Management Relations Act, 1947, §304, 61 Stat. 159; Act of Oct. 31, 1951, §21, 65 Stat. 718; Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3; FECA Amendments of 1974, 88 Stat. 1263; FECA Amendments of 1976, 90 Stat. 475; FECA Amendments of 1979, 93 Stat. 1339; Bipartisan Campaign Reform Act of 2002, 116 Stat. 81.

> "State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" 494 U. S., at 658–659 (quoting *Massachusetts Citizens for Life*, *supra*, at 257).

Hence, the public interest in "restrict[ing] the influence of political war chests funneled through the corporate form." *National Conservative Political Action Comm.*, *supra*, at 500–501; see *National Right to Work*, *supra*, at 207 ("[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators").

As these excerpts from recent opinions show, not only has the original ban on direct corporate contributions endured, but so have the original rationales for the law. In barring corporate earnings from conversion into political "war chests," the ban was and is intended to "preven[t] corruption or the appearance of corruption." *National Conservative Political Action Comm.*, *supra*, at 496–497; see also *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788, n. 26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted"). But the ban has always done further duty in protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *National Right to Work*, *supra*, at 208;

see *CIO*, 335 U. S., at 113; see also *Austin*, *supra*, at 673–678 (Brennan, J., concurring).

Quite aside from war-chest corruption and the interests of contributors and owners, however, another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions, and recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of [valid] contribution limits." *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 456, and n. 18 (2001); see *Austin*, *supra*, at 664. To the degree that a corporation could contribute to political candidates, the individuals "who created it, who own it, or whom it employs," *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 163 (2001), could exceed the bounds imposed on their own contributions by diverting money through the corporation, cf. *Colorado Republican*, 533 U. S., at 446–447. As we said on the subject of limiting coordinated expenditures by political parties, experience "demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Id.*, at 457.

In sum, our cases on campaign finance regulation represent respect for the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work*, *supra*, at 209–210. And we have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 26–28, 47 (1976) *(per curiam)*. As we said in *Colorado Republican*, "limits on contributions are more clearly justified by a link to political corruption than limits on other

kinds of . . . political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence)." 533 U. S., at 440–441 (citation omitted).

B

That historical prologue would discourage any broadside attack on corporate campaign finance regulation or regulation of corporate contributions, and NCRL accordingly questions § 441b only to the extent the law places nonprofit advocacy corporations like itself under the general ban on direct contributions. But not even this more focused challenge can claim a blank slate, for Judge Gregory rightly said in his dissent that our explanation in *National Right to Work* all but decided the issue against NCRL's position.

National Right to Work addressed the provision of § 441b restricting a nonstock corporation to its membership when soliciting contributions to its PAC,[4] and we considered whether a nonprofit advocacy corporation without members of the usual sort could be held to violate the law by soliciting a donation to its PAC from any individual who had at one time contributed to the corporation. See 459 U. S., at 199–200. We sustained the FEC's position that a fund drive as broad as this went beyond the solicitation of "members" permitted by § 441b, and we invoked the history distilled above in holding that the statutory restriction was no infringement on those First Amendment associational rights closely akin to speech. *Id.*, at 206–209. We concluded that the congressional judgment to regulate corporate political involvement

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[4] Section 441b(b)(4)(A) bars a corporation from soliciting contributions to a PAC established by the corporation, except from stockholders or other specified categories of persons. Section 441b(b)(4)(C), the specific provision at issue in *National Right to Work*, provides, in relevant part, that § 441b(b)(4)(A) "shall not prevent a . . . corporation without capital stock . . . from soliciting contributions to [a PAC established by the corporation] from members of such . . . corporation."

"warrants considerable deference" and "reflects a permissible assessment of the dangers posed by [corporations] to the electoral process." *Id.*, at 207–211.

It would be hard to read our conclusion in *National Right to Work*, that the PAC solicitation restrictions were constitutional, except on the practical understanding that the corporation's capacity to make contributions was legitimately limited to indirect donations within the scope allowed to PACs. See, *e. g.*, *id.*, at 208 (reviewing both "the statutory prohibitions and exceptions"). In fact, we specifically rejected the argument made here, that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations. In the same breath, we remarked on the broad applicability of § 441b to "corporations and labor unions without great financial resources, as well as those more fortunately situated," and made a point of refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.*, at 210.

Later cases have repeatedly acknowledged, without questioning, the reading of *National Right to Work* as generally approving the § 441b prohibition on direct contributions, even by nonprofit corporations "without great financial resources." *Ibid.* In *National Conservative Political Action Committee*, for example, we not only spoke of *National Right to Work* as consistent with "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office," but went on to reaffirm that the Court in that case had "rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." 470 U. S., at 495, 500; see *id.*, at 500 (describ-

ing *National Right to Work* as giving "proper deference to a congressional determination of the need for a prophylactic rule"). Relying again on *National Right to Work*, we made a similar point in *Austin* when we sustained Michigan's ban on direct corporate contributions, even though the ban "include[d] within its scope closely held corporations that do not possess vast reservoirs of capital." 494 U. S., at 661. "Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies [the state law's] general applicability to all corporations." *Ibid.*

But *National Right to Work* does not stand alone in its bearing on the issue here, and equal significance must be accorded to *Massachusetts Citizens for Life*, the very case upon which NCRL and the Court of Appeals have placed principal reliance. There, we held the prohibition on independent expenditures under § 441b unconstitutional as applied to a nonprofit advocacy corporation. While the majority explained generally that the "potential for unfair deployment of wealth for political purposes" fell short of justifying a ban on expenditures by groups like Massachusetts Citizens for Life that "do not pose that danger of corruption," the majority's response to the dissent pointed to a different resolution of the present case. 479 U. S., at 259. THE CHIEF JUSTICE's dissenting opinion noted that Massachusetts Citizens for Life "was not unlike" the corporation at issue in *National Right to Work*, which he read as supporting the ban on independent expenditures. 479 U. S., at 269. Without disagreeing about the similarity of the two organizations, the majority nonetheless distinguished *National Right to Work* on the ground of its addressing regulation of contributions, not expenditures. See 479 U. S., at 259–260 ("[R]estrictions on contributions require less com-

pelling justification than restrictions on independent spending"). "In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule [against contributions] was thus sufficient in *[National Right to Work]*." *Id.*, at 260.

C

The upshot is that, although we have never squarely held against NCRL's position here, we could not hold for it without recasting our understanding of the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them. NCRL's efforts, however, fail to unsettle existing law on any of these points.

First, NCRL argues that on a class-wide basis "*[Massachusetts Citizens for Life]*-type corporations pose no potential of threat to the political system," so that the governmental interest in combating corruption is as weak as the Court held it to be in relation to the particular corporation considered in *Massachusetts Citizens for Life*. Brief for Respondents 19. But this generalization does not hold up. For present purposes, we will assume advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve. See *Massachusetts Citizens for Life*, *supra*, at 260–262.[5] But concern about the corrupt-

[5] That said, this concern is not wholly inapplicable to advocacy corporations, as "persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause." *Massachusetts Citizens for Life*, 479 U. S., at 261. In any event, we have never intimated that the risk of corruption alone is insufficient to support regulation of political contributions. See, *e. g.*, *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 658–659 (1990); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459

ing potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant "state-created advantages," *Austin*, *supra*, at 659, and may well be able to amass substantial "political 'war chests,' " *National Right to Work*, 459 U. S., at 207. Not all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club.[6] Nonprofit advocacy corporations are, moreover, no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals. Cf. *Austin*, *supra*, at 664 (noting that a nonprofit corporation is capable of "serv-[ing] as a conduit for corporate political spending").[7]

U. S. 197, 208 (1982); cf. *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 388–389 (2000).

[6] See http://www.aarp.org/press/disclosure.html (as visited June 12, 2003) (available in Clerk of Court's case file) (AARP); http://www.give.org/reports/index.asp (as visited June 12, 2003) (available in Clerk of Court's case file) (National Rifle Association and Sierra Club). These examples answer NCRL's argument that the *Massachusetts Citizens for Life* exception is "self-limiting." See Brief for Respondents 27 ("If [a *Massachusetts Citizens for Life*]-type corporation begins generating or receiving substantial business income or business corporation contributions, by definition, it automatically is no longer [a *Massachusetts Citizens for Life*]-type corporation" (citing *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 263–264 (1986))). The nonprofit advocacy corporations mentioned (one of which has, in fact, been granted "*[Massachusetts Citizens for Life]*-type" status by a Court of Appeals, see, *e. g.*, *FEC* v. *National Rifle Assn.*, 254 F. 3d 173, 192 (CADC 2001)) show that "political 'war chests' " may be amassed simply from members' contributions. 459 U. S., at 207.

[7] NCRL suggests that the Government's interest in combating circumvention of the campaign finance laws would be sufficiently met by allowing limited contributions subject to the earmarking rule of § 441a(a)(8), which provides that "contributions which are in any way earmarked or otherwise directed through an intermediate or conduit to [a] candidate" are treated as contributions to the candidate (thus triggering the disclosure require-

Second, NCRL argues that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that § 441b does not merely limit contributions, but bans them on the basis of their source. Brief for Respondents 14–16. This argument, however, overlooks the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the "political activity at issue" to effective speech or political association. *Massachusetts Citizens for Life*, 479 U. S., at 259; see *Colorado Republican*, 533 U. S., at 440–442, and nn. 6–7; *Nixon*, 528 U. S., at 386–388. Going back to *Buckley* v. *Valeo*, 424 U. S. 1 (1976), restrictions on political contributions have been treated as merely "marginal" speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. See *Colorado Republican*, *supra*, at 440.[8] "While contributions may result in political expression if spent by a candidate or an association . . . , the transformation of contributions into political debate involves

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ments of § 434(b)(3)(A)). Brief for Respondents 31. We rejected this precise argument, however, in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431 (2001), where we concluded that it "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id.*, at 462. "The earmarking provision . . . would reach only the most clumsy attempts to pass contributions through to candidates. To treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious effort to limit [circumvention]." *Ibid.*

[8] Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, see, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 458–459 (1958), and of the public in receiving information, see, *e. g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978). A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.

speech by someone other than the contributor." *Buckley*, *supra*, at 20–21. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involving 'significant interference' with associational rights" passes muster if it satisfies the lesser demand of being "'closely drawn' to match a 'sufficiently important interest.'" *Nixon*, *supra*, at 387–388 (quoting *Buckley*, *supra*, at 25); cf. *Austin*, 494 U. S., at 657; *Buckley*, *supra*, at 44–45.[9]

Indeed, this recognition that degree of scrutiny turns on the nature of the activity regulated is the only practical way to square two leading cases: *National Right to Work* approved strict solicitation limits on a PAC organized to make contributions, see 459 U. S., at 201–202, whereas *Massachusetts Citizens for Life* applied a compelling interest test to invalidate the ban on an advocacy corporation's expenditures in light of PAC regulatory burdens, see 479 U. S., at 252–255; see also *id.*, at 265–266 (opinion of O'Connor, J.). Each case involved § 441b, after all, and the same "ban" on the same corporate "sources" of political activity applied in both cases.

It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself. But even when NCRL urges precisely that, and asserts that § 441b is not sufficiently "closely drawn," the claim still rests on a false premise, for NCRL is simply wrong in characterizing § 441b as a complete ban. As we have said before, the section "permits some participation of unions and corporations in the federal electoral proc-

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[9] Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of "careful legislative adjustment." *National Right to Work*, *supra*, at 209; cf. *Nixon*, *supra*, at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

ess by allowing them to establish and pay the administrative expenses of [PACs]." *National Right to Work*, *supra*, at 201; see also *Austin*, *supra*, at 660; *Massachusetts Citizens for Life*, *supra*, at 252. The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure, see §§ 432–434, without jeopardizing the associational rights of advocacy organizations' members, see *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958) (holding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" may violate the First Amendment).

NCRL cannot prevail, then, simply by arguing that a ban on an advocacy corporation's direct contributions is bad tailoring. NCRL would have to demonstrate that the law violated the First Amendment in allowing contributions to be made only through its PAC and subject to a PAC's administrative burdens. But a unanimous Court in *National Right to Work* did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions. See 459 U. S., at 201–202. There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here.

III

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

My position, expressed in dissenting opinions in previous cases, has been that the Court erred in sustaining certain state and federal restrictions on political speech in the cam-

paign finance context and misapprehended basic First Amendment principles in doing so. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 409 (2000) (KENNEDY, J., dissenting); *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 699 (1990) (KENNEDY, J., dissenting); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 626 (1996) (KENNEDY, J., concurring in judgment and dissenting in part). I adhere to this view, and so can give no weight to those authorities in the instant case.

That said, it must be acknowledged that *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) *(MCFL)*, contains language supporting the Court's holding here that corporate contributions can be regulated more closely than corporate expenditures. The language upon which the Court relies tends to reconcile the tension between the approach in *MCFL* and the Court's earlier decision in *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197 (1982).

Were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join JUSTICE THOMAS' dissenting opinion. The Court does not undertake that comprehensive examination here, however. And since there is language in *MCFL* that supports today's holding, I concur in the judgment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I continue to believe that campaign finance laws are subject to strict scrutiny. *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 465–466 (2001) *(Colorado II)* (THOMAS, J., dissenting); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 640 (1996) *(Colorado I)* (THOMAS, J., concurring in judgment and dissenting in part).

See also *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 427 (2000) (THOMAS, J., dissenting). As in *Colorado II*, the Government does not argue here that 2 U. S. C. § 441b survives review under that rigorous standard. Indeed, it could not. "[U]nder traditional strict scrutiny, broad prophylactic caps on . . . giving in the political process . . . are unconstitutional," *Colorado I*, 518 U. S., at 640–641, because, as I have explained before, they are not narrowly tailored to meet any relevant compelling state interest, *id.*, at 641–644; *Nixon*, *supra*, at 427–430. See also *Colorado II*, *supra*, at 465–466. Accordingly, I would affirm the judgment of the Court of Appeals and respectfully dissent from the Court's contrary disposition.

Syllabus

SELL *v.* UNITED STATES

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

No. 02–5664. Argued March 3, 2003—Decided June 16, 2003

A Federal Magistrate Judge (Magistrate) initially found petitioner Sell, who has a long history of mental illness, competent to stand trial for fraud and released him on bail, but later revoked bail because Sell's condition had worsened. Sell subsequently asked the Magistrate to reconsider his competence to stand trial for fraud and attempted murder. The Magistrate had him examined at a United States Medical Center for Federal Prisoners (Medical Center), found him mentally incompetent to stand trial, and ordered his hospitalization to determine whether he would attain the capacity to allow his trial to proceed. While there, Sell refused the staff's recommendation to take antipsychotic medication. Medical Center authorities decided to allow involuntary medication, which Sell challenged in court. The Magistrate authorized forced administration of antipsychotic drugs, finding that Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to Sell outweighed the risks, and that the drugs were substantially likely to return Sell to competence. In affirming, the District Court found the Magistrate's dangerousness finding clearly erroneous but concluded that medication was the only viable hope of rendering Sell competent to stand trial and was necessary to serve the Government's interest in obtaining an adjudication of his guilt or innocence. The Eighth Circuit affirmed. Focusing solely on the fraud charges, it found that the Government had an essential interest in bringing Sell to trial, that the treatment was medically appropriate, and that the medical evidence indicated a reasonable probability that Sell would fairly be able to participate in his trial.

Held:

1. The Eighth Circuit had jurisdiction to hear the appeal. The District Court's pretrial order was an appealable "collateral order" within the exceptions to the rule that only final judgments are appealable. The order conclusively determines the disputed question whether Sell has a legal right to avoid forced medication. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. It also resolves an important issue, for involuntary medical treatment raises questions of clear constitutional importance. *Ibid.* And the issue is effectively unreviewable on appeal

from a final judgment, *ibid.*, since, by the time of trial, Sell will have undergone forced medication—the very harm that he seeks to avoid and which cannot be undone by an acquittal. Pp. 175–177.

2. Under the framework of *Washington* v. *Harper*, 494 U. S. 210, and *Riggins* v. *Nevada*, 504 U. S. 127, the Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. Pp. 177–183.

(a) This standard will permit forced medication solely for trial competence purposes in certain instances. But these instances may be rare, because the standard says or fairly implies the following: First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. However, courts must consider each case's facts in evaluating this interest because special circumstances may lessen its importance, *e. g.*, a defendant's refusal to take drugs may mean lengthy confinement in an institution, which would diminish the risks of freeing without punishment one who has committed a serious crime. In addition to its substantial interest in timely prosecution, the Government has a concomitant interest in assuring a defendant a fair trial. Second, the court must conclude that forced medication will *significantly further* those concomitant state interests. It must find that medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a defense. Third, the court must conclude that involuntary medication is *necessary* to further those interests and find that alternative, less intrusive treatments are unlikely to achieve substantially the same results. Fourth, the court must conclude that administering the drugs is *medically appropriate.* Pp. 177–181.

(b) The court applying these standards is trying to determine whether forced medication is necessary to further the Government's interest in rendering the defendant competent to stand trial. If a court authorizes medication on an alternative ground, such as dangerousness, the need to consider authorization on trial competence grounds will likely disappear. There are often strong reasons for a court to consider alternative grounds first. For one thing, the inquiry into whether medication is permissible to render an individual nondangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent. For another,

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courts typically address involuntary medical treatment as a civil matter. If a court decides that medication cannot be authorized on alternative grounds, its findings will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. Pp. 181–183.

3. The Eighth Circuit erred in approving forced medication solely to render Sell competent to stand trial. Because that court and the District Court held the Magistrate's dangerousness finding clearly erroneous, this Court assumes that Sell was not dangerous. And on that hypothetical assumption, the Eighth Circuit erred in reaching its conclusion. For one thing, the Magistrate did not find forced medication legally justified on trial competence grounds alone. Moreover, the experts at the Magistrate's hearing focused mainly on dangerousness. The failure to focus on trial competence could well have mattered, for this Court cannot tell whether the medication's side effects were likely to undermine the fairness of Sell's trial, a question not necessarily relevant when dangerousness is primarily at issue. Finally, the lower courts did not consider that Sell has been confined at the Medical Center for a long time, and that his refusal to be medicated might result in further lengthy confinement. Those factors, the first because a defendant may receive credit toward a sentence for time served and the second because it reduces the likelihood of the defendant's committing future crimes, moderate the importance of the governmental interest in prosecution. The Government may pursue its forced medication request on the grounds discussed in this Court's opinion but should do so based on current circumstances, since Sell's condition may have changed over time. Pp. 183–186.

282 F. 3d 560, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post,* p. 186.

Barry A. Short, by appointment of the Court, 537 U. S. 1087, argued the cause for petitioner. With him on the briefs were *Neal F. Perryman, Mark N. Light, Norman S. London,* and *Lee T. Lawless.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor*

General Olson, Assistant Attorney General Chertoff, Lisa Schiavo Blatt, and *Joseph C. Wyderko.**

JUSTICE BREYER delivered the opinion of the Court.

The question presented is whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes. We conclude that the Constitution allows the Government to administer those drugs, even against the defendant's will, in limited circumstances, *i. e.*, upon satisfaction of conditions that we shall describe. Because the Court of Appeals did not find that the requisite circumstances existed in this case, we vacate its judgment.

I

A

Petitioner Charles Sell, once a practicing dentist, has a long and unfortunate history of mental illness. In September 1982, after telling doctors that the gold he used for fillings had been contaminated by communists, Sell was hospitalized, treated with antipsychotic medication, and subsequently discharged. App. 146. In June 1984, Sell called the police to say that a leopard was outside his office boarding a bus, and he then asked the police to shoot him. *Id.*, at 148; Record, Forensic Report, p. 1 (June 20, 1997) (Sealed). Sell

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union of Eastern Missouri by *Peter A. Joy;* for the Center for Cognitive Liberty & Ethics by *Richard Glen Boire;* for the Drug Policy Alliance by *David T. Goldberg* and *Daniel N. Abrahamson;* for the National Association of Criminal Defense Lawyers by *Burton H. Shostak;* for the New York State Association of Criminal Defense Lawyers by *Joshua L. Dratel;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

Briefs of *amici curiae* were filed for the American Psychological Association by *David W. Ogden, Paul R. Q. Wolfson,* and *Nathalie F. P. Gilfoyle;* and for the American Psychiatric Association et al. by *Richard G. Taranto.*

was again hospitalized and subsequently released. On various occasions, he complained that public officials, for example, a State Governor and a police chief, were trying to kill him. *Id.*, at 4. In April 1997, he told law enforcement personnel that he "spoke to God last night," and that "God told me every [Federal Bureau of Investigation] person I kill, a soul will be saved." *Id.*, at 1.

In May 1997, the Government charged Sell with submitting fictitious insurance claims for payment. See 18 U. S. C. § 1035(a)(2). A Federal Magistrate Judge (Magistrate), after ordering a psychiatric examination, found Sell "currently competent," but noted that Sell might experience "a psychotic episode" in the future. App. 321. The Magistrate released Sell on bail. A grand jury later produced a superseding indictment charging Sell and his wife with 56 counts of mail fraud, 6 counts of Medicaid fraud, and 1 count of money laundering. *Id.*, at 12–22.

In early 1998, the Government claimed that Sell had sought to intimidate a witness. The Magistrate held a bail revocation hearing. Sell's behavior at his initial appearance was, in the judge's words, "'totally out of control,'" involving "screaming and shouting," the use of "personal insults" and "racial epithets," and spitting "in the judge's face." *Id.*, at 322. A psychiatrist reported that Sell could not sleep because he expected the Federal Bureau of Investigation (FBI) to "'come busting through the door,'" and concluded that Sell's condition had worsened. *Ibid.* After considering that report and other testimony, the Magistrate revoked Sell's bail.

In April 1998, the grand jury issued a new indictment charging Sell with attempting to murder the FBI agent who had arrested him and a former employee who planned to testify against him in the fraud case. *Id.*, at 23–29. The attempted murder and fraud cases were joined for trial.

In early 1999, Sell asked the Magistrate to reconsider his competence to stand trial. The Magistrate sent Sell to the

United States Medical Center for Federal Prisoners (Medical Center) at Springfield, Missouri, for examination. Subsequently the Magistrate found that Sell was "mentally incompetent to stand trial." *Id.*, at 323. He ordered Sell to "be hospitalized for treatment" at the Medical Center for up to four months, "to determine whether there was a substantial probability that [Sell] would attain the capacity to allow his trial to proceed." *Ibid.*

Two months later, Medical Center staff recommended that Sell take antipsychotic medication. Sell refused to do so. The staff sought permission to administer the medication against Sell's will. That effort is the subject of the present proceedings.

B

We here review the last of five hierarchically ordered lower court and Medical Center determinations. First, in June 1999, Medical Center staff sought permission from institutional authorities to administer antipsychotic drugs to Sell involuntarily. A reviewing psychiatrist held a hearing and considered Sell's prior history; Sell's current persecutional beliefs (for example, that Government officials were trying to suppress his knowledge about events in Waco, Texas, and had sent him to Alaska to silence him); staff medical opinions (for example, that "Sell's symptoms point to a diagnosis of Delusional Disorder but . . . there well may be an underlying Schizophrenic Process"); staff medical concerns (for example, about "the persistence of Dr. Sell's belief that the Courts, FBI, and federal government in general are against him"); an outside medical expert's opinion (that Sell suffered only from delusional disorder, which, in that expert's view, "medication rarely helps"); and Sell's own views, as well as those of other laypersons who know him (to the effect that he did not suffer from a serious mental illness). *Id.*, at 147–150.

The reviewing psychiatrist then authorized involuntary administration of the drugs, both (1) because Sell was "men-

tally ill and dangerous, and medication is necessary to treat the mental illness," and (2) so that Sell would "become competent for trial." *Id.*, at 145. The reviewing psychiatrist added that he considered Sell "dangerous based on threats and delusions if outside, but not necessarily in[side] prison" and that Sell was "[a]ble to function" in prison in the "open population." *Id.*, at 144.

Second, the Medical Center administratively reviewed the determination of its reviewing psychiatrist. A Bureau of Prisons official considered the evidence that had been presented at the initial hearing, referred to Sell's delusions, noted differences of professional opinion as to proper classification and treatment, and concluded that antipsychotic medication represents the medical intervention "most likely" to "ameliorate" Sell's symptoms; that other "less restrictive interventions" are "unlikely" to work; and that Sell's "pervasive belief" that he was "being targeted for nefarious actions by various governmental . . . parties," along with the "current charges of conspiracy to commit murder," made Sell "a potential risk to the safety of one or more others in the community." *Id.*, at 154–155. The reviewing official "upheld" the "hearing officer's decision that [Sell] would benefit from the utilization of anti-psychotic medication." *Id.*, at 157.

Third, in July 1999, Sell filed a court motion contesting the Medical Center's right involuntarily to administer antipsychotic drugs. In September 1999, the Magistrate who had ordered Sell sent to the Medical Center held a hearing. The evidence introduced at the hearing for the most part replicated the evidence introduced at the administrative hearing, with two exceptions. First, the witnesses explored the question of the medication's effectiveness more thoroughly. Second, Medical Center doctors testified about an incident that took place at the Medical Center *after* the administrative proceedings were completed. In July 1999, Sell had approached one of the Medical Center's nurses, sug-

gested that he was in love with her, criticized her for having nothing to do with him, and, when told that his behavior was inappropriate, added " 'I can't help it.' " *Id.*, at 168–170, 325. He subsequently made remarks or acted in ways indicating that this kind of conduct would continue. The Medical Center doctors testified that, given Sell's prior behavior, diagnosis, and current beliefs, boundary-breaching incidents of this sort were not harmless and, when coupled with Sell's inability or unwillingness to desist, indicated that he was a safety risk even within the institution. They added that he had been moved to a locked cell.

In August 2000, the Magistrate found that "the government has made a substantial and very strong showing that Dr. Sell is a danger to himself and others at the institution in which he is currently incarcerated"; that "the government has shown that anti-psychotic medication is the only way to render him less dangerous"; that newer drugs and/or changing drugs will "ameliorat[e]" any "serious side effects"; that "the benefits to Dr. Sell . . . far outweigh any risks"; and that "there is a substantial probability that" the drugs will "retur[n]" Sell "to competency." *Id.*, at 333–334. The Magistrate concluded that "the government has shown in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial." *Id.*, at 335. The Magistrate issued an order authorizing the involuntary administration of antipsychotic drugs to Sell, *id.*, at 331, but stayed that order to allow Sell to appeal the matter to the Federal District Court, *id.*, at 337.

Fourth, the District Court reviewed the record and, in April 2001, issued an opinion. The court addressed the Magistrate's finding "that defendant presents a danger to himself or others sufficient" to warrant involuntary administration of antipsychotic drugs. *Id.*, at 349. After noting that Sell subsequently had "been returned to an open ward," the District Court held the Magistrate's "dangerousness"

finding "clearly erroneous." *Id.*, at 349, and n. 5. The court limited its determination to Sell's "dangerousness *at this time* to himself and to those around him *in his institutional context.*" *Id.*, at 349 (emphasis in original).

Nonetheless, the District Court *affirmed* the Magistrate's order permitting Sell's involuntary medication. The court wrote that "anti-psychotic drugs are medically appropriate," that "they represent the only viable hope of rendering defendant competent to stand trial," and that "administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges" (including fraud and attempted murder). *Id.*, at 354. The court added that it was "premature" to consider whether "the effects of medication might prejudice [Sell's] defense at trial." *Id.*, at 351, 352. The Government and Sell both appealed.

Fifth, in March 2002, a divided panel of the Court of Appeals affirmed the District Court's judgment. 282 F. 3d 560 (CA8). The majority affirmed the District Court's determination that Sell was not dangerous. The majority noted that, according to the District Court, Sell's behavior at the Medical Center "amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." *Id.*, at 565. The Court of Appeals agreed, "[u]pon review," that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid.*

The Court of Appeals also affirmed the District Court's order requiring medication in order to render Sell competent to stand trial. Focusing solely on the serious fraud charges, the panel majority concluded that the "government has an essential interest in bringing a defendant to trial." *Id.*, at 568. It added that the District Court "correctly concluded that there were no less intrusive means." *Ibid.* After reviewing the conflicting views of the experts, *id.*, at 568–571, the panel majority found antipsychotic drug treatment "med-

ically appropriate" for Sell, *id.*, at 571. It added that the "medical evidence presented indicated a reasonable probability that Sell will fairly be able to participate in his trial." *Id.*, at 572. One member of the panel dissented primarily on the ground that the fraud and money laundering charges were "not serious enough to warrant the forced medication of the defendant." *Id.*, at 574 (opinion of Bye, J.).

We granted certiorari to determine whether the Eighth Circuit "erred in rejecting" Sell's argument that "allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses," Brief for Petitioner i, violated the Constitution—in effect by improperly depriving Sell of an important "liberty" that the Constitution guarantees, Amdt. 5.

II

We first examine whether the Eighth Circuit had jurisdiction to decide Sell's appeal. The District Court's judgment, from which Sell had appealed, was a pretrial order. That judgment affirmed a Magistrate's order requiring Sell involuntarily to receive medication. The Magistrate entered that order pursuant to an earlier delegation from the District Court of legal authority to conduct pretrial proceedings. App. 340; see 28 U. S. C. § 636(b)(1)(A). The order embodied legal conclusions related to the Medical Center's administrative efforts to medicate Sell; these efforts grew out of Sell's provisional commitment; and that provisional commitment took place pursuant to an earlier Magistrate's order seeking a medical determination about Sell's future competence to stand trial. Cf. *Riggins* v. *Nevada*, 504 U. S. 127 (1992) (reviewing, as part of criminal proceeding, trial court's denial of defendant's motion to discontinue medication); *Stack* v. *Boyle*, 342 U. S. 1, 6–7 (1951) (district court's denial of defendant's motion to reduce bail is part of criminal proceeding and is not reviewable in separate habeas action).

How was it possible for Sell to appeal from such an order? The law normally requires a defendant to wait until the end of the trial to obtain appellate review of a pretrial order. The relevant jurisdictional statute, 28 U. S. C. § 1291, authorizes federal courts of appeals to review "*final* decisions of the district courts." (Emphasis added.) And the term "final decision" normally refers to a final judgment, such as a judgment of guilt, that terminates a criminal proceeding.

Nonetheless, there are exceptions to this rule. The Court has held that a preliminary or interim decision is appealable as a "collateral order" when it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). And this District Court order does appear to fall within the "collateral order" exception.

The order (1) "conclusively determine[s] the disputed question," namely, whether Sell has a legal right to avoid forced medication. *Ibid.* The order also (2) "resolve[s] an important issue," for, as this Court's cases make clear, involuntary medical treatment raises questions of clear constitutional importance. *Ibid.* See *Winston* v. *Lee*, 470 U. S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security" of great magnitude); see also *Riggins*, *supra*, at 133–134; *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 278–279 (1990); *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990). At the same time, the basic issue—whether Sell must undergo medication against his will—is "completely separate from the merits of the action," *i. e.*, whether Sell is guilty or innocent of the crimes charged. *Coopers & Lybrand*, 437 U. S., at 468. The issue is wholly separate as well from questions concerning trial procedures. Finally, the issue is (3) "effectively unreviewable on appeal from a final judgment." *Ibid.* By the time of trial Sell will have undergone

forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review. Cf. *Stack*, *supra*, at 6–7 (permitting appeal of order setting high bail as "collateral order"). These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent. See *post*, at 191–192 (opinion of SCALIA, J.).

We add that the question presented here, whether Sell has a legal right to avoid forced medication, perhaps in part because medication may make a trial unfair, differs from the question whether forced medication *did* make a trial unfair. The first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction. See *infra*, at 181. The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.

We conclude that the District Court order from which Sell appealed was an appealable "collateral order." The Eighth Circuit had jurisdiction to hear the appeal. And we consequently have jurisdiction to decide the question presented, whether involuntary medication violates Sell's constitutional rights.

III

We turn now to the basic question presented: Does forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive him of his "liberty" to reject medical treatment? U. S. Const., Amdt. 5 (Federal Government may not "depriv[e]" any person of "liberty . . . without due process of law"). Two prior prece-

dents, *Harper, supra,* and *Riggins* v. *Nevada,* 504 U. S. 127 (1992), set forth the framework for determining the legal answer.

In *Harper,* this Court recognized that an individual has a "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs." 494 U. S., at 221. The Court considered a state law authorizing forced administration of those drugs "to inmates who are . . . gravely disabled or represent a significant danger to themselves or others." *Id.,* at 226. The State had established "by a medical finding" that Harper, a mentally ill prison inmate, had "a mental disorder . . . which is likely to cause harm if not treated." *Id.,* at 222. The treatment decision had been made "by a psychiatrist," it had been approved by "a reviewing psychiatrist," and it "ordered" medication only because that was "in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Ibid.*

The Court found that the State's interest in administering medication was "legitima[te]" and "importan[t]," *id.,* at 225; and it held that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest," *id.,* at 227. The Court concluded that, in the circumstances, the state law authorizing involuntary treatment amounted to a constitutionally permissible "accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id.,* at 236.

In *Riggins,* the Court repeated that an individual has a constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs"—an interest

that only an "essential" or "overriding" state interest might overcome. 504 U. S., at 134, 135. The Court suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible. The Court, citing *Harper*, noted that the State "would have satisfied due process if the prosecution had demonstrated . . . that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' *own safety or the safety of others.*" 504 U. S., at 135 (emphasis added). And it said that the State "*[s]imilarly* . . . might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence" of the murder charge "by using less intrusive means." *Ibid.* (emphasis added). Because the trial court had permitted forced medication of Riggins without taking account of his "liberty interest," with a consequent possibility of trial prejudice, the Court reversed Riggins' conviction and remanded for further proceedings. *Id.*, at 137–138. JUSTICE KENNEDY, concurring in the judgment, emphasized that antipsychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair trial. *Id.*, at 145 (finding forced medication likely justified only where State shows drugs would not significantly affect defendant's "behavior and demeanor").

These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare. That is because the standard says or fairly implies the following:

First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security. See *Riggins*, *supra*, at 135–136 ("'[P]ower to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace'" (quoting *Illinois* v. *Allen*, 397 U. S. 337, 347 (1970) (Brennan, J., concurring))).

Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U. S. C. § 3585(b)). Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.

Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. See *Riggins*, 504 U. S., at 142–145 (KENNEDY, J., concurring in judgment).

Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. Cf. Brief for American Psychological Association as *Amicus Curiae* 10–14 (nondrug therapies may be effective in restoring psychotic defendants to competence); but cf. Brief for American Psychiatric Association et al. as *Amici Curiae* 13–22 (alternative treatments for psychosis commonly not as effective as medication). And the court must consider less intrusive means for administering the drugs, *e. g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods.

Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate, i. e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial.* A court need not consider whether to allow forced medication for that kind of purpose,

if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U. S., at 225–226. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent. *Riggins*, *supra*, at 140 (KENNEDY, J., concurring in judgment). The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication—when in the best interests of a patient who lacks the mental competence to make such a decision. *E. g.*, Ala. Code §§ 26–2A–102(a), 26–2A–105, 26–2A–108 (West 1992); Alaska Stat. §§ 13.26.105(a), 13.26.116(b) (2002); Ariz. Rev. Stat. Ann. §§ 14–5303, 14–5312 (West 1995); Ark. Code Ann. §§ 28–65–205, 28–65–301 (1987). And courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others. See, *e. g.*, 28 CFR § 549.43 (2002); cf. 18 U. S. C. § 4246.

If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. At the least, they will facilitate direct medical and legal focus upon such questions as: Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is *not* dangerous *and* (2) *is* competent to make up his own mind about treatment? Can bringing such an individual to trial *alone* justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial? We consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.

When a court must nonetheless reach the trial competence question, the factors discussed above, *supra*, at 180–181, should help it make the ultimate constitutionally required judgment. Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? See *Harper*, *supra*, at 221–223; *Riggins*, *supra*, at 134–135.

IV

The Medical Center and the Magistrate in this case, applying standards roughly comparable to those set forth here and in *Harper*, approved forced medication substantially, if not primarily, upon grounds of Sell's dangerousness to oth-

ers. But the District Court and the Eighth Circuit took a different approach. The District Court found "clearly erroneous" the Magistrate's conclusion regarding dangerousness, and the Court of Appeals agreed. Both courts approved forced medication solely in order to render Sell competent to stand trial.

We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make that assumption *only* because the Government did not contest, and the parties have not argued, that particular matter. If anything, the record before us, described in Part I, suggests the contrary.

The Court of Appeals apparently agreed with the District Court that "Sell's inappropriate behavior . . . amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." 282 F. 3d, at 565. That being so, it also agreed that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid.* The Court of Appeals, however, did not discuss the potential differences (described by a psychiatrist testifying before the Magistrate) between ordinary "overfamiliarity" and the same conduct engaged in persistently by a patient with Sell's behavioral history and mental illness. Nor did it explain why those differences should be minimized in light of the fact that the testifying psychiatrists concluded that Sell was dangerous, while Sell's own expert denied, not Sell's dangerousness, but the efficacy of the drugs proposed for treatment.

The District Court's opinion, while more thorough, places weight upon the Medical Center's decision, taken after the Magistrate's hearing, to return Sell to the general prison population. It does not explain whether that return reflected an improvement in Sell's condition or whether the Medical Center saw it as permanent rather than temporary. Cf. *Harper, supra,* at 227, and n. 10 (indicating that physical

restraints and seclusion often not acceptable substitutes for medication).

Regardless, as we have said, we must assume that Sell was not dangerous. And on that hypothetical assumption, we find that the Court of Appeals was wrong to approve forced medication solely to render Sell competent to stand trial. For one thing, the Magistrate's opinion makes clear that he did *not* find forced medication legally justified on trial competence grounds alone. Rather, the Magistrate concluded that Sell *was* dangerous, and he wrote that forced medication was "the only way to render the defendant *not dangerous and* competent to stand trial." App. 335 (emphasis added).

Moreover, the record of the hearing before the Magistrate shows that the experts themselves focused mainly upon the dangerousness issue. Consequently the experts did not pose important questions—questions, for example, about trial-related side effects and risks—the answers to which could have helped determine whether forced medication was warranted on trial competence grounds alone. Rather, the Medical Center's experts conceded that their proposed medications had "significant" side effects and that "there has to be a cost benefit analysis." *Id.*, at 185 (testimony of Dr. DeMier); *id.*, at 236 (testimony of Dr. Wolfson). And in making their "cost-benefit" judgments, they primarily took into account Sell's dangerousness, not the need to bring him to trial.

The failure to focus upon trial competence could well have mattered. Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence, *Riggins*, 504 U. S., at 142–145 (KENNEDY, J., concurring in judgment), but not necessarily relevant when dangerousness is primarily at issue. We cannot tell whether

the side effects of antipsychotic medication were likely to undermine the fairness of a trial in Sell's case.

Finally, the lower courts did not consider that Sell has already been confined at the Medical Center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement. Those factors, the first because a defendant ordinarily receives credit toward a sentence for time served, 18 U. S. C. § 3585(b), and the second because it reduces the likelihood of the defendant's committing future crimes, moderate—though they do not eliminate—the importance of the governmental interest in prosecution. See *supra*, at 180.

V

For these reasons, we believe that the present orders authorizing forced administration of antipsychotic drugs cannot stand. The Government may pursue its request for forced medication on the grounds discussed in this opinion, including grounds related to the danger Sell poses to himself or others. Since Sell's medical condition may have changed over time, the Government should do so on the basis of current circumstances.

The judgment of the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The District Court never entered a final judgment in this case, which should have led the Court of Appeals to wonder whether it had any business entertaining petitioner's appeal. Instead, without so much as acknowledging that Congress has limited court-of-appeals jurisdiction to "appeals from all *final decisions* of the district courts of the United States," 28 U. S. C. § 1291 (emphasis added), and appeals from certain specified interlocutory orders, see § 1292, the Court of Ap-

peals proceeded to the merits of Sell's interlocutory appeal. 282 F. 3d 560 (CA8 2002). Perhaps this failure to discuss jurisdiction was attributable to the United States' refusal to contest the point there (as it has refused here, see Brief for United States 10, n. 5), or to the panel's unexpressed agreement with the conclusion reached by other Courts of Appeals, that pretrial forced-medication orders are appealable under the "collateral order doctrine," see, *e. g., United States* v. *Morgan*, 193 F. 3d 252, 258–259 (CA4 1999); *United States* v. *Brandon*, 158 F. 3d 947, 950–951 (CA6 1998). But *this* Court's cases do not authorize appeal from the District Court's April 4, 2001, order, which was neither a "final decision" under § 1291 nor part of the class of specified interlocutory orders in § 1292. We therefore lack jurisdiction, and I would vacate the Court of Appeals' decision and remand with instructions to dismiss.

I

After petitioner's indictment, a Magistrate Judge found that petitioner was incompetent to stand trial because he was unable to understand the nature and consequences of the proceedings against him and to assist in his defense. As required by 18 U. S. C. § 4241(d), the Magistrate Judge committed petitioner to the custody of the Attorney General, and petitioner was hospitalized to determine whether there was a substantial probability that in the foreseeable future he would attain the capacity to stand trial. On June 9, 1999, a reviewing psychiatrist determined, after a § 549.43 administrative hearing,[1] that petitioner should be required to take

[1] Title 28 CFR § 549.43 (2002) provides the standards and procedures used to determine whether a person in the custody of the Attorney General may be involuntarily medicated. Before that can be done, a reviewing psychiatrist must determine that it is "necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison," § 549.43(a)(5).

antipsychotic medication, finding the medication necessary to render petitioner competent for trial and medically appropriate to treat his mental illness. Petitioner's administrative appeal from that decision[2] was denied with a written statement of reasons.

At that point the Government possessed the requisite authority to administer forced medication. Petitioner responded, not by appealing to the courts the § 549.43 administrative determination, see 5 U. S. C. § 702, but by moving in the District Court overseeing his criminal prosecution for a *hearing* regarding the appropriateness of his medication. A Magistrate Judge granted the motion and held a hearing. The Government then requested from the Magistrate Judge an order authorizing the involuntary medication of petitioner, which the Magistrate Judge entered.[3] On April 4, 2001, the District Court affirmed this Magistrate Judge's order, and it is from *this* order that petitioner appealed to the Eighth Circuit.

II

A

Petitioner and the United States maintain that 28 U. S. C. § 1291, which permits the courts of appeals to review "all

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[2] Section 549.43(a)(6) provides: "The inmate . . . may submit an appeal to the institution mental health division administrator regarding the decision within 24 hours of the decision and . . . the administrator shall review the decision within 24 hours of the inmate's appeal."

[3] It is not apparent why this order was necessary, since the Government had *already* received authorization to medicate petitioner pursuant to § 549.43. If the Magistrate Judge had denied the Government's motion (or if this Court were to reverse the Magistrate Judge's order) the Bureau of Prisons' administrative decision ordering petitioner's forcible medication would remain in place. Which is to suggest that, in addition to the jurisdictional defect of interlocutoriness to which my opinion is addressed, there may be no jurisdiction because, at the time this suit was filed, petitioner failed to meet the "remediability" requirement of Article III standing. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83 (1998). The Court of Appeals should address this jurisdictional issue on remand.

final decisions of the district courts of the United States" (emphasis added), allowed the Court of Appeals to review the District Court's April 4, 2001, order. We have described § 1291, however, as a "final judgment rule," *Flanagan* v. *United States*, 465 U. S. 259, 263 (1984), which "[i]n a criminal case . . . prohibits appellate review *until conviction and imposition of sentence*," *ibid.* (emphasis added). See also *Abney* v. *United States*, 431 U. S. 651, 656–657 (1977). We have invented[4] a narrow exception to this statutory command: the so-called "collateral order" doctrine, which permits appeal of district court orders that (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," *and* (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). But the District Court's April 4, 2001, order fails to satisfy the third requirement of this test.

Our decision in *Riggins* v. *Nevada*, 504 U. S. 127 (1992), demonstrates that the District Court's April 4, 2001, order *is* reviewable on appeal from conviction and sentence. The defendant in *Riggins* had been involuntarily medicated while a pretrial detainee, and he argued, *on appeal from his murder conviction*, that the State of Nevada had contravened the substantive-due-process standards set forth in *Washington* v. *Harper*, 494 U. S. 210 (1990). Rather than holding that review of this claim was not possible on appeal from a criminal conviction, the *Riggins* Court held that forced medication of a criminal defendant that fails to comply with *Harper* creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. 504 U. S., at 135–138. The Court is therefore wrong to say that "[a]n ordinary appeal comes too late for a defendant to enforce" this right, *ante*, at 177, and appellate review of any substantive-due-process challenge to the District Court's

[4] I use the term "invented" advisedly. The statutory text provides no basis.

April 4, 2001, order must wait until after conviction and sentence have been imposed.[5]

It is true that, if petitioner must wait until final judgment to appeal, he will not receive the *type* of remedy he would prefer—a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*. But *that* ground for interlocutory appeal is emphatically rejected by our cases. See, *e. g.*, *Flanagan*, *supra* (disallowing interlocutory appeal of an order disqualifying defense counsel); *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) *(per curiam)* (disallowing interlocutory appeal of an order denying motion to dismiss indictment on grounds of prosecutorial vindictiveness); *Carroll* v. *United States*, 354 U. S. 394 (1957) (disallowing interlocutory appeal of an order denying motion to suppress evidence).

We have until today interpreted the collateral-order exception to § 1291 "'with the *utmost strictness*'" in criminal cases. *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 799 (1989) (emphasis added). In the 54 years since we invented the exception, see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), we have found only three types of prejudgment orders in criminal cases appealable: denials of motions to reduce bail, *Stack* v. *Boyle*, 342 U. S. 1 (1951), denials of motions to dismiss on double-jeopardy grounds, *Abney*, *supra*, and denials of motions to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U. S. 500 (1979). The first of these exceptions was justified on the ground that the denial of a motion to reduce bail becomes moot (and thus effectively unreviewable) on appeal

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[5] To be sure, the order here is unreviewable after final judgment *if the defendant is acquitted.* But the "unreviewability" leg of our collateral-order doctrine—which, as it is framed, requires that the interlocutory order be "effectively unreviewable *on appeal from a final judgment*," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (emphasis added)—is not satisfied by the possibility that the aggrieved party will have no occasion to appeal.

from conviction. See *Flanagan*, *supra*, at 266. As *Riggins* demonstrates, that is not the case here. The interlocutory appeals in *Abney* and *Helstoski* were justified on the ground that it was appropriate to interrupt the trial when the precise right asserted was the *right not to be tried.* See *Abney*, *supra*, at 660–661; *Helstoski*, *supra*, at 507–508. Petitioner does not assert a right not to be tried, but a right not to be *medicated.*

B

Today's narrow holding will allow criminal defendants in petitioner's position to engage in opportunistic behavior. They can, for example, voluntarily take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis. This sort of concern for the disruption of criminal proceedings—strangely missing from the Court's discussion today—is what has led us to state many times that we interpret the collateral-order exception narrowly in criminal cases. See *Midland Asphalt Corp.*, *supra*, at 799; *Flanagan*, 465 U. S., at 264.

But the adverse effects of today's narrow holding are as nothing compared to the adverse effects of the new rule of law that underlies the holding. The Court's opinion announces that appellate jurisdiction is proper because review after conviction and sentence will come only after "Sell will have undergone forced medication—the very harm that he seeks to avoid." *Ante*, at 176–177. This analysis effects a breathtaking expansion of appellate jurisdiction over interlocutory orders. If it is applied faithfully (and some appellate panels will be eager to apply it faithfully), any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights may immediately appeal. He is empowered to hold up the trial for months by claiming that review after final judgment "would come too late" to prevent the violation. A trial-court order requiring the de-

fendant to wear an electronic bracelet could be attacked as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the jury could be attacked as an immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial of Fifth Amendment rights. All these orders would be immediately appealable. *Flanagan* and *Carroll*, which held that appellate review of orders that might infringe a defendant's constitutionally protected rights *still* had to wait until final judgment, are seemingly overruled. The narrow gate of entry to the collateral-order doctrine—hitherto traversable by only (1) orders unreviewable on appeal from judgment and (2) orders denying an asserted right not to be tried—has been generously widened.

The Court dismisses these concerns in a single sentence immediately following its assertion that the order here meets the three *Cohen*-exception requirements of (1) conclusively determining the disputed question (correct); (2) resolving an important issue separate from the merits of the action (correct); and (3) being unreviewable on appeal (quite plainly incorrect). That sentence reads as follows: "These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent." *Ante*, at 177. That is a brand new consideration put forward in rebuttal, not at all discussed in the body of the Court's analysis, which relies on the ground that (contrary to my contention) this order *is not reviewable on appeal.* The Court's last-minute addition must mean that it is revising the *Cohen* test, to dispense with the third requirement (unreviewable on appeal) *only when the important separate issue in question involves a "severe intrusion" and hence an "important constitutional issue."* Of course I welcome this narrowing of a misguided revision—but I still

would not favor the revision, not only because it is a novelty with no basis in our prior opinions, but also because of the uncertainty, and the obvious opportunity for gamesmanship, that the revision-as-narrowed produces. If, however, I did make this more limited addition to the textually unsupported *Cohen* doctrine, I would at least do so in an undisguised fashion.

* * *

Petitioner could have obtained pre-trial review of the § 549.43 medication order by filing suit under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, or even by filing a *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), action, which is available to federal pretrial detainees challenging the conditions of their confinement, see, *e. g.*, *Lyons* v. *United States Marshals*, 840 F. 2d 202 (CA3 1987). In such a suit, he could have obtained immediate appellate review of denial of relief.[6] But if he chooses to challenge his forced medication in the context of a criminal trial, he must abide by the limitations attached to such a challenge—which prevent him from stopping the proceedings in their tracks. Petitioner's mistaken litigation strategy, and this Court's desire to decide an interesting constitutional issue, do not justify a disregard of the limits that Congress has imposed on courts of appeals' (and our own) jurisdiction. We should vacate the judgment here, and remand the case to the Court of Appeals with instructions to dismiss.

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[6] Petitioner points out that there are disadvantages to such an approach—for example, lack of constitutional entitlement to appointed counsel in a *Bivens* action. That does not entitle him or us to disregard the limits on appellate jurisdiction.

Syllabus

UNITED STATES ET AL. *v.* AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02–361. Argued March 5, 2003—Decided June 23, 2003

Two forms of federal assistance help public libraries provide patrons with Internet access: discounted rates under the E-rate program and grants under the Library Services and Technology Act (LSTA). Upon discovering that library patrons, including minors, regularly search the Internet for pornography and expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers, Congress enacted the Children's Internet Protection Act (CIPA), which forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. Appellees, a group of libraries, patrons, Web site publishers, and related parties, sued the Government, challenging the constitutionality of CIPA's filtering provisions. Ruling that CIPA is facially unconstitutional and enjoining the Government from withholding federal assistance for failure to comply with CIPA, the District Court held, *inter alia*, that Congress had exceeded its authority under the Spending Clause because any public library that complies with CIPA's conditions will necessarily violate the First Amendment; that the CIPA filtering software constitutes a content-based restriction on access to a public forum that is subject to strict scrutiny; and that, although the Government has a compelling interest in preventing the dissemination of obscenity, child pornography, or material harmful to minors, the use of software filters is not narrowly tailored to further that interest.

Held: The judgment is reversed.

201 F. Supp. 2d 401, reversed.

CHIEF JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS, concluded:

1. Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives, *South Dakota* v. *Dole*, 483 U. S. 203, 206, but may not "induce" the recipient "to engage in activities that would themselves be unconstitutional," *id.*, at

210. To determine whether libraries would violate the First Amendment by employing the CIPA filtering software, the Court must first examine their societal role. To fulfill their traditional missions of facilitating learning and cultural enrichment, public libraries must have broad discretion to decide what material to provide to their patrons. This Court has held in two analogous contexts that the Government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 672–674; *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 585–586. Just as forum analysis and heightened judicial scrutiny were incompatible with the role of public television stations in the former case and the role of the National Endowment for the Arts in the latter, so are they incompatible with the broad discretion that public libraries must have to consider content in making collection decisions. Thus, the public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a "traditional" nor a "designated" public forum. See, *e. g.*, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802–803. Unlike the "Student Activity Fund" at issue in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834, Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction. The decisions by most libraries to exclude pornography from their print collections are not subjected to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently. Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality. Concerns over filtering software's tendency to erroneously "overblock" access to constitutionally protected speech that falls outside the catego-

ries software users intend to block are dispelled by the ease with which patrons may have the filtering software disabled. Pp. 203–209.

2. CIPA does not impose an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on that receipt, to surrender their First Amendment right to provide the public with access to constitutionally protected speech. Assuming that appellees may assert an "unconstitutional conditions" claim, that claim would fail on the merits. When the Government appropriates public funds to establish a program, it is entitled to broadly define that program's limits. *Rust* v. *Sullivan*, 500 U. S. 173, 194. As in *Rust*, the Government here is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purpose for which they are authorized: helping public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*. Appellees mistakenly contend, in reliance on *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 542–543, that CIPA's filtering conditions distort the usual functioning of public libraries. In contrast to the lawyers who furnished legal aid to the indigent under the program at issue in *Velazquez*, public libraries have no role that pits them against the Government, and there is no assumption, as there was in that case, that they must be free of any conditions that their benefactors might attach to the use of donated funds. Pp. 210–214.

JUSTICE KENNEDY concluded that if, as the Government represents, a librarian will unblock filtered material or disable the Internet software filter without significant delay on an adult user's request, there is little to this case. There are substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that adult library users' access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not this facial challenge. Pp. 214–215.

JUSTICE BREYER agreed that the "public forum" doctrine is inapplicable here and that the statute's filtering software provisions do not vio-

late the First Amendment, but would reach that ultimate conclusion through a different approach. Because the statute raises special First Amendment concerns, he would not require only a "rational basis" for the statute's restrictions. At the same time, "strict scrutiny" is not warranted, for such a limiting and rigid test would unreasonably interfere with the discretion inherent in the "selection" of a library's collection. Rather, he would examine the constitutionality of the statute's restrictions as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. The key question in such instances is one of proper fit. The Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that is out of proportion to that objective. The statute's restrictions satisfy these constitutional demands. Its objectives—of restricting access to obscenity, child pornography, and material that is comparably harmful to minors—are "legitimate," and indeed often "compelling." No clearly superior or better fitting alternative to Internet software filters has been presented. Moreover, the statute contains an important exception that limits the speech-related harm: It allows libraries to permit any adult patron access to an "overblocked" Web site or to disable the software filter entirely upon request. Given the comparatively small burden imposed upon library patrons seeking legitimate Internet materials, it cannot be said that any speech-related harm that the statute may cause is disproportionate when considered in relation to the statute's legitimate objectives. Pp. 215–220.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR, SCALIA, and THOMAS, JJ., joined. KENNEDY, J., *post,* p. 214, and BREYER, J., *post,* p. 215, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, *post,* p. 220. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 231.

Solicitor General Olson argued the cause for appellants. With him on the briefs were *Assistant Attorney General*

McCallum, *Deputy Solicitor General Kneedler*, *Irving L. Gornstein*, *Barbara L. Herwig*, and *Jacob M. Lewis*.

Paul M. Smith argued the cause for appellees. With him on the brief for appellees American Library Association, Inc., et al. were *Theresa A. Chmara*, *Daniel Mach*, *Elliot M. Mincberg*, and *Lawrence S. Ottinger*. *Christopher A. Hansen*, *Ann Beeson*, *Steven R. Shapiro*, *Charles S. Sims*, *Stefan Presser*, and *David L. Sobel* filed a brief for appellees Multnomah County Public Library et al.*

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS joined.

To address the problems associated with the availability of Internet pornography in public libraries, Congress enacted

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas by *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, *Jeffrey S. Boyd*, Deputy Attorney General, *Philip A. Lionberger*, Solicitor General, and *Amy Warr* and *Ryan D. Clinton*, Assistant Solicitors General; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Colby M. May*, *Ben Bull*, *James M. Henderson*, *Joel H. Thornton*, *John P. Tuskey*, and *Laura B. Hernandez;* for the American Civil Rights Union by *Peter Ferrara;* for Cities, Mayors, and County Commissioners by *Kelly Shackelford;* for the Greenville, South Carolina, Public Library et al. by *Kenneth C. Bass III;* for the National Law Center for Children and Families et al. by *Kristina A. Bullock*, *Bruce A. Taylor*, and *Janet M. LaRue;* and for Sen. Trent Lott et al. by *Brian Fahling*, *Stephen M. Crampton*, and *Michael J. DePrimo*.

Briefs of *amici curiae* urging affirmance were filed for the Association of American Publishers, Inc., et al. by *R. Bruce Rich*, *Jonathan Bloom*, and *John B. Morris, Jr.;* for the Brennan Center for Justice by *Burt Neuborne*, *Laura K. Abel*, and *David S. Udell;* for the Cleveland Public Library et al. by *David W. Ogden;* and for Partnership for Progress on the Digital Divide et al. by *Marjorie Heins*.

Briefs of *amici curiae* were filed for the National School Boards Association et al. by *Julie Underwood*, *Naomi Gittins*, and *Stuart L. Knade;* for the Online Policy Group, Inc., et al. by *Daniel H. Bromberg* and *Charles R. A. Morse;* and for Jonathan Wallace d/b/a The Ethical Spectacle by *Michael B. Green* and *Jonathan D. Wallace*.

the Children's Internet Protection Act (CIPA), 114 Stat. 2763A–335. Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them. The District Court held these provisions facially invalid on the ground that they induce public libraries to violate patrons' First Amendment rights. We now reverse.

To help public libraries provide their patrons with Internet access, Congress offers two forms of federal assistance. First, the E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount. 110 Stat. 71, 47 U. S. C. § 254(h)(1)(B). In the year ending June 30, 2002, libraries received $58.5 million in such discounts. Redacted Joint Trial Stipulations of All Parties in Nos. 01–CV–1303, etc. (ED Pa.), ¶ 128, p. 16 (hereinafter Jt. Tr. Stip.). Second, pursuant to the Library Services and Technology Act (LSTA), 110 Stat. 3009–295, as amended, 20 U. S. C. § 9101 *et seq.*, the Institute of Museum and Library Services makes grants to state library administrative agencies to "electronically lin[k] libraries with educational, social, or information services," "assis[t] libraries in accessing information through electronic networks," and "pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies." §§ 9141(a)(1)(B), (C), (E). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants. Jt. Tr. Stip. ¶ 185, p. 26. These programs have succeeded greatly in bringing Internet access to public libraries: By 2000, 95% of the Nation's libraries provided public Internet access. J. Bertot & C. McClure, Public Libraries and the Internet 2000: Summary Findings and Data Tables, p. 3 (Sept. 7, 2000), http://www.nclis.gov/statsurv/2000plo.pdf (all Internet materials as visited Mar. 25, 2003, and available in Clerk of Court's case file).

By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained. 201 F. Supp. 2d 401, 419 (ED Pa. 2002). The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. *Id.*, at 406. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers. *Id.*, at 423.

Upon discovering these problems, Congress became concerned that the E-rate and LSTA programs were facilitating access to illegal and harmful pornography. S. Rep. No. 105–226, p. 5 (1998). Congress learned that adults "us[e] library computers to access pornography that is then exposed to staff, passersby, and children," and that "minors acces[s] child and adult pornography in libraries."[1]

But Congress also learned that filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources. *Id.*, at 20–26. By 2000, before Congress enacted CIPA, almost 17% of public libraries used such software on at least some of their Internet terminals, and 7% had filters on all of them. Library Research Center of U. Ill., Survey of Internet Access Management in Public Libraries 8, http://alexia.lis.uiuc.edu/gslis/research/internet.pdf. A library can

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[1] The Children's Internet Protection Act: Hearing on S. 97 before the Senate Committee on Commerce, Science, and Transportation, 106th Cong., 1st Sess., 49 (1999) (prepared statement of Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families). See also Obscene Material Available Via The Internet: Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 106th Cong., 2d Sess., 1, 27 (2000) (citing D. Burt, Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries (2000)) (noting more than 2,000 incidents of patrons, both adults and minors, using library computers to view online pornography, including obscenity and child pornography).

set such software to block categories of material, such as "Pornography" or "Violence." 201 F. Supp. 2d, at 428. When a patron tries to view a site that falls within such a category, a screen appears indicating that the site is blocked. *Id.*, at 429. But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter. To minimize this problem, a library can set its software to prevent the blocking of material that falls into categories like "Education," "History," and "Medical." *Id.*, at 428–429. A library may also add or delete specific sites from a blocking category, *id.*, at 429, and anyone can ask companies that furnish filtering software to unblock particular sites, *id.*, at 430.

Responding to this information, Congress enacted CIPA. It provides that a library may not receive E-rate or LSTA assistance unless it has "a policy of Internet safety for minors that includes the operation of a technology protection measure . . . that protects against access" by all persons to "visual depictions" that constitute "obscen[ity]" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 20 U. S. C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U. S. C. §§ 254(h)(6)(B)(i) and (C)(i). The statute defines a "[t]echnology protection measure" as "a specific technology that blocks or filters Internet access to material covered by" CIPA. § 254(h)(7)(I). CIPA also permits the library to "disable" the filter "to enable access for bona fide research or other lawful purposes." 20 U. S. C. § 9134(f)(3); 47 U. S. C. § 254(h)(6)(D). Under the E-rate program, disabling is permitted "during use by an adult." § 254(h)(6)(D). Under the LSTA program, disabling is permitted during use by any person. 20 U. S. C. § 9134(f)(3).

Appellees are a group of libraries, library associations, library patrons, and Web site publishers, including the American Library Association (ALA) and the Multnomah County Public Library in Portland, Oregon (Multnomah). They

sued the United States and the Government agencies and officials responsible for administering the E-rate and LSTA programs in District Court, challenging the constitutionality of CIPA's filtering provisions. A three-judge District Court convened pursuant to § 1741(a) of CIPA, 114 Stat. 2763A–351, note following 20 U. S. C. § 7001.

After a trial, the District Court ruled that CIPA was facially unconstitutional and enjoined the relevant agencies and officials from withholding federal assistance for failure to comply with CIPA. The District Court held that Congress had exceeded its authority under the Spending Clause, U. S. Const., Art. I, § 8, cl. 1, because, in the court's view, "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." 201 F. Supp. 2d, at 453. The court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." *Id.*, at 462. But it distinguished libraries' decisions to make certain Internet material inaccessible. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." *Ibid.* Reasoning that "the provision of Internet access within a public library . . . is for use by the public . . . for expressive activity," the court analyzed such access as a "designated public forum." *Id.*, at 457 (citation and internal quotation marks omitted). The District Court also likened Internet access in libraries to "traditional public fora . . . such as sidewalks and parks" because it "promotes First Amendment values in an analogous manner." *Id.*, at 466.

Based on both of these grounds, the court held that the filtering software contemplated by CIPA was a content-

based restriction on access to a public forum, and was therefore subject to strict scrutiny. *Ibid.* Applying this standard, the District Court held that, although the Government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors," *id.*, at 471, the use of software filters is not narrowly tailored to further those interests, *id.*, at 479. We noted probable jurisdiction, 537 U. S. 1017 (2002), and now reverse.

Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. *South Dakota* v. *Dole*, 483 U. S. 203, 206 (1987). But Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." *Id.*, at 210. To determine whether libraries would violate the First Amendment by employing the filtering software that CIPA requires,[2] we must first examine the role of libraries in our society.

Public libraries pursue the worthy missions of facilitating learning and cultural enrichment. Appellee ALA's Library Bill of Rights states that libraries should provide "[b]ooks and other . . . resources . . . for the interest, information, and enlightenment of all people of the community the library

[2] JUSTICE STEVENS misapprehends the analysis we must perform to determine whether CIPA exceeds Congress' authority under the Spending Clause. He asks and answers whether it is constitutional for Congress to "impose [CIPA's filtering] requirement" on public libraries, instead of "allowing local decisionmakers to tailor their responses to local problems." *Post*, at 220 (dissenting opinion). But under our well-established Spending Clause precedent, that is not the proper inquiry. Rather, as the District Court correctly recognized, 201 F. Supp. 2d 401, 453 (ED Pa. 2002), we must ask whether the condition that Congress requires "would . . . be unconstitutional" if performed by the library itself. *Dole*, 483 U. S., at 210.

CIPA does not directly regulate private conduct; rather, Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds. Therefore, *Dole* provides the appropriate framework for assessing CIPA's constitutionality.

serves." 201 F. Supp. 2d, at 420 (internal quotation marks omitted). To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide "universal coverage." *Id.*, at 421. Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." *Ibid.* To this end, libraries collect only those materials deemed to have "requisite and appropriate quality." *Ibid.* See W. Katz, Collection Development: The Selection of Materials for Libraries 6 (1980) ("The librarian's responsibility . . . is to separate out the gold from the garbage, not to preserve everything"); F. Drury, Book Selection xi (1930) ("[I]t is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to advantage"); App. 636 (Rebuttal Expert Report of Donald G. Davis, Jr.) ("A hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need").

We have held in two analogous contexts that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 672–673 (1998), we held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers. "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." *Id.*, at 673. Recognizing a broad right of public access "would [also] risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.*, at 674.

Similarly, in *National Endowment for Arts* v. *Finley*, 524 U. S. 569 (1998), we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. We explained that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." *Id.*, at 585. In particular, "[t]he very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." *Ibid.* (some internal quotation marks omitted). We expressly declined to apply forum analysis, reasoning that it would conflict with "NEA's mandate . . . to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support." *Id.*, at 586.

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.

The public forum principles on which the District Court relied, 201 F. Supp. 2d, at 457–470, are out of place in the context of this case. Internet access in public libraries is neither a "traditional" nor a "designated" public forum. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802 (1985) (describing types of forums). First, this resource—which did not exist until quite recently—has not "immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 679 (1992) (internal quo-

tation marks omitted). We have "rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, *supra*, at 678. The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.

Nor does Internet access in a public library satisfy our definition of a "designated public forum." To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum. *Cornelius*, *supra*, at 802–803; *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, *supra*, at 802. The District Court likened public libraries' Internet terminals to the forum at issue in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). 201 F. Supp. 2d, at 465. In *Rosenberger*, we considered the "Student Activity Fund" established by the University of Virginia that subsidized all manner of student publications except those based on religion. We held that the fund had created a limited public forum by giving public money to student groups who wished to publish, and therefore could not discriminate on the basis of viewpoint.

The situation here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers," *Rosenberger*, *supra*, at 834, but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. See *Cornelius*, *supra*, at 805 (noting, in upholding limits on participation in the Combined Federal Campaign (CFC), that "[t]he Government did not

create the CFC for purposes of providing a forum for expressive activity"). As Congress recognized, "[t]he Internet is simply another method for making information available in a school or library." S. Rep. No. 106–141, p. 7 (1999). It is "no more than a technological extension of the book stack." *Ibid.*[3]

The District Court disagreed because, whereas a library reviews and affirmatively chooses to acquire every book in its collection, it does not review every Web site that it makes available. 201 F. Supp. 2d, at 462–463. Based on this distinction, the court reasoned that a public library enjoys less discretion in deciding which Internet materials to make

[3] Even if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import "the public forum doctrine . . . wholesale into" the context of the Internet. *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727, 749 (1996) (opinion of BREYER, J.). "[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." *Ibid.*

The dissents agree with the District Court that less restrictive alternatives to filtering software would suffice to meet Congress' goals. *Post,* at 223 (opinion of STEVENS, J.) (quoting 201 F. Supp. 2d, at 410); *post,* at 234 (opinion of SOUTER, J.) (quoting 201 F. Supp. 2d, at 422–427). But we require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies. For the reasons stated above, see *supra,* at 205–208, such is not the case here. In deciding not to collect pornographic material from the Internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision.

In any case, the suggested alternatives have their own drawbacks. Close monitoring of computer users would be far more intrusive than the use of filtering software, and would risk transforming the role of a librarian from a professional to whom patrons turn for assistance into a compliance officer whom many patrons might wish to avoid. Moving terminals to places where their displays cannot easily be seen by other patrons, or installing privacy screens or recessed monitors, would not address a library's interest in preventing patrons from deliberately using its computers to view online pornography. To the contrary, these alternatives would make it *easier* for patrons to do so.

available than in making book selections. *Ibid.* We do not find this distinction constitutionally relevant. A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.

Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality.

Like the District Court, the dissents fault the tendency of filtering software to "overblock"—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block. See *post*, at 221–222 (opinion of STEVENS, J.); *post*, at 233–234 (opinion of SOUTER, J.). Due to the software's limitations, "[m]any erroneously blocked [Web] pages contain content

that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" 201 F. Supp. 2d, at 449. Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, *id.*, at 429, and the Solicitor General stated at oral argument that a "library may . . . eliminate the filtering with respect to specific sites . . . at the request of a patron," Tr. of Oral Arg. 4. With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U. S. C. § 9134(f)(3) (disabling permitted for both adults and minors); 47 U. S. C. § 254(h)(6)(D) (disabling permitted for adults). The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether," Tr. of Oral Arg. 11, and further explained that a patron would not "have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled," *id.*, at 4. The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them. 201 F. Supp. 2d, at 411. But the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.[4]

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[4] The dissents argue that overblocking will "'reduce the adult population . . . to reading only what is fit for children.'" *Post*, at 222, n. 2 (opinion of STEVENS, J.) (quoting *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957)). See also *post*, at 222, and n. 2 (citing *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 252 (2002); *United States* v. *Playboy Entertainment Group*,

Appellees urge us to affirm the District Court's judgment on the alternative ground that CIPA imposes an unconstitutional condition on the receipt of federal assistance. Under this doctrine, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 674 (1996) (quoting *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972)). Appellees argue that CIPA imposes an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech. The Government counters that this claim fails because Government entities do not have First Amendment rights. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94,

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Inc., 529 U. S. 803, 814 (2000); and *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 875 (1997)); see *post*, at 237–238 (opinion of SOUTER, J.). But these cases are inapposite because they addressed Congress' direct regulation of private conduct, not exercises of its Spending Power.

The dissents also argue that because some library patrons would not make specific unblocking requests, the interest of authors of blocked Internet material "in reaching the widest possible audience would be abridged." *Post*, at 225 (opinion of STEVENS, J.); see *post*, at 242–243, n. 8 (opinion of SOUTER, J.). But this mistakes a public library's purpose for acquiring Internet terminals: A library does so to provide its patrons with materials of requisite and appropriate quality, not to create a public forum for Web publishers to express themselves. See *supra*, at 206–208.

JUSTICE STEVENS further argues that, because some libraries' procedures will make it difficult for patrons to have blocked material unblocked, CIPA "will create a significant prior restraint on adult access to protected speech." *Post*, at 225. But this argument, which the District Court did not address, mistakenly extends prior restraint doctrine to the context of public libraries' collection decisions. A library's decision to use filtering software is a collection decision, not a restraint on private speech. Contrary to JUSTICE STEVENS' belief, a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected.

139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the government"); *id.*, at 139, n. 7 ("'The purpose of the First Amendment is to protect private expression'" (quoting T. Emerson, The System of Freedom of Expression 700 (1970))). See also *Warner Cable Communications, Inc.*, v. *Niceville*, 911 F. 2d 634, 638 (CA11 1990); *Student Govt. Assn.* v. *Board of Trustees of the Univ. of Mass.*, 868 F. 2d 473, 481 (CA1 1989); *Estiverne* v. *Louisiana State Bar Assn.*, 863 F. 2d 371, 379 (CA5 1989).

We need not decide this question because, even assuming that appellees may assert an "unconstitutional conditions" claim, this claim would fail on the merits. Within broad limits, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991). In *Rust*, Congress had appropriated federal funding for family planning services and forbidden the use of such funds in programs that provided abortion counseling. *Id.*, at 178. Recipients of these funds challenged this restriction, arguing that it impermissibly conditioned the receipt of a benefit on the relinquishment of their constitutional right to engage in abortion counseling. *Id.*, at 196. We rejected that claim, recognizing that "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.*

The same is true here. The E-rate and LSTA programs were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes.[5] Congress

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[5] See 20 U. S. C. § 9121 ("It is the purpose of [LSTA] (2) to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages"); S. Conf. Rep. No. 104–230, p. 132 (1996) (The E-rate program "will help open new worlds of knowledge, learning and education to all Americans . . . . [It is] intended, for

may certainly insist that these "public funds be spent for the purposes for which they were authorized." *Ibid.* Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust.*

JUSTICE STEVENS asserts the premise that "[a] federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate [the First] Amendment." *Post*, at 226. See also *post*, at 230–231. But—assuming again that public libraries have First Amendment rights—CIPA does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. "'A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.'" *Rust*, *supra*, at 193 (quoting *Harris* v. *McRae*, 448 U. S. 297, 317, n. 19 (1980)). "'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'" *Rust*, *supra*, at 193 (quoting *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 549 (1983)).[6]

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example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via . . . libraries").

[6] These holdings, which JUSTICE STEVENS ignores, also make clear that his reliance on *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990), *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), is misplaced. See *post*, at 227. The invalidated state action in those cases involved true penalties, such as denial of a promotion or outright discharge from employment, not nonsubsidies.

Appellees mistakenly contend, in reliance on *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533 (2001), that CIPA's filtering conditions "[d]istor[t] the [u]sual [f]unctioning of [p]ublic [l]ibraries." Brief for Appellees ALA et al. 40 (citing *Velazquez*, *supra*, at 543); Brief for Appellees Multnomah et al. 47–48 (same). In *Velazquez*, the Court concluded that a Government program of furnishing legal aid to the indigent differed from the program in *Rust* "[i]n th[e] vital respect" that the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control. 531 U. S., at 542–543. The Court concluded that the restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.[7]

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[7] Relying on *Velazquez*, JUSTICE STEVENS argues mistakenly that *Rust* is inapposite because that case "only involved, and only applies to, . . . situations in which the government seeks to communicate a specific message," *post*, at 228, and unlike the Title X program in *Rust*, the E-rate and LSTA programs "are not designed to foster or transmit any particular governmental message." *Post*, at 229. But he misreads our cases discussing *Rust*, and again misapprehends the purpose of providing Internet terminals in public libraries. *Velazquez* held only that viewpoint-based restrictions are improper "'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers.*'" 531 U. S., at 542 (quoting *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834 (1995) (emphasis added)). See also 531 U. S., at 542 ("[T]he salient point is that, like the program in *Rosenberger*, the LSC [Legal Services Corporation] program was designed *to facilitate private speech* . . ." (emphasis added)); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229 (2000) ("The University of Wisconsin

Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries. Therefore, the judgment of the District Court for the Eastern District of Pennsylvania is

Reversed.

JUSTICE KENNEDY, concurring in the judgment.

If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact. Tr. of Oral Arg. 11; *ante*, at 209 (plurality opinion).

The District Court, in its "Preliminary Statement," did say that "the unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries." 201 F. Supp. 2d 401, 411 (ED Pa. 2002). See also *post*, at 232–233 (SOUTER, J., dissenting). That statement, however, does not appear to be a specific finding. It was not the basis for the District Court's decision in any event, as the court assumed that "the disabling provisions permit public libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron." 201 F. Supp. 2d, at 485–486.

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exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas"); *Rosenberger*, *supra*, at 830, 834 ("The [Student Activities Fund] is a forum"; "[T]he University . . . expends funds to encourage a diversity of views from private speakers"). Indeed, this very distinction led us to state in *Southworth* that that case did not implicate our unconstitutional conditions jurisprudence. 529 U. S., at 229 ("The case we decide here . . . does not raise the issue of the government's right . . . to use its own funds to advance a particular message"). As we have stated above, *supra*, at 206–208, public libraries do not install Internet terminals to provide a forum for Web publishers to express themselves, but rather to provide patrons with online material of requisite and appropriate quality.

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case. See *post*, at 219–220 (BREYER, J., concurring in judgment).

There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. For these reasons, I concur in the judgment of the Court.

JUSTICE BREYER, concurring in the judgment.

The Children's Internet Protection Act (Act) sets conditions for the receipt of certain Government subsidies by public libraries. Those conditions require the libraries to install on their Internet-accessible computers technology, say, filtering software, that will help prevent computer users from gaining Internet access to child pornography, obscenity, or material comparably harmful to minors. 20 U. S. C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U. S. C. §§ 254(h)(6)(B)(i) and (C)(i). The technology, in its current form, does not function perfectly, for to some extent it also screens out constitutionally protected materials that fall outside the scope of the statute (*i. e.*, "overblocks") and fails to prevent access to some materials that the statute deems harmful (*i. e.*, "underblocks"). See 201 F. Supp. 2d 401, 448–449 (ED Pa. 2002); *ante*, at 208–209 (plurality opinion). In determining whether the statute's conditions consequently violate the First Amendment, the plurality first finds the "public forum" doctrine inapplicable, *ante*, at 205–208, and then holds that the statutory provisions are constitutional. I agree with

both determinations. But I reach the plurality's ultimate conclusion in a different way.

In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care. The Act directly restricts the public's receipt of information. See *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas"); *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997). And it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the Internet as accessed via public libraries. See *ante*, at 200, 203–204 (plurality opinion); *post*, at 225–226 (STEVENS, J., dissenting); *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 915 (1982) (REHNQUIST, J., dissenting) (describing public libraries as places "designed for freewheeling inquiry"). See also *Reno*, *supra*, at 853, 868 (describing the Internet as a "vast democratic" medium and the World Wide Web, in part, as "comparable, from the readers' viewpoint, to . . . a vast library"); *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 566 (2002). For that reason, we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a "rational basis" for imposing a restriction. Nor should we accept the Government's suggestion that a presumption in favor of the statute's constitutionality applies. See, *e. g.*, 201 F. Supp. 2d, at 409; Brief for United States 21–24.

At the same time, in my view, the First Amendment does not here demand application of the most limiting constitutional approach—that of "strict scrutiny." The statutory restriction in question is, in essence, a kind of "selection" restriction (a kind of editing). It affects the kinds and amount of materials that the library can present to its pa-

trons. See *ante*, at 204, 207–208 (plurality opinion). And libraries often properly engage in the selection of materials, either as a matter of necessity (*i. e.*, due to the scarcity of resources) or by design (*i. e.*, in accordance with collection development policies). See, *e. g.*, 201 F. Supp. 2d, at 408–409, 421, 462; *ante*, at 204, 208 (plurality opinion). To apply "strict scrutiny" to the "selection" of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's "collection" (broadly defined to include all the information the library makes available). Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–258 (1974) (protecting newspaper's exercise of editorial control and judgment). That is to say, "strict scrutiny" implies too limiting and rigid a test for me to believe that the First Amendment requires it in this context.

Instead, I would examine the constitutionality of the Act's restrictions here as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. Typically the key question in such instances is one of proper fit. See, *e. g.*, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469 (1989); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 740–747 (1996) (plurality opinion); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 227 (1997) (BREYER, J., concurring in part); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389–390 (1969).

In such cases the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent

to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion. In *Fox*, *supra*, at 480, for example, the Court stated:

> "What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . . , a means narrowly tailored to achieve the desired objective." (Internal quotation marks and citations omitted.)

Cf., *e. g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 564 (1980); *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). This approach does not substitute a form of "balancing" for less flexible, though more speech-protective, forms of "strict scrutiny." Rather, it *supplements* the latter with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue. Cf. *Fox*, *supra*, at 480–481; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 769–773 (1976).

The Act's restrictions satisfy these constitutional demands. The Act seeks to restrict access to obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful. These objectives are "legitimate," and indeed often "compelling." See, *e. g.*, *Miller* v. *California*, 413 U. S. 15, 18 (1973) (interest in prohibiting access to

obscene material is "legitimate"); *Reno*, 521 U. S., at 869–870 (interest in "shielding" minors from exposure to indecent material is "'compelling'"); *New York* v. *Ferber*, 458 U. S. 747, 756–757 (1982) (same). As the District Court found, software filters "provide a relatively cheap and effective" means of furthering these goals. 201 F. Supp. 2d, at 448. Due to present technological limitations, however, the software filters both "overblock," screening out some perfectly legitimate material, and "underblock," allowing some obscene material to escape detection by the filter. *Id.*, at 448–449. See *ante*, at 208–209 (plurality opinion). But no one has presented any clearly superior or better fitting alternatives. See *ante*, at 207, n. 3 (plurality opinion).

At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter." See *ante*, at 209; 20 U. S. C. § 9134(f)(3) (permitting library officials to "disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes"); 47 U. S. C. § 254(h)(6)(D) (same).

The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere. Perhaps local library rules or practices could further restrict the ability of patrons to obtain "overblocked" Internet material. See, *e. g.*, *In re Federal-State Joint Board on Universal Service: Children's Internet Protection Act*, 16 FCC Rcd.

8182, 8183, ¶ 2, 8204, ¶ 53 (2001) (leaving determinations regarding the appropriateness of compliant Internet safety policies and their disabling to local communities). But we are not now considering any such local practices. We here consider only a facial challenge to the Act itself.

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives. I therefore agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment.

JUSTICE STEVENS, dissenting.

"To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons." *Ante*, at 204. Accordingly, I agree with the plurality that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images. I also agree with the plurality that the 7% of public libraries that decided to use such software on *all* of their Internet terminals in 2000 did not act unlawfully. *Ante*, at 200. Whether it is constitutional for the Congress of the United States to impose that requirement on the other 93%, however, raises a vastly different question. Rather than allowing local decisionmakers to tailor their responses to local problems, the Children's Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to "an enormous amount of valuable information" that individual librarians cannot possibly review. *Ante*, at 208. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional.

I

The unchallenged findings of fact made by the District Court reveal fundamental defects in the filtering software that is now available or that will be available in the foreseeable future. Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images. As the District Court explained:

> "[T]he search engines that software companies use for harvesting are able to search text only, not images. This is of critical importance, because CIPA, by its own terms, covers only 'visual depictions.' 20 U. S. C. § 9134(f)(1)(A)(i); 47 U. S. C. § 254(h)(5)(B)(i). Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future. None of the filtering software companies deposed in this case employs image recognition technology when harvesting or categorizing URLs. Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i. e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize the Playboy name in that logo." 201 F. Supp. 2d 401, 431–432 (ED Pa. 2002).

Given the quantity and ever-changing character of Web sites offering free sexually explicit material,[1] it is inevitable that a substantial amount of such material will never be blocked. Because of this "underblocking," the statute will provide parents with a false sense of security without really solving the problem that motivated its enactment. Conversely, the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that "contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" *Id.*, at 449. In my judgment, a statutory blunderbuss that mandates this vast amount of "overblocking" abridges the freedom of speech protected by the First Amendment.

The effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation. Neither the interest in suppressing unlawful speech nor the interest in protecting children from access to harmful materials justifies this overly broad restriction on adult access to protected speech. "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 255 (2002).[2]

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[1] "The percentage of Web pages on the indexed Web containing sexually explicit content is relatively small. Recent estimates indicate that no more than 1–2% of the content on the Web is pornographic or sexually explicit. However, the absolute number of Web sites offering free sexually explicit material is extremely large, approximately 100,000 sites." 201 F. Supp. 2d 401, 419 (ED Pa. 2002).

[2] We have repeatedly reaffirmed the holding in *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957), that the State may not "reduce the adult population . . . to reading only what is fit for children." See *Ashcroft* v. *Free Speech Coalition*, 535 U. S., at 252; *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814 (2000) ("[T]he objective of shielding chil-

Although CIPA does not permit any experimentation, the District Court expressly found that a variety of alternatives less restrictive are available at the local level:

> "[L]ess restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet." 201 F. Supp. 2d, at 410.

Those findings are consistent with scholarly comment on the issue arguing that local decisions tailored to local circumstances are more appropriate than a mandate from Con-

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dren does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 875 (1997) ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults").

gress.[3] The plurality does not reject any of those findings. Instead, "[a]ssuming that such erroneous blocking presents constitutional difficulties," it relies on the Solicitor General's assurance that the statute permits individual librarians to disable filtering mechanisms whenever a patron so requests. *Ante*, at 209. In my judgment, that assurance does not cure the constitutional infirmity in the statute.

Until a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed. It is as though the statute required a significant part of every library's reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests. Some curious readers would in time obtain access to the hidden materials, but

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[3] "Indeed, federal or state mandates in this area are unnecessary and unwise. Locally designed solutions are likely to best meet local circumstances. Local decision makers and library boards, responding to local concerns and the prevalence of the problem in their own libraries, should decide if minors' Internet access requires filters. They are the persons in the best position to judge local community standards for what is and is not obscene, as required by the *Miller* [v. *California*, 413 U. S. 15 (1973)] test. Indeed, one nationwide solution is not needed, as the problems are local and, to some extent, uniquely so. Libraries in rural communities, for instance, have reported much less of a problem than libraries in urban areas. A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit. Further, by allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches." Laughlin, Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries, 51 Drake L. Rev. 213, 279 (2003).

many would not. Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged. Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech. A law that prohibits reading without official consent, like a law that prohibits speaking without consent, "constitutes a dramatic departure from our national heritage and constitutional tradition." *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 166 (2002).

II

The plurality incorrectly argues that the statute does not impose "an unconstitutional condition on public libraries." *Ante*, at 214. On the contrary, it impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights.

The plurality explains the "worthy missions" of the public library in facilitating "learning and cultural enrichment." *Ante*, at 203. It then asserts that in order to fulfill these missions, "libraries must have broad discretion to decide what material to provide to their patrons." *Ante*, at 204. Thus the selection decision is the province of the librarians, a province into which we have hesitated to enter:

> "A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these deci-

> sions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason." *Ante*, at 208.

As the plurality recognizes, we have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections. That discretion is comparable to the "'business of a university . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted).[4] As the District Court found, one of the central purposes of a library is to provide information for educational purposes: "'Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves.'" 201 F. Supp. 2d, at 420 (quoting the American Library Association's Library Bill of Rights). Given our Nation's deep commitment "to safeguarding academic freedom" and to the "robust exchange of ideas," *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967), a library's exercise of judgment with respect to its collection is entitled to First Amendment protection.

A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate that Amendment. Cf. *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997). I think it equally clear that the First Amendment protects libraries from being denied funds for refusing to

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[4] See also J. Boyer, Academic Freedom and the Modern University: The Experience of the University of Chicago 95 (2002) ("The right to speak, to write, and to teach freely is a precious right, one that the American research universities over the course of the twentieth century have slowly but surely made central to the very identity of the university in the modern world").

comply with an identical rule. An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty.

Our cases holding that government employment may not be conditioned on the surrender of rights protected by the First Amendment illustrate the point. It has long been settled that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" *Wieman* v. *Updegraff*, 344 U. S. 183, 191–192 (1952). Neither discharges, as in *Elrod* v. *Burns*, 427 U. S. 347, 350–351 (1976), nor refusals to hire or promote, as in *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 66–67 (1990), are immune from First Amendment scrutiny. Our precedents firmly rejecting "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,'" *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 674 (1996), draw no distinction between the penalty of discharge from one's job and the withholding of the benefit of a new job. The abridgment of First Amendment rights is equally unconstitutional in either context. See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine . . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

The issue in this case does not involve governmental attempts to control the speech or views of its employees. It involves the use of its treasury to impose controls on an important medium of expression. In an analogous situation, we specifically held that when "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning," the distorting restriction must be struck down under the First

Amendment. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 543 (2001).[5] The question, then, is whether requiring the filtering software on all Internet-accessible computers distorts that medium. As I have discussed above, the over- and underblocking of the software does just that.

The plurality argues that the controversial decision in *Rust* v. *Sullivan*, 500 U. S. 173 (1991), requires rejection of appellees' unconstitutional conditions claim. See *ante*, at 211–212. But, as subsequent cases have explained, *Rust* only involved, and only applies to, instances of governmental speech—that is, situations in which the government seeks to communicate a specific message.[6] The discounts under the E-rate program and funding under the Library Services and Technology Act (LSTA) program involved in this case do not subsidize any message favored by the Government. As Congress made clear, these programs were designed "[t]o help public libraries provide their patrons with Internet access," which in turn "provide[s] patrons with a vast amount of valuable information." *Ante*, at 199, 200. These programs thus are designed to provide access, particularly for individuals in low-income communities, see 47 U. S. C. §254(h)(1), to a vast amount and wide variety of private

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[5] Contrary to the plurality's narrow reading, *Velazquez* is not limited to instances in which the recipient of Government funds might be "pit[ted]" against the Government. See *ante*, at 213. To the contrary, we assessed the issue in *Velazquez* by turning to, and harmonizing it with, our prior unconstitutional condition cases in the First Amendment context. See 531 U. S., at 543–544.

[6] See *id.*, at 541 (distinguishing *Rust* on the ground that "the counseling activities of the doctors . . . amounted to governmental speech"); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229 (2000) (unlike *Rust*, "the issue of the government's right . . . to use its own funds to advance a particular message" was not presented); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834 (1995) (*Rust* is inapplicable where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

speech. They are not designed to foster or transmit any particular governmental message.

Even if we were to construe the passage of CIPA as modifying the E-rate and LSTA programs such that they now convey a governmental message that no "'visual depictions' that are 'obscene,' 'child pornography,' or in the case of minors, 'harmful to minors,'" 201 F. Supp. 2d, at 407, should be expressed or viewed, the use of filtering software does not promote that message. As described above, all filtering software erroneously blocks access to a substantial number of Web sites that contain constitutionally protected speech on a wide variety of topics. See *id.*, at 446–447 (describing erroneous blocking of speech on churches and religious groups, on politics and government, on health issues, on education and careers, on sports, and on travel). Moreover, there are "frequent instances of underblocking," *id.*, at 448, that is, instances in which filtering software did not prevent access to Web sites with depictions that fall within what CIPA seeks to block access to. In short, the message conveyed by the use of filtering software is not that all speech except that which is prohibited by CIPA is supported by the Government, but rather that all speech that gets through the software is supported by the Government. And the items that get through the software include some visual depictions that are obscene, some that are child pornography, and some that are harmful to minors, while at the same time the software blocks an enormous amount of speech that is not sexually explicit and certainly does not meet CIPA's definitions of prohibited content. As such, since the message conveyed is far from the message the Government purports to promote—indeed, the material permitted past the filtering software does not seem to have any coherent message—*Rust* is inapposite.

The plurality's reliance on *National Endowment for Arts* v. *Finley*, 524 U. S. 569 (1998), is also misplaced. That case involved a challenge to a statute setting forth the criteria

used by a federal panel of experts administering a federal grant program. Unlike this case, the Federal Government was not seeking to impose restrictions on the administration of a nonfederal program. As explained *supra*, at 228, *Rust* would appear to permit restrictions on a federal program such as the National Endowment for the Arts (NEA) arts grant program at issue in *Finley*.

Further, like a library, the NEA experts in *Finley* had a great deal of discretion to make judgments as to what projects to fund. But unlike this case, *Finley* did not involve a challenge by the NEA to a governmental restriction on its ability to award grants. Instead, the respondents were performance artists who had applied for NEA grants but were denied funding. See 524 U. S., at 577. If this were a case in which library patrons had challenged a library's decision to install and use filtering software, it would be in the same posture as *Finley*. Because it is not, *Finley* does not control this case.

Also unlike *Finley*, the Government does not merely seek to control a library's discretion with respect to computers purchased with Government funds or those computers with Government-discounted Internet access. CIPA requires libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount from the E-rate program or *any* funds from the LSTA program.[7] See 20 U. S. C. § 9134(f)(1); 47 U. S. C. §§ 254(h)(6)(B) and (C). If a library has 10 computers paid for by nonfederal funds and has Internet service for those computers also paid for by nonfederal funds, the library may choose not to put filtering software on any of those 10 computers. Or a library may decide to put filtering software on the 5 computers in its

[7] Thus, appellees are not merely challenging a "refusal to fund protected activity, without more," as in *Harris* v. *McRae*, 448 U. S. 297, 317, n. 19 (1980), or a "decision not to subsidize the exercise of a fundamental right," as in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 549 (1983). They are challenging a restriction that applies to property that they acquired without federal assistance.

children's section. Or a library in an elementary school might choose to put filters on every single one of its 10 computers. But under this statute, if a library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount.

This Court should not permit federal funds to be used to enforce this kind of broad restriction of First Amendment rights, particularly when such a restriction is unnecessary to accomplish Congress' stated goal. See *supra*, at 223 (discussing less restrictive alternatives). The abridgment of speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.

I would affirm the judgment of the District Court.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

I agree in the main with JUSTICE STEVENS, *ante*, at 225–230 and this page (dissenting opinion), that the blocking requirements of the Children's Internet Protection Act, 20 U. S. C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U. S. C. §§ 254(h)(6)(B)(i) and (C)(i), impose an unconstitutional condition on the Government's subsidies to local libraries for providing access to the Internet. I also agree with the library appellees on a further reason to hold the blocking rule invalid in the exercise of the spending power under Article I, § 8: the rule mandates action by recipient libraries that would violate the First Amendment's guarantee of free speech if the libraries took that action entirely on their own. I respectfully dissent on this further ground.

I

Like the other Members of the Court, I have no doubt about the legitimacy of governmental efforts to put a barrier between child patrons of public libraries and the raw offer-

ings on the Internet otherwise available to them there, and if the only First Amendment interests raised here were those of children, I would uphold application of the Act. We have said that the governmental interest in "shielding" children from exposure to indecent material is "compelling," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 869–870 (1997), and I do not think that the awkwardness a child might feel on asking for an unblocked terminal is any such burden as to affect constitutionality.

Nor would I dissent if I agreed with the majority of my colleagues, see *ante*, at 208–209 (plurality opinion); *ante*, at 219 (BREYER, J., concurring in judgment); *ante*, at 214 (KENNEDY, J., concurring in judgment), that an adult library patron could, consistently with the Act, obtain an unblocked terminal simply for the asking. I realize the Solicitor General represented this to be the Government's policy, see Tr. of Oral Arg. 4–5, 11, and if that policy were communicated to every affected library as unequivocally as it was stated to us at argument, local librarians might be able to indulge the unblocking requests of adult patrons to the point of taking the curse off the statute for all practical purposes. But the Federal Communications Commission, in its order implementing the Act, pointedly declined to set a federal policy on when unblocking by local libraries would be appropriate under the statute. See *In re Federal-State Joint Board on Universal Service: Children's Internet Protection Act*, 16 FCC Rcd. 8182, 8204, ¶ 53 (2001) ("Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities"). Moreover, the District Court expressly found that "unblocking may take days, and may be unavailable, espe-

cially in branch libraries, which are often less well staffed than main libraries." 201 F. Supp. 2d 401, 411 (ED Pa. 2002); see *id.*, at 487–488 (same).

In any event, we are here to review a statute, and the unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. First, the statute says only that a library "may" unblock, not that it must. 20 U. S. C. § 9134(f)(3); see 47 U. S. C. § 254(h)(6)(D). In addition, it allows unblocking only for "bona fide research or other lawful purposes," 20 U. S. C. § 9134(f)(3); see 47 U. S. C. § 254(h)(6)(D), and if the "lawful purposes" criterion means anything that would not subsume and render the "bona fide research" criterion superfluous, it must impose some limit on eligibility for unblocking, see, *e. g.*, *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous"). There is therefore necessarily some restriction, which is surely made more onerous by the uncertainty of its terms and the generosity of its discretion to library staffs in deciding who gets complete Internet access and who does not. Cf. *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 130 (1992) (noting that the First Amendment bars licensing schemes that grant unduly broad discretion to licensing officials, given the potential for such discretion to "becom[e] a means of suppressing a particular point of view" (internal quotation marks omitted)).[1]

We therefore have to take the statute on the understanding that adults will be denied access to a substantial amount of nonobscene material harmful to children but lawful for

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[1] If the Solicitor General's representation turns out to be honored in the breach by local libraries, it goes without saying that our decision today would not foreclose an as-applied challenge. See also *ante*, at 219–220 (BREYER, J., concurring in judgment); *ante*, at 215 (KENNEDY, J., concurring in judgment).

adult examination, and a substantial quantity of text and pictures harmful to no one. As the plurality concedes, see *ante*, at 208–209, this is the inevitable consequence of the indiscriminate behavior of current filtering mechanisms, which screen out material to an extent known only by the manufacturers of the blocking software, see 201 F. Supp. 2d, at 408 ("The category lists maintained by the blocking programs are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking").

We likewise have to examine the statute on the understanding that the restrictions on adult Internet access have no justification in the object of protecting children. Children could be restricted to blocked terminals, leaving other unblocked terminals in areas restricted to adults and screened from casual glances. And, of course, the statute could simply have provided for unblocking at adult request, with no questions asked. The statute could, in other words, have protected children without blocking access for adults or subjecting adults to anything more than minimal inconvenience, just the way (the record shows) many librarians had been dealing with obscenity and indecency before imposition of the federal conditions. See *id.*, at 422–427. Instead, the Government's funding conditions engage in overkill to a degree illustrated by their refusal to trust even a library's staff with an unblocked terminal, one to which the adult public itself has no access. See *id.*, at 413 (quoting 16 FCC Rcd., at 8196, ¶ 30).

The question for me, then, is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and

whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship. True, the censorship would not necessarily extend to every adult, for an intending Internet user might convince a librarian that he was a true researcher or had a "lawful purpose" to obtain everything the library's terminal could provide. But as to those who did not qualify for discretionary unblocking, the censorship would be complete and, like all censorship by an agency of the Government, presumptively invalid owing to strict scrutiny in implementing the Free Speech Clause of the First Amendment. "The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent 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." *Bigelow* v. *Virginia*, 421 U. S. 809, 829 (1975) (internal quotation marks and brackets omitted).

II

The Court's plurality does not treat blocking affecting adults as censorship, but chooses to describe a library's act in filtering content as simply an instance of the kind of selection from available material that every library (save, perhaps, the Library of Congress) must perform. *Ante*, at 208 ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source"). But this position does not hold up.[2]

[2] Among other things, the plurality's reasoning ignores the widespread utilization of interlibrary loan systems. See 201 F. Supp. 2d 401, 421 (ED Pa. 2002). With interlibrary loan, virtually any book, say, is effectively

A

Public libraries are indeed selective in what they acquire to place in their stacks, as they must be. There is only so much money and so much shelf space, and the necessity to choose some material and reject the rest justifies the effort to be selective with an eye to demand, quality, and the object of maintaining the library as a place of civilized enquiry by widely different sorts of people. Selectivity is thus necessary and complex, and these two characteristics explain why review of a library's selection decisions must be limited: the decisions are made all the time, and only in extreme cases could one expect particular choices to reveal impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic. See *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico,* 457 U. S. 853, 870–871 (1982) (plurality opinion). Review for rational basis is probably the most that any court could conduct, owing to the myriad particular selections that might be attacked by someone, and the difficulty of untangling the play of factors behind a particular decision.

At every significant point, however, the Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed.

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made available to a library's patrons. If, therefore, a librarian refused to get a book from interlibrary loan for an adult patron on the ground that the patron's "purpose" in seeking the book was not acceptable, the librarian could find no justification in the fact that libraries have traditionally "collect[ed] only those materials deemed to have 'requisite and appropriate quality.'" *Ante,* at 204. In any event, in the ensuing analysis, I assume for the sake of argument that we are in a world without interlibrary loan.

Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space.[3] In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired. Thus, deciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees. The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable "purpose," or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.

B

The plurality claims to find support for its conclusions in the "traditional missio[n]" of the public library. *Ante*, at 205; see also *ante*, at 219 (BREYER, J., concurring in judgment) (considering "traditional library practices"). The plurality thus argues, in effect, that the traditional responsibility of public libraries has called for denying adult access to certain books, or bowdlerizing the content of what the libraries let adults see. But, in fact, the plurality's conception of a public library's mission has been rejected by the libraries themselves. And no library that chose to block adult access in the way mandated by the Act could claim that the history of public library practice in this country furnished an implicit

[3] Of course, a library that allowed its patrons to use computers for any purposes might feel the need to purchase more computers to satisfy what would presumably be greater demand, see Brief for Appellants 23, but the answer to that problem would be to limit the number of unblocked terminals or the hours in which they could be used. In any event, the rationale for blocking has no reference whatever to scarcity.

gloss on First Amendment standards, allowing for blocking out anything unsuitable for adults.

Institutional history of public libraries in America discloses an evolution toward a general rule, now firmly rooted, that any adult entitled to use the library has access to any of its holdings.[4] To be sure, this freedom of choice was apparently not within the inspiration for the mid-19th-century development of public libraries, see J. Shera, Foundations of the Public Library: The Origins of the Public Library Movement in New England, 1629–1855, p. 107 (1949), and in the infancy of their development a "[m]oral censorship" of reading material was assumed, E. Geller, Forbidden Books in American Public Libraries, 1876–1939, p. 12 (1984). But even in the early 20th century, the legitimacy of the librarian's authority as moral arbiter was coming into question. See, *e. g.*, Belden, President's Address: Looking Forward, 20 Bull. Am. Libr. Assn. 273, 274 (1926) ("The true public library must stand for the intellectual freedom of access to the printed word"). And the practices of European fascism fueled the reaction against library censorship. See M. Harris, History of Libraries in the Western World 248 (4th ed. 1995). The upshot was a growing understanding that a librarian's job was to guarantee that "all people had access to all ideas," Geller, *supra*, at 156, and by the end of the 1930s, librarians' "basic position in opposition to censorship [had] emerged," Krug & Harvey, ALA and Intellectual Freedom: A Historical Overview, in Intellectual Freedom Manual, pp. xi, xv (American Library Association 1974) (hereinafter Intellectual Freedom Manual); see also Darling, Access, Intellectual Freedom and Libraries, 27 Library Trends 315–316 (1979).

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[4] That is, libraries do not refuse materials to adult patrons on account of their content. Of course, libraries commonly limit access on content-neutral grounds to, say, rare or especially valuable materials. Such practices raise no First Amendment concerns, because they have nothing to do with suppressing ideas.

By the time McCarthyism began its assaults, appellee American Library Association (ALA) had developed a Library Bill of Rights against censorship, Library Bill of Rights, in Intellectual Freedom Manual, pt. 1, p. 7, and an Intellectual Freedom Committee to maintain the position that beyond enforcing existing laws against obscenity, "there is no place in our society for extra-legal efforts to coerce the taste of others, to confine adults to the reading matter deemed suitable for adolescents, or to inhibit the efforts of writers to achieve artistic expression." Freedom to Read, in *id.*, pt. 2, at 8; see also Krug & Harvey, in *id.*, at xv. So far as I have been able to tell, this statement expressed the prevailing ideal in public library administration after World War II, and it seems fair to say as a general rule that libraries by then had ceased to deny requesting adults access to any materials in their collections. The adult might, indeed, have had to make a specific request, for the literature and published surveys from the period show a variety of restrictions on the circulation of library holdings, including placement of materials apart from open stacks, and availability only upon specific request.[5] But aside from the isolated suggestion, see, *e. g.*, Born, Public Libraries and Intellectual Freedom, in *id.*, pt. 3, at 4, 9, I have not been able to find from this period any record of a library barring access to materials in its collection on a basis other than a reader's age. It seems to have been out of the question for a library to refuse a book in its collection to a requesting adult patron, or to presume to evaluate the basis for a particular request.

This take on the postwar years is confirmed by evidence of the dog that did not bark. During the second half of the

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[5] See, *e. g.*, M. Fiske, Book Selection and Censorship: A Study of School and Public Libraries in California 69–73 (1959); Moon, "Problem" Fiction, in Book Selection and Censorship in the Sixties 56–58 (E. Moon ed. 1969); F. Jones, Defusing Censorship: The Librarian's Guide to Handling Censorship Conflicts 92–99 (1983); see also The Censorship of Books 173–182 (W. Daniels ed. 1954).

20th century, the ALA issued a series of policy statements, since dubbed Interpretations of the Library Bill of Rights, see *id.*, pt. 1, at 13, commenting on library administration and pointing to particular practices the ALA opposed. Thus, for example, in response to pressure by the Sons of the American Revolution on New Jersey libraries to place labels on materials "advocat[ing] or favor[ing] communism," the ALA in 1957 adopted a "Statement on Labeling," opposing it as "a censor's tool." *Id.*, pt. 1, at 18–19. Again, 10 years later, the ALA even adopted a statement against any restriction on access to library materials by minors. It acknowledged that age restrictions were common across the Nation in "a variety of forms, including, among others, restricted reading rooms for adult use only, library cards limiting circulation of some materials to adults only, closed collections for adult use only, and interlibrary loan for adult use only." *Id.*, pt. 1, at 16. Nevertheless, the ALA opposed all such limitations, saying that "only the parent . . . may restrict his children—and only *his* children—from access to library materials and services." *Id.*, pt. 1, at 17.

And in 1973, the ALA adopted a policy opposing the practice already mentioned, of keeping certain books off the open shelves, available only on specific request. See *id.*, pt. 1, at 42. The statement conceded that "'closed shelf,' 'locked case,' 'adults only,' or 'restricted shelf' collections" were "common to many libraries in the United States." *Id.*, pt. 1, at 43. The ALA nonetheless came out against it, in these terms: "While the limitation differs from direct censorship activities, such as removal of library materials or refusal to purchase certain publications, it nonetheless constitutes censorship, albeit a subtle form." *Ibid.*[6]

Amidst these and other ALA statements from the latter half of the 20th century, however, one subject is missing.

[6] For a complete listing of the ALA's Interpretations, see R. Peck, Libraries, the First Amendment and Cyberspace: What You Need to Know 148–175 (2000).

There is not a word about barring requesting adults from any materials in a library's collection, or about limiting an adult's access based on evaluation of his purposes in seeking materials. If such a practice had survived into the latter half of the 20th century, one would surely find a statement about it from the ALA, which had become the nemesis of anything sounding like censorship of library holdings, as shown by the history just sampled.[7] The silence bespeaks an American public library that gives any adult patron any material at hand, and a history without support for the plurality's reading of the First Amendment as tolerating a public library's censorship of its collection against adult enquiry.

C

Thus, there is no preacquisition scarcity rationale to save library Internet blocking from treatment as censorship, and no support for it in the historical development of library practice. To these two reasons to treat blocking differently from a decision declining to buy a book, a third must be added. Quite simply, we can smell a rat when a library blocks material already in its control, just as we do when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand. Content-based blocking and removal tell us something that mere absence from the shelves does not.

I have already spoken about two features of acquisition decisions that make them poor candidates for effective judicial review. The first is their complexity, the number of legitimate considerations that may go into them, not all pointing one way, providing cover for any illegitimate reason that managed to sneak in. A librarian should consider likely demand, scholarly or esthetic quality, alternative purchases,

[7] Thus, it is not surprising that, with the emergence of the circumstances giving rise to this case, the ALA has adopted statements opposing restrictions on access to adult patrons, specific to electronic media like the Internet. See *id.*, at 150–153, 176–179, 180–187.

relative cost, and so on. The second reason the judiciary must be shy about reviewing acquisition decisions is the sheer volume of them, and thus the number that might draw fire. Courts cannot review the administration of every library with a constituent disgruntled that the library fails to buy exactly what he wants to read.

After a library has acquired material in the first place, however, the variety of possible reasons that might legitimately support an initial rejection are no longer in play. Removal of books or selective blocking by controversial subject matter is not a function of limited resources and less likely than a selection decision to reflect an assessment of esthetic or scholarly merit. Removal (and blocking) decisions being so often obviously correlated with content, they tend to show up for just what they are, and because such decisions tend to be few, courts can examine them without facing a deluge. The difference between choices to keep out and choices to throw out is thus enormous, a perception that underlay the good sense of the plurality's conclusion in *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853 (1982), that removing classics from a school library in response to pressure from parents and school board members violates the Speech Clause.

III

There is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material.[8] On that ground,

[8] I assume, although there is no occasion here to decide, that the originators of the material blocked by the Internet filters could object to the wall between them and any adult audience they might attract, although they

the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional.

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would be unlikely plaintiffs, given that their private audience would be unaffected by the library's action, and many of them might have no more idea that a library is blocking their work than the library does. It is for this reason that I rely on the First and Fourteenth Amendment rights of adult library patrons, who would experience the more acute injury by being denied a look at anything the software identified as apt to harm a child (and whatever else got blocked along with it). In practical terms, if libraries and the National Government are going to be kept from engaging in unjustifiable adult censorship, there is no alternative to recognizing a viewer's or reader's right to be free of paternalistic censorship as at least an adjunct of the core right of the speaker. The plurality in *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853 (1982), saw this and recognized the right of students using a school library to object to the removal of disfavored books from the shelves, *id.*, at 865–868 (opinion of Brennan, J.). By the same token, we should recognize an analogous right on the part of a library's adult Internet users, who may be among the 10% of American Internet users whose access comes solely through library terminals, see 201 F. Supp. 2d, at 422. There should therefore be no question that censorship by blocking produces real injury sufficient to support a suit for redress by patrons whose access is denied.

Syllabus

GRATZ ET AL. *v.* BOLLINGER ET AL.

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

No. 02–516. Argued April 1, 2003—Decided June 23, 2003

Petitioners Gratz and Hamacher, both of whom are Michigan residents and Caucasian, applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively. Although the LSA considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied early admission and were ultimately denied admission. In order to promote consistency in the review of the many applications received, the University's Office of Undergraduate Admissions (OUA) uses written guidelines for each academic year. The guidelines have changed a number of times during the period relevant to this litigation. The OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During all relevant periods, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.

Petitioners filed this class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U. S. C. § 1981. They sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated their rights to nondiscriminatory treatment, an injunction prohibiting respondents from continuing to discriminate on the basis of race, and an order requiring the LSA to offer Hamacher admission as a transfer student. The District Court granted petitioners' motion to certify a class consisting of individuals who applied for and were denied admission to the LSA for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher, whose claim was found to challenge racial discrimination on a classwide basis, was designated as the class representative. On cross-motions for summary judgment, respondents relied on Justice Powell's principal opinion in *Regents of*

Univ. of Cal. v. *Bakke*, 438 U. S. 265, 317, which expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. The court agreed with respondents as to the LSA's current admissions guidelines and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines for 1995 through 1998 operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion, and thus granted petitioners summary judgment with respect to respondents' admissions programs for those years. While interlocutory appeals were pending in the Sixth Circuit, that court issued an opinion in *Grutter* v. *Bollinger*, *post*, p. 306, upholding the admissions program used by the University's Law School. This Court granted certiorari in both cases, even though the Sixth Circuit had not yet rendered judgment in this one.

Held:

1. Petitioners have standing to seek declaratory and injunctive relief. The Court rejects JUSTICE STEVENS' contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim is at best conjectural or hypothetical rather than real and immediate. The "injury in fact" necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666. In the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory policy prevents it from doing so on an equal basis. *Ibid.* In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. Hamacher was denied admission to the University as a freshman applicant even though an underrepresented minority applicant with his qualifications would have been admitted. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race. Also rejected is JUSTICE STEVENS' contention that such use in undergraduate transfer admissions differs from the University's use of race in undergraduate freshman admissions, so that Hamacher lacks standing to represent absent class members challenging the latter. Each year the OUA produces a document setting forth

guidelines for those seeking admission to the LSA, including freshman and transfer applicants. The transfer applicant guidelines specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to diversity are *identical* to those used to evaluate freshman applicants. The *only* difference is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest justifying its consideration of the race of its undergraduate applicants. See *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 159; *Blum* v. *Yaretsky*, 457 U. S. 991, distinguished. The District Court's carefully considered decision to certify this class action is correct. Cf. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469. Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain the action. Pp. 260–268.

2. Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter* v. *Bollinger*, *post*, at 327–333, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve educational diversity. In *Bakke*, Justice Powell explained his view that it would be permissible for a university to employ an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." 438 U. S., at 317. He emphasized, however, the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315. The current LSA policy does not provide the individualized consideration Justice Powell contemplated. The only consideration that accompanies the 20-point automatic distribution to all applicants from underrepresented minorities is a factual review to determine whether an individual is a member

of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *id.*, at 317, the LSA's 20-point distribution has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant, *ibid.* The fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. The record does not reveal precisely how many applications are flagged, but it is undisputed that such consideration is the exception and not the rule in the LSA's program. Also, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant. The Court rejects respondents' contention that the volume of applications and the presentation of applicant information make it impractical for the LSA to use the admissions system upheld today in *Grutter.* The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See, *e. g., Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 508. Nothing in Justice Powell's *Bakke* opinion signaled that a university may employ whatever means it desires to achieve diversity without regard to the limits imposed by strict scrutiny. Pp. 268–275.

3. Because the University's use of race in its current freshman admissions policy violates the Equal Protection Clause, it also violates Title VI and § 1981. See, *e. g., Alexander* v. *Sandoval*, 532 U. S. 275, 281; *General Building Contractors Assn.* v. *Pennsylvania*, 458 U. S. 375, 389–390. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 275–276.

Reversed in part and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BREYER, J., joined in part, *post*, p. 276. THOMAS, J., filed a concurring opinion, *post*, p. 281. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 281. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 282. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post*, p. 291. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which BREYER, J., joined as to Part I, *post*, p. 298.

Counsel

Kirk O. Kolbo argued the cause for petitioners. With him on the briefs were *David F. Herr*, *R. Lawrence Purdy*, *Michael C. McCarthy*, *Michael E. Rosman*, *Hans Bader*, and *Kerry L. Morgan.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Boyd* and *Deputy Solicitor General Clement.*

John Payton argued the cause for respondents. With him on the brief for respondent Bollinger et al. were *John H. Pickering*, *Brigida Benitez*, *Craig Goldblatt*, *Terry A. Maroney*, *Maureen E. Mahoney*, *Marvin Krislov*, *Jonathan Alger*, *Jeffrey Lehman*, *Evan Caminker*, *Philip J. Kessler*, and *Leonard M. Niehoff.* *Theodore M. Shaw*, *Norman J. Chachkin*, *James L. Cott*, *Melissa S. Woods*, *Christopher A. Hansen*, *Brent E. Simmons*, *Michael J. Steinberg*, *Antonia Hernandez*, *Patricia Mendoza*, *Godfrey J. Dillard*, and *Milton R. Henry* filed a brief for respondent Patterson et al.*

*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Charlie Crist*, Attorney General of Florida, *Christopher M. Kise*, Solicitor General, *Louis F. Hubener*, Deputy Solicitor General, and *Daniel Woodring;* for the Cato Institute by *Robert A. Levy*, *Timothy Lynch*, *James L. Swanson*, and *Samuel Estreicher;* for the Center for Equal Opportunity et al. by *Roger Clegg* and *C. Mark Pickrell;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Center for New Black Leadership by *Clint Bolick*, *William H. Mellor*, and *Richard D. Komer;* for the Center for the Advancement of Capitalism by *David Reed Burton;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Michigan Association of Scholars by *William F. Mohrman;* for the National Association of Scholars by *William H. Allen*, *Oscar M. Garibaldi*, and *Keith A. Noreika;* for the Pacific Legal Foundation by *John H. Findley;* and for the Reason Foundation by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for Members of the United States Congress by *Leslie T. Thornton* and *Steven M. Schneebaum;* for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Andrew H. Baida*, Solicitor General, *Mark J. Davis* and *William F. Brockman*, Assistant Attorneys General, *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, and *Julie Mathy Sheridan* and

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in under-

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Sachin S. Pandya, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Peggy A. Lautenschlager* of Wisconsin; for the State of New Jersey by *David Samson*, Attorney General, *Jeffrey Burstein*, Assistant Attorney General, and *Donna Arons* and *Anne Marie Kelly*, Deputy Attorneys General; for New York City Council Speaker A. Gifford Miller et al. by *Jack Greenberg* and *Saul B. Shapiro;* for the City of Philadelphia, Pennsylvania, et al. by *Victor A. Bolden* and *Nelson A. Diaz;* for the American Educational Research Association et al. by *Angelo N. Ancheta;* for the American Jewish Committee et al. by *Stewart D. Aaron*, *Thomas M. Jancik*, *Jeffrey P. Sinensky*, *Kara H. Stein*, and *Richard T. Foltin;* for the American Psychological Association by *Paul R. Friedman*, *William F. Sheehan*, and *Nathalie F. P. Gilfoyle;* for Amherst College et al. by *Charles S. Sims;* for the Authors of the Texas Ten Percent Plan by *Rolando L. Rios;* for the Bay Mills Indian Community et al. by *Vanya S. Hogen;* for the College Board by *Janet Pitterle Holt;* for Columbia University et al. by *Floyd Abrams*, *Susan Buckley*, and *James J. Mingle;* for Harvard University et al. by *Laurence H. Tribe*, *Jonathan S. Massey*, *Beverly Ledbetter*, *Robert B. Donin*, and *Wendy S. White;* for Howard University by *Janell M. Byrd;* for the Lawyers' Committee for Civil Rights Under Law et al. by *John S. Skilton*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Dennis C. Hayes*, *Marcia D. Greenberger*, *Judith L. Lichtman*, and *Jocelyn C. Frye;* for the Leadership Conference on Civil Rights et al. by *Robert N. Weiner* and *William L. Taylor;* for the National Coalition of Blacks for Reparations in America et al. by *Kevin Outterson;* for the National Education Association et al. by *Robert H. Chanin*, *John M. West*, *Elliot Mincberg*, *Larry P. Weinberg*, and *John C. Dempsey;* for the National Urban League et al. by *William A. Norris* and *Michael C. Small;* for the New America Alliance by *Thomas R. Julin* and *D. Patricia*

graduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d), or 42 U. S. C. § 1981." Brief

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Wallace; for Northeastern University by *Daryl J. Lapp* and *Lisa A. Sinclair;* for the NOW Legal Defense and Education Fund et al. by *Wendy R. Weiser* and *Martha F. Davis;* for the United Negro College Fund et al. by *Drew S. Days III* and *Beth S. Brinkmann;* for the University of Pittsburgh et al. by *David C. Frederick* and *Sean A. Lev;* for Lieutenant General Julius W. Becton, Jr., et al. by *Virginia A. Seitz*, *Joseph R. Reeder*, *Robert P. Charrow*, and *Kevin E. Stern;* for Senator Thomas A. Daschle et al. by *David T. Goldberg* and *Penny Shane;* for the Hayden Family by *Roy C. Howell;* and for Glenn C. Loury et al. by *Jeffrey F. Liss* and *James J. Halpert.*

Briefs of *amici curiae* were filed for Michigan Governor Jennifer M. Granholm by *John D. Pirich* and *Mark A. Goldsmith;* for the American Federation of Labor and Congress of Industrial Organizations by *Harold Craig Becker*, *David J. Strom*, *Jonathan P. Hiatt*, and *Daniel W. Sherrick;* for the Asian American Legal Foundation by *Daniel C. Girard* and *Gordon M. Fauth, Jr.;* for the Anti-Defamation League by *Martin E. Karlinsky* and *Steven M. Freeman;* for Banks Broadcasting, Inc., by *Elizabeth G. Taylor;* for the Black Women Lawyers Association of Greater Chicago, Inc., by *Sharon E. Jones;* for Carnegie Mellon University et al. by *W. Thomas McGough, Jr.*, *Kathy M. Banke*, *Gary L. Kaplan*, and *Edward N. Stoner II;* for the Equal Employment Advisory Council by *Jeffrey A. Norris* and *Ann Elizabeth Reesman;* for Exxon Mobil Corp. by *Richard R. Brann;* for General Motors Corp. by *Kenneth S. Geller*, *Eileen Penner*, and *Thomas A. Gottschalk;* for Human Rights Advocates et al. by *Constance de la Vega;* for the Massachusetts Institute of Technology et al. by *Donald B. Ayer*, *Elizabeth Rees*, *Debra L. Zumwalt*, and *Stacey J. Mobley;* for the National Asian Pacific American Legal Consortium et al. by *Mark A. Packman*, *Jonathan M. Cohen*, *Karen K. Narasaki*, *Vincent A. Eng*, and *Trang Q. Tran;* for the National Council of La Raza et al. by *Vilma S. Martinez* and *Jeffrey L. Bleich;* for the National School Boards Association et al. by *Julie Underwood* and *Naomi Gittins;* for 3M et al. by *David W. DeBruin*, *Deanne E. Maynard*, *Daniel Mach*, *Russell W. Porter, Jr.*, *Charles R. Wall*, *Martin J. Barrington*, *Deval L. Patrick*, *John R. Parker, Jr.*, *William J. O'Brien*, *Gary P. Van Graafeiland*, *Kathryn A. Oberly*, *Randall E. Mehrberg*, *Donald M. Remy*, *Ben W. Heineman, Jr.*, *Brackett B. Denniston III*, *Elpidio Villarreal*, *Wayne A. Budd*, *J. Richard Smith*, *Stewart S. Hudnut*, *John A. Shutkin*, *Theodore L. Banks*, *Kenneth C. Frazier*, *David R. Andrews*, *Jeffrey B. Kindler*, *Teresa M. Holland*, *Charles*

for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University's determination that, although Gratz was "'well qualified,'" she was "'less competitive than the students who ha[d] been admitted on first review.'" App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his "'academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.'" *Ibid.* Hamacher's application was subsequently denied in April 1997, and he enrolled at Michigan State University.[1]

W. Gerdts III, John L. Sander, Mark P. Klein, and *Stephen P. Sawyer;* for Representative John Conyers, Jr., et al. by *Paul J. Lawrence* and *Anthony R. Miles;* for Duane C. Ellison, by *Mr. Ellison, pro se,* and *Carl V. Angelis;* and for Representative Richard A. Gephardt et al. by *Andrew L. Sandler* and *Mary L. Smith.*

[1] Although Hamacher indicated that he "intend[ed] to apply to transfer if the [LSA's] discriminatory admissions system [is] eliminated," he has since graduated from Michigan State University. App. 34.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan against the University, the LSA,[2] James Duderstadt, and Lee Bollinger.[3] Petitioners' complaint was a class-action suit alleging "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment . . . , and for racial discrimination in violation of 42 U. S. C. §§ 1981, 1983 and 2000d *et seq.*" App. 33. Petitioners sought, *inter alia*, compensatory and punitive damages for past violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from "continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student.[4] *Id.*, at 40.

The District Court granted petitioners' motion for class certification after determining that a class action was appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2). The certified class consisted of "those individuals who applied for and were not granted admission to the College of

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[2] The University of Michigan Board of Regents was subsequently named as the proper defendant in place of the University and the LSA. See *id.*, at 17.

[3] Duderstadt was the president of the University during the time that Gratz's application was under consideration. He has been sued in his individual capacity. Bollinger was the president of the University when Hamacher applied for admission. He was originally sued in both his individual and official capacities, but he is no longer the president of the University. *Id.*, at 35.

[4] A group of African-American and Latino students who applied for, or intended to apply for, admission to the University, as well as the Citizens for Affirmative Action's Preservation, a nonprofit organization in Michigan, sought to intervene pursuant to Federal Rule of Civil Procedure 24. See App. 13–14. The District Court originally denied this request, see *id.*, at 14–15, but the Sixth Circuit reversed that decision. See *Gratz* v. *Bollinger*, 188 F. 3d 394 (1999).

Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat[ed] less favorably on the basis of race in considering their application for admission." App. 70–71. And Hamacher, whose claim the District Court found to challenge a " 'practice of racial discrimination pervasively applied on a classwide basis,' " was designated as the class representative. *Id.*, at 67, 70. The court also granted petitioners' motion to bifurcate the proceedings into a liability and damages phase. *Id.*, at 71. The liability phase was to determine "whether [respondents'] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution." *Id.*, at 70.[5]

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process.[6] In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the Uni-

[5] The District Court decided also to consider petitioners' request for injunctive and declaratory relief during the liability phase of the proceedings. App. 71.

[6] Our description is taken, in large part, from the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process" filed by the parties in the District Court. App. to Pet. for Cert. 108a–117a.

versity has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified . . . applicant" from these groups. App. to Pet. for Cert. 111a.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status.[7] For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

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[7] In 1995, counselors used four such tables for different groups of applicants: (1) in-state, nonminority applicants; (2) out-of-state, nonminority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. But each cell on these two tables contained separate courses of action for minority applicants and nonminority applicants whose GPA 2 scores and ACT/SAT scores placed them in that cell.

In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the "'development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions.'" App. to Pet. for Cert. 116a.

In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of "protected seats." Specific groups—including athletes, foreign students, ROTC candidates, and underrepresented minorities—were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University,[8] (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's com-

[8] LSA applicants who are Michigan residents must accumulate 80 points from the selection index criteria to be flagged, while out-of-state applicants need to accumulate 75 points to be eligible for such consideration. See App. 257.

position of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or deny each applicant.

C

The parties filed cross-motions for summary judgment with respect to liability. Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. Respondents relied on Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter* v. *Bollinger*, *post*, at 323–325, Justice Powell, in *Bakke*, expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. See 438 U. S., at 317. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. Respondent-intervenors asserted that the LSA had a compelling interest in remedying the University's past and current discrimination against minorities.[9]

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[9] The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F. Supp. 2d 790 (ED Mich. 2001). The court explained that respondent-intervenors "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." *Id.*, at 795. We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.

The District Court began its analysis by reviewing this Court's decision in *Bakke*. See 122 F. Supp. 2d 811, 817 (ED Mich. 2000). Although the court acknowledged that no decision from this Court since *Bakke* has explicitly accepted the diversity rationale discussed by Justice Powell, see 122 F. Supp. 2d, at 820–821, it also concluded that this Court had not, in the years since *Bakke*, ruled out such a justification for the use of race, 122 F. Supp. 2d, at 820–821. The District Court concluded that respondents and their *amici curiae* had presented "solid evidence" that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. See *id.*, at 822–824.

The court next considered whether the LSA's admissions guidelines were narrowly tailored to achieve that interest. See *id.*, at 824. Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. See 122 F. Supp. 2d, at 827. The court emphasized that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. See *ibid.* The award of 20 points for membership in an underrepresented minority group, in the District Court's view, was not the functional equivalent of a quota because minority candidates were not insulated from review by virtue of those points. See *id.*, at 828. Likewise, the court rejected the assertion that the LSA's program operates like the two-track system Justice Powell found objectionable in *Bakke* on the grounds that LSA applicants are not competing for different groups of seats. See 122 F. Supp. 2d, at 828–829. The court also dismissed petitioners' assertion that the LSA's current system is nothing more than a means by which to achieve racial balancing. See *id.*, at 831. The court explained that the LSA does not seek to

achieve a certain proportion of minority students, let alone a proportion that represents the community. See *ibid.*

The District Court found the admissions guidelines the LSA used from 1995 through 1998 to be more problematic. In the court's view, the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots. See *id.*, at 832. This system, the court concluded, operated as the functional equivalent of a quota and ran afoul of Justice Powell's opinion in *Bakke*.[10] See 122 F. Supp. 2d, at 832.

Based on these findings, the court granted petitioners' motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and respondents' motion with respect to the LSA's admissions programs for 1999 and 2000. See *id.*, at 833. Accordingly, the District Court denied petitioners' request for injunctive relief. See *id.*, at 814.

The District Court issued an order consistent with its rulings and certified two questions for interlocutory appeal to the Sixth Circuit pursuant to 28 U. S. C. § 1292(b). Both parties appealed aspects of the District Court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter* v. *Bollinger*. The Sixth Circuit later issued an opinion in *Grutter*, upholding the admissions program used by the University of Michigan Law School, and the petitioner in that case sought a writ of certiorari from this Court. Petitioners asked this Court to grant certiorari in this case as

[10] The District Court determined that respondents Bollinger and Duderstadt, who were sued in their individual capacities under Rev. Stat. § 1979, 42 U. S. C. § 1983, were entitled to summary judgment based on the doctrine of qualified immunity. See 122 F. Supp. 2d, at 833–834. Petitioners have not asked this Court to review this aspect of the District Court's decision. The District Court denied the Board of Regents' motion for summary judgment with respect to petitioners' Title VI claim on Eleventh Amendment immunity grounds. See *id.*, at 834–836. Respondents have not asked this Court to review this aspect of the District Court's decision.

well, despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so. See 537 U. S. 1044 (2002).

II

As they have throughout the course of this litigation, petitioners contend that the University's consideration of race in its undergraduate admissions decisions violates § 1 of the Equal Protection Clause of the Fourteenth Amendment,[11] Title VI,[12] and 42 U. S. C. § 1981.[13] We consider first whether petitioners have standing to seek declaratory and injunctive relief, and, finding that they do, we next consider the merits of their claims.

A

Although no party has raised the issue, JUSTICE STEVENS argues that petitioners lack Article III standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions. He first contends that because Hamacher did not "actually appl[y] for admission as a transfer student[,] [h]is claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.'" *Post*, at 285 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not

[11] The Equal Protection Clause of the Fourteenth Amendment explains that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[12] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

[13] Section 1981(a) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

determinative of his ability to seek injunctive relief in this case. If Hamacher had submitted a transfer application and been rejected, he would still need to allege an intent to apply again in order to seek prospective relief. If JUSTICE STEVENS means that because Hamacher did not apply to transfer, he must never *really* have intended to do so, that conclusion directly conflicts with the finding of fact entered by the District Court that Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admissions preference." App. 67.[14]

It is well established that intent may be relevant to standing in an equal protection challenge. In *Clements* v. *Fashing*, 457 U. S. 957 (1982), for example, we considered a challenge to a provision of the Texas Constitution requiring the immediate resignation of certain state officeholders upon their announcement of candidacy for another office. We concluded that the plaintiff officeholders had Article III standing because they had alleged that they *would have announced their candidacy* for other offices were it not for the "automatic resignation" provision they were challenging. *Id.*, at 962; accord, *Turner* v. *Fouche*, 396 U. S. 346, 361–362, n. 23 (1970) (plaintiff who did not own property had standing to challenge property ownership requirement for membership on school board even though there was no evidence that plaintiff had applied and been rejected); *Quinn* v. *Millsap*, 491 U. S. 95, 103, n. 8 (1989) (plaintiffs who did not own property had standing to challenge property ownership requirement for membership on government board even though they lacked standing to challenge the requirement "as applied"). Likewise, in *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain

[14] This finding is further corroborated by Hamacher's request that the District Court "[r]equir[e] the LSA College to offer [him] admission as a transfer student." App. 40.

minority-owned businesses in the award of city contracts needed to show that one of its members would have received a contract absent the ordinance in order to establish standing. In finding that no such showing was necessary, we explained that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract." *Id.*, at 666. We concluded that in the face of such a barrier, "[t]o establish standing . . . , a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ibid.*

In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. When Hamacher applied to the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted. See App. to Pet. for Cert. 115a. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.

JUSTICE STEVENS raises a second argument as to standing. He contends that the University's use of race in undergraduate transfer admissions differs from its use of race in undergraduate freshman admissions, and that therefore Hamacher lacks standing to represent absent class members challenging the latter. *Post*, at 286–287 (dissenting opinion).

As an initial matter, there is a question whether the relevance of this variation, if any, is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a). The parties have not briefed the question of standing versus adequacy, however, and we need not resolve the question today: Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case.[15]

From the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting "diversity." See, *e. g.*, App. 38; Brief for Petitioners 13. Consistent with this challenge, petitioners requested injunctive relief prohibiting respondents "from continuing to discriminate on the basis of race." App. 40. They sought to certify a class consisting of all individuals who were not members of an underrepresented minority group who either had applied for admission to the LSA and been rejected or who intended to apply for admission to the LSA, for all academic years from 1995 forward. *Id.*, at 35–36. The District Court determined that the proposed class satisfied the requirements of the Federal Rules of Civil Procedure, including the requirements of numerosity, commonality, and typicality. See Fed. Rule Civ. Proc. 23(a); App. 70. The court further concluded that Hamacher was an adequate repre-

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[15] Although we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard. See, *e. g.*, Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U. C. D. L. Rev. 1239, 1240–1241 (1989); *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 149 (1982) (Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican-American applicants" who were not hired by the same employer); *Blum* v. *Yaretsky*, 457 U. S. 991 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

sentative for the class in the pursuit of compensatory and injunctive relief for purposes of Rule 23(a)(4), see *id.*, at 61–69, and found "the record utterly devoid of the presence of . . . antagonism between the interests of . . . Hamacher, and the members of the class which [he] seek[s] to represent," *id.*, at 61. Finally, the District Court concluded that petitioners' claim was appropriate for class treatment because the University's "'practice of racial discrimination pervasively applied on a classwide basis.'" *Id.*, at 67. The court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2), and designated Hamacher as the class representative. App. 70.

JUSTICE STEVENS cites *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), in arguing that the District Court erred. *Post*, at 289. In *Blum*, we considered a class-action suit brought by Medicaid beneficiaries. The named representatives in *Blum* challenged decisions by the State's Medicaid Utilization Review Committee (URC) to transfer them to lower levels of care without, in their view, sufficient procedural safeguards. After a class was certified, the plaintiffs obtained an order expanding class certification to include challenges to URC decisions to transfer patients to *higher* levels of care as well. The defendants argued that the named representatives could not represent absent class members challenging transfers to higher levels of care because they had not been threatened with such transfers. We agreed. We noted that "[n]othing in the record . . . suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." 457 U. S., at 1001. And we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones. *Id.*, at 1001–1002 (noting, for example, that transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not).

In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions. Respondents challenged Hamacher's standing at the certification stage, but *never* did so on the grounds that the University's use of race in undergraduate transfer admissions involves a different set of concerns than does its use of race in freshman admissions. Respondents' failure to allege any such difference is simply consistent with the fact that no such difference exists. Each year the OUA produces a document entitled "COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS," which sets forth guidelines for all individuals seeking admission to the LSA, including freshman applicants, transfer applicants, international student applicants, and the like. See, *e. g.*, 2 App. in No. 01–1333 etc. (CA6), pp. 507–542. The guidelines used to evaluate transfer applicants specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of diversity are *identical* to that used to evaluate freshman applicants. For example, in 1997, when the class was certified and the District Court found that Hamacher had standing to represent the class, the transfer guidelines contained a separate section entitled "CONTRIBUTION TO A DIVERSE STUDENT BODY." 2 *id.*, at 531. This section explained that any transfer applicant who could "*contribut[e] to a diverse student body*" should "generally be admitted" even with substantially lower qualifications than those required of other transfer applicants. *Ibid.* (emphasis added). To determine whether a transfer applicant was capable of "contribut[ing] to a diverse student body," admissions counselors were instructed to determine whether that transfer applicant met the "criteria as defined in Section IV of the 'U' category of [the] SCUGA" factors used to assess

freshman applicants. *Ibid.* Section IV of the "U" category, entitled "Contribution to a Diverse Class," explained that "[t]he University is committed to a rich educational experience for its students. A diverse, as opposed to a homogenous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class." 1 *id.*, at 432. These indicators, used in evaluating freshman and transfer applicants alike, list being a member of an underrepresented minority group as establishing an applicant's contribution to diversity. See 3 *id.*, at 1133–1134, 1153–1154. Indeed, the *only* difference between the University's use of race in considering freshman and transfer applicants is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest that justifies its consideration of the race of its undergraduate applicants.[16]

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[16] Because the University's guidelines concededly use race in evaluating both freshman and transfer applications, and because petitioners have challenged *any* use of race by the University in undergraduate admissions, the transfer admissions policy is very much before this Court. Although petitioners did not raise a narrow tailoring challenge to the transfer policy, as counsel for petitioners repeatedly explained, the transfer policy is before this Court in that petitioners challenged any use of race by the University to promote diversity, including through the transfer policy. See Tr. of Oral Arg. 4 ("[T]he [transfer] policy is essentially the same with respect to the consideration of race"); *id.*, at 5 ("The transfer policy considers race"); *id.*, at 6 (same); *id.*, at 7 ("[T]he transfer policy and the [freshman] admissions policy are fundamentally the same in the respect that

Particularly instructive here is our statement in *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982), that "[i]f [defendant-employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test *clearly* would satisfy the . . . requirements of Rule 23(a)." *Id.*, at 159, n. 15 (emphasis added). Here, the District Court found that the sole rationale the University had provided for any of its race-based preferences in undergraduate admissions was the interest in "the educational benefits that result from having a diverse student body." App. to Pet. for Cert. 8a. And petitioners argue that an interest in "diversity" is not a compelling state interest that is *ever* capable of justifying the use of race in undergraduate admissions. See, *e. g.*, Brief for Petitioners 11–13. In sum, the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines.[17] We therefore agree with the District Court's

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they both consider race in the admissions process in a way that is discriminatory"); *id.*, at 7–8 ("[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor").

[17] Indeed, as the litigation history of this case demonstrates, "the class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano* v. *Yamasaki*, 442 U. S. 682, 701 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982), in which we found that the named representative, who had been passed over for a promotion, was not an adequate representative for absent class members who were never hired in the first instance. As we explained, the plaintiff's "evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of

carefully considered decision to certify this class-action challenge to the University's consideration of race in undergraduate admissions. See App. 67 ("'It is a singular policy . . . applied on a classwide basis'"); cf. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)). Indeed, class-action treatment was particularly important in this case because "the claims of the individual students run the risk of becoming moot" and the "[t]he class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court." App. 69. Thus, we think it clear that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions.

B

Petitioners argue, first and foremost, that the University's use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15–16. Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Id.*, at 17–18, 40–41. But for the reasons set forth today in *Grutter* v. *Bollinger*, *post*, at 327–333, the Court has rejected these arguments of petitioners.

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disparate impact. . . . It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" *Id.*, at 159 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 553 (1974)).

Petitioners alternatively argue that even if the University's interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*." Brief for Petitioners 18. Respondents reply that the University's current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program (U. C. Davis) rejected by Justice Powell.[18] They claim that their program "hews closely" to both the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed. Brief for Respondent Bollinger et al. 32. Specifically, respondents contend that the LSA's policy provides the individualized consideration that "Justice Powell considered a hallmark of a constitutionally appropriate admissions program." *Id.*, at 35. For the reasons set out below, we do not agree.

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[18] U. C. Davis set aside 16 of the 100 seats available in its first year medical school program for "economically and/or educationally disadvantaged" applicants who were also members of designated "minority groups" as defined by the university. "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 274, 289 (1978) (principal opinion). Justice Powell found that the program employed an impermissible two-track system that "disregard[ed] . . . individual rights as guaranteed by the Fourteenth Amendment." *Id.*, at 320. He reached this conclusion even though the university argued that "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups" was "the only effective means of serving the interest of diversity." *Id.*, at 315. Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995). This "'standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.'" *Ibid.* (quoting *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 494 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand*, 515 U. S., at 224.

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs "narrowly tailored measures that further compelling governmental interests." *Id.*, at 227. Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove* v. *Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail "'a most searching examination.'" *Adarand*, *supra*, at 223 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion of Powell, J.)). We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

In *Bakke*, Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 U. S., at 307. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be

deemed a 'plus' in a particular applicant's file." *Id.*, at 317. He explained that such a program might allow for "[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Ibid.* Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.*

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315. See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 618 (1990) (O'Connor, J., dissenting) (concluding that the Federal Communications Commission's policy, which "embodie[d] the related notions . . . that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] 'likely to provide [a] distinct perspective,' " "impermissibly value[d] individuals" based on a presumption that "persons think in a manner associated with their race"). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of

points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U. S., at 317, the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.*[19]

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id.*, at 324. It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not depend-*

[19] JUSTICE SOUTER recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *post*, at 296 (dissenting opinion).

ent upon race but sometimes associated with it." *Ibid.* (emphasis added).

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234–235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."[20]

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior academic performance," would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the Univer-

[20] JUSTICE SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post,* at 295. As JUSTICE O'CONNOR explains in her concurrence, the LSA's program "ensures that the diversity contributions of applicants cannot be individually assessed." *Post,* at 279.

sity would never consider student A's individual background, experiences, and characteristics to assess his individual "potential contribution to diversity," *Bakke*, *supra*, at 317. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20-point distribution, and that student C could muster at least 70 additional points. But the fact that the "review committee can look at the applications individually and ignore the points," once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program. See App. to Pet. for Cert. 117a ("The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG").[21] Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

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[21] JUSTICE SOUTER is mistaken in his assertion that the Court "take[s] it upon itself to apply a newly-formulated legal standard to an undeveloped record." *Post*, at 297, n. 3. He ignores the fact that respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes *after* the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U. S., at 316 (internal quotation marks omitted).

Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter*. Brief for Respondent Bollinger et al. 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *J. A. Croson Co.*, 488 U. S., at 508 (citing *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973) (plurality opinion of Brennan, J.) (rejecting "'administrative convenience'" as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.[22] We further find that the admissions policy also violates Title VI and

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[22] JUSTICE GINSBURG in her dissent observes that "[o]ne can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post*, at 304. She goes on to say that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Post*, at 305. These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter* v. *Bollinger*, *post*, at 328, we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

42 U. S. C. § 1981.[23] Accordingly, we reverse that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.*

I

Unlike the law school admissions policy the Court upholds today in *Grutter* v. *Bollinger*, *post*, p. 306, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter* v. *Bollinger*, *post*, at 337–339. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or

[23] We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander* v. *Sandoval*, 532 U. S. 275, 281 (2001); *United States* v. *Fordice*, 505 U. S. 717, 732, n. 7 (1992); *Alexander* v. *Choate*, 469 U. S. 287, 293 (1985). Likewise, with respect to § 1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 295–296 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of § 1981. See *Runyon* v. *McCrary*, 427 U. S. 160, 172 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389–390 (1982).

*JUSTICE BREYER joins this opinion, except for the last sentence.

qualities of each individual applicant. Cf. *ante,* at 271–272, 273. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter, post,* at 334, requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante,* at 272–273 (citing *Bakke, supra,* at 324).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F. Supp. 2d 811, 827 (ED Mich. 2000). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a–118a. When the University receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points—a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as "admit or postpone"; applicants with 90–94 points are postponed or admitted; applicants with 75–89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic "[m]ass [a]ction[s]." *Ibid.*

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic per-

formance, and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor

may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not "necessarily accor[d]" all diversity factors "the same weight," 438 U. S., at 317, and the "weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class," *id.*, at 317–318. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter* v. *Bollinger*, *post*, at 337 ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how

the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the "'[committee] reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].'" *Ante*, at 274 (quoting App. to Pet. for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cutoff levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University's admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter* v. *Bollinger*, *post*, p. 306. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

JUSTICE THOMAS, concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter* v. *Bollinger*, *post*, p. 306. For similar reasons to those given in my separate opinion in that case, see *post*, p. 349 (opinion concurring in part and dissenting in part), however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

I make only one further observation. The University of Michigan's College of Literature, Science, and the Arts (LSA) admissions policy that the Court today invalidates does not suffer from the additional constitutional defect of allowing racial "discriminat[ion] among [the] groups" included within its definition of underrepresented minorities, *Grutter*, *post*, at 336 (opinion of the Court); *post*, at 374 (THOMAS, J., concurring in part and dissenting in part), because it awards all underrepresented minorities the same racial preference. The LSA policy falls, however, because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants. Under today's decisions, a university may not racially discriminate between the groups constituting the critical mass. See *post*, at 374–375; *Grutter*, *post*, at 329–330 (opinion of the Court) (stating that such "racial balancing . . . is patently unconstitutional"). An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification. See *ante*, at 272–273 (opinion of the Court); *ante*, at 276–277 (O'CONNOR, J., concurring).

JUSTICE BREYER, concurring in the judgment.

I concur in the judgment of the Court though I do not join its opinion. I join JUSTICE O'CONNOR's opinion except insofar as it joins that of the Court. I join Part I of JUSTICE GINSBURG's dissenting opinion, but I do not dissent from the

Court's reversal of the District Court's decision. I agree with JUSTICE GINSBURG that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, *post*, at 301, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally, see U. S. Const., Amdt. 14.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter* v. *Bollinger*, *post*, p. 306,[1] the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear that neither petitioner does. Our precedents therefore require dismissal of the action.

I

Petitioner Jennifer Gratz applied in 1994 for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995–1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999.

[1] In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02–241, p. 30.

Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997–1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "[h]e intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to Federal Rule of Civil Procedure 23(b)(2).[2] See App. 71, n. 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered "'no threat of imminent future injury'" given that he had already enrolled at another undergraduate institution.[3] *Id.*, at 64. The District Court rejected Michigan's contention, concluding that Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70–71.

In subsequent proceedings, the District Court held that the 1995–1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but

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[2] Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule of Civil Procedure 23(b)(2). See App. 71, n. 3.

[3] In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n. 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

that Michigan's new 1999–2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondent Bollinger et al. 5, n. 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old freshman admissions system. However, like the plaintiff in *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983), who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102 ("'[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects'" (quoting *O'Shea* v. *Littleton*, 414 U. S. 488, 495–496 (1974))). To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210–211 (1995). This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy.[4]

[4] In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the

Even though there is not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred.[5] See App. 34; see also Tr. of Oral Arg. 4–5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea* v. *Littleton*, 414 U. S., at 494

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reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a "'real and immediate threat'" of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210–211 (1995) (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978); cf. *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*.

[5] Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

(internal quotation marks omitted); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4–5 (admitting that "[t]he transfer admissions policy itself is not before you—the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20 points to be added to the selection index scores of minority applicants. See *ante*, at 271. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis* v. *Casey*, 518 U. S. 343,

358–359, n. 6 (1996) (emphasis in original); see also *Blum* v. *Yaretsky*, 457 U. S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar").[6]

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy. See *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 222 (1974) ("[T]he discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14–15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"—freshman and transfer alike. *Ante*, at 266, n. 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an ab-*

[6] Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

solute rule forbidding any use of race under any circumstances. What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far. . . . [T]here may be other reasons. I think they would have to be extraordinary and rare. . . ." *Id.*, at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e. g.*, Brief for Petitioners 16–17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra*, at 286, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7–8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante*, at 265. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy might impact a narrow tailoring analysis of that policy.

At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H. L.* v. *Matheson*, 450 U. S. 398, 406–407 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum* v. *Yaretsky*, 457 U. S., at 1001. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher has been certified as the representative of a class, some of whose members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that "a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975)); see also 1 A. Conte & H. Newberg, Class Actions §2:5 (4th ed. 2002) ("[O]ne cannot acquire individual standing by virtue of bringing a class action").[7] Thus, in *Blum*, we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in

[7] Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.

Blum included patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974).' *Ibid.*" 457 U. S., at 1001, n. 13.

Much like the class representatives in *Blum*, Hamacher—the sole class representative in this case—cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not

have standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins as to Part II, dissenting.

I agree with JUSTICE STEVENS that Patrick Hamacher has no standing to seek declaratory or injunctive relief against a freshman admissions policy that will never cause him any harm. I write separately to note that even the Court's new gloss on the law of standing should not permit it to reach the issue it decides today. And because a majority of the Court has chosen to address the merits, I also add a word to say that even if the merits were reachable, I would dissent from the Court's judgment.

I

The Court's finding of Article III standing rests on two propositions: first, that both the University of Michigan's undergraduate college's transfer policy and its freshman admissions policy seek to achieve student body diversity through the "use of race," *ante*, at 261–263, 265–269, and second, that Hamacher has standing to challenge the transfer policy on the grounds that diversity can never be a "compelling state interest" justifying the use of race in any admissions decision, freshman or transfer, *ante*, at 269. The Court concludes that, because Hamacher's argument, if successful, would seal the fate of both policies, his standing to challenge the transfer policy also allows him to attack the freshman admissions policy. *Ante*, at 266, n. 16 ("[P]etitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ante*, at 267, n. 16 ("'[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor'" (quoting Tr. of Oral Arg. 7–8)). I agree with JUSTICE STEVENS's cri-

tique that the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him. See *ante*, at 286–287, and n. 6 (dissenting opinion).[1]

But even on the Court's indulgent standing theory, the decision should not go beyond a recognition that diversity can serve as a compelling state interest justifying race-conscious decisions in education. *Ante*, at 268 (citing *Grutter* v. *Bollinger*, *post*, at 327–333). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante*, at 266, n. 16, our decision in *Grutter* is fatal to Hamacher's sole attack upon the transfer policy, which is the only policy before this Court that he claims aggrieved him. Hamacher's challenge to that policy having failed, his standing is presumably spent. The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a plaintiff who is actually hurt by it.[2]

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[1] The Court's holding arguably exposes a weakness in the rule of *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum*, and I follow JUSTICE STEVENS in approaching the case on the assumption that *Blum* is settled law.

[2] For that matter, as the Court suggests, narrow tailoring challenges against the two policies could well have different outcomes. *Ante*, at 266. The record on the decisionmaking process for transfer applicants is understandably thin, given that petitioners never raised a narrow tailoring challenge against it. Most importantly, however, the transfer policy does not use a points-based "selection index" to evaluate transfer applicants, but rather considers race as one of many factors in making the general determination whether the applicant would make a "'contribution to a diverse student body.'" *Ante*, at 265 (quoting 2 App. in No. 01–1333 etc. (CA6), p. 531 (capitalization omitted)). This limited glimpse into the transfer policy at least permits the inference that the university engages in a "holistic review" of transfer applications consistent with the program upheld today in *Grutter* v. *Bollinger*, *post*, at 337.

II

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke*, which "insulate[d]" all nonminority candidates from competition from certain seats. *Bakke*, *supra*, at 317 (opinion of Powell, J.); see also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 496 (1989) (plurality opinion) (stating that *Bakke* invalidated "a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). The *Bakke* plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke*, *supra*, at 315, 319 (opinion of Powell, J.) (emphasis in original).

The plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic

disadvantage, athletic ability, and quality of a personal essay. *Ante*, at 255. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus. Cf. *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 638 (1987) (upholding a program in which gender "was but one of numerous factors [taken] into account in arriving at [a] decision" because "[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants" (emphasis deleted)).

Subject to one qualification to be taken up below, this scheme of considering, through the selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program: one that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" and places each element "on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, *supra*, at 317. In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." *Ante*, at 271. An unsuccessful nonminority applicant cannot complain that he was rejected "simply because he was not the right color"; an applicant who is rejected because "his combined qualifications . . . did not outweigh those of the other applicant" has been given an opportunity to compete with all other applicants. *Bakke*, *supra*, at 318 (opinion of Powell, J.).

The one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a so-

cioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Ante*, at 271–272. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter*, *post*, at 337; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U. S., at 319, n. 53 (opinion of Powell, J.). But petitioners do not have a convincing ar-

gument that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified under-represented minority applicant," App. to Pet. for Cert. 111a, may reflect nothing more than the likelihood that very few qualified minority applicants apply, Brief for Respondent Bollinger et al. 39, as well as the possibility that self-selection results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

Any argument that the "tailoring" amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not. But suspicion does not carry petitioners' ultimate burden of persuasion in this constitutional challenge, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 287–288 (1986) (plurality opinion of Powell, J.), and it surely does not warrant condemning the college's admissions scheme on this record. Because the District Court (correctly, in my view) did not believe that the specific point assignment was constitutionally troubling, it made only limited and general findings on other characteristics of the university's admissions practice, such as the conduct of individualized review by the Admissions Review Committee. 122 F. Supp. 2d 811, 829–830 (ED Mich. 2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante*, at 274 ("The record does not reveal precisely how many applications are flagged for this individualized consideration [by the committee]"); see also *ante*, at 279–280 (O'CONNOR, J., concurring) ("The evidence in the record . . . reveals very little about how the review committee actually functions"). The point system cannot operate as a *de facto* set-aside if the

greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court's standards. Since the record is quiet, if not silent, on the case-by-case work of the committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee's specific determinations.[3]

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. Brief for United States as *Amicus Curiae* 18; Brief for United States as *Amicus Curiae* in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241, pp. 13–17.

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage.[4] It

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[3] The Court surmises that the committee does not contribute meaningfully to the university's individualized review of applications. *Ante*, at 273–274. The Court should not take it upon itself to apply a newly formulated legal standard to an undeveloped record. Given the District Court's statement that the committee may examine "any number of applicants, including applicants other than under-represented minority applicants," 122 F. Supp. 2d 811, 830 (ED Mich. 2000), it is quite possible that further factual development would reveal the committee to be a "source of individualized consideration" sufficient to satisfy the Court's rule, *ante*, at 279 (O'CONNOR, J., concurring). Determination of that issue in the first instance is a job for the District Court, not for this Court on a record that is admittedly lacking.

[4] Of course it might be pointless in the State of Michigan, where minorities are a much smaller fraction of the population than in California, Florida, or Texas. Brief for Respondents Bollinger et al. 48–49.

is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

III

If this plan were challenged by a plaintiff with proper standing under Article III, I would affirm the judgment of the District Court granting summary judgment to the college. As it is, I would vacate the judgment for lack of jurisdiction, and I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.*

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante,* at 268; see *Grutter* v. *Bollinger, post,* at 326–333. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante,* at 270 (quoting *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 224 (1995); *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 494 (1989) (plurality opinion)). This insistence on "consistency," *Adarand,* 515 U. S., at 224, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.,* at 274–276, and n. 8 (GINSBURG, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

*JUSTICE BREYER joins Part I of this opinion.

In the wake "of a system of racial caste only recently ended," *id.*, at 273 (GINSBURG, J., dissenting), large disparities endure. Unemployment,[1] poverty,[2] and access to health care[3] vary disproportionately by race. Neighborhoods and schools remain racially divided.[4] African-American and Hispanic children are all too often educated in poverty-

[1] See, *e. g.*, U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African-Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

[2] See, *e. g.*, U. S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African-Americans, 10.8% of Asian-Americans, and 21.2% of Hispanics were living in poverty.); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B–5, Feb. 2000) ("Blacks, Hispanics, and Native Americans . . . each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

[3] See, *e. g.*, U. S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p. 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African-Americans, 18.0% of Asian-Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites . . . .").

[4] See, *e. g.*, U. S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980–2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file) ("[W]hites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white."); *id.*, at 28 ("[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority. . . . More than one in six black children attend a school that is 99–100% minority . . . . One in nine Latino students attend virtually all minority schools.").

stricken and underperforming institutions.[5] Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education.[6] Equally credentialed job applicants receive different receptions depending on their race.[7] Irrational prejudice is still encountered in real estate markets[8] and consumer transactions.[9] "Bias both

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[5] See, *e. g.*, Ryan, Schools, Race, and Money, 109 Yale L. J. 249, 273–274 (1999) ("Urban public schools are attended primarily by African-American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

[6] See, *e. g.*, Statistical Abstract 140 (Table 211).

[7] See, *e. g.*, Holzer, Career Advancement Prospects and Strategies for Low-Wage Minority Workers, in Low-Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("[I]n studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http://gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165–186 (M. Fix & R. Struyk eds. 1993).

[8] See, *e. g.*, M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp. i, iii (Nov. 2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals—one minority and the other white—pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

[9] See, *e. g.*, Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause, 94 Mich. L. Rev. 109, 109–110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.*, at 274 (GINSBURG, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L. Rev. 1251, 1276–1291 (1998).

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 316 (1986) (STEVENS, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978)] was the same as the issue in [*Brown* v. *Board of Education*, 347 U. S. 483 (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931–932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.*, at 932, no automatic proscription is in order.

For, as insightfully explained: "The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Ed.*, 372 F. 2d 836, 876 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter*, *post*, at 344 (GINSBURG, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women).

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County*, 372 F. 2d, at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand*, 515 U. S., at 275 (GINSBURG, J., dissenting), and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.*, at 276.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by

JUSTICE SOUTER, I see no constitutional infirmity. See *ante*, at 293–298 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.*, at 111a. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra*, at 298–301. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondent Bollinger et al. 10; Tr. of Oral Arg. 41–42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.").[10]

[10] The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ[e]" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see U. S. Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov. 2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10% or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific

The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L. Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e. g.*, Steinberg, Using Synonyms for Race, College Strives for Diversity,

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purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Brief for Respondent Bollinger et al. 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14–19 (2003), http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10% or 20% are minorities. Moreover, because such plans link college admission to a single criterion—high school class rank—they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the 'X-Percent Solution,' Chronicle of Higher Education, June 2, 2000, p. A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

N. Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14–15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.[11]

* * *

For the reasons stated, I would affirm the judgment of the District Court.

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[11] Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 275, n. 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 301–302. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.

Syllabus

GRUTTER *v.* BOLLINGER ET AL.

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

No. 02–241. Argued April 1, 2003—Decided June 23, 2003

The University of Michigan Law School (Law School), one of the Nation's top law schools, follows an official admissions policy that seeks to achieve student body diversity through compliance with *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score. Additionally, officials must look beyond grades and scores to so-called "soft variables," such as recommenders' enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for "substantial weight," but it does reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.

When the Law School denied admission to petitioner Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed this suit, alleging that respondents had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U. S. C. § 1981; that she was rejected because the Law School uses race as a "predominant" factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race. The District Court found the Law School's use of race as an admissions factor unlawful. The Sixth Circuit reversed, holding that Justice Powell's opinion in *Bakke* was binding precedent establishing

diversity as a compelling state interest, and that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.

Held: The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981. Pp. 322–344.

(a) In the landmark *Bakke* case, this Court reviewed a medical school's racial set-aside program that reserved 16 out of 100 seats for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority. Four Justices would have upheld the program on the ground that the government can use race to remedy disadvantages cast on minorities by past racial prejudice. 438 U. S., at 325. Four other Justices would have struck the program down on statutory grounds. *Id.*, at 408. Justice Powell, announcing the Court's judgment, provided a fifth vote not only for invalidating the program, but also for reversing the state court's injunction against any use of race whatsoever. In a part of his opinion that was joined by no other Justice, Justice Powell expressed his view that attaining a diverse student body was the only interest asserted by the university that survived scrutiny. *Id.*, at 311. Grounding his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment," *id.*, at 312, 314, Justice Powell emphasized that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation." *Id.*, at 313. However, he also emphasized that "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify using race. *Id.*, at 315. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.* Since *Bakke*, Justice Powell's opinion has been the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views. Courts, however, have struggled to discern whether Justice Powell's diversity rationale is binding precedent. The Court finds it unnecessary to decide this issue because the Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions. Pp. 322–325.

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(b) All government racial classifications must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227. But not all such uses are invalidated by strict scrutiny. Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest. *E. g., Shaw* v. *Hunt*, 517 U. S. 899, 908. Context matters when reviewing such action. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343–344. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context. Pp. 326–327.

(c) The Court endorses Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions. The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise. See, *e. g., Bakke*, 438 U. S., at 319, n. 53 (opinion of Powell, J.). Attaining a diverse student body is at the heart of the Law School's proper institutional mission, and its "good faith" is "presumed" absent "a showing to the contrary." *Id.*, at 318–319. Enrolling a "critical mass" of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. *E. g., id.*, at 307. But the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, *Sweatt* v. *Painter*, 339 U. S. 629, 634, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body. Pp. 327–333.

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(d) The Law School's admissions program bears the hallmarks of a narrowly tailored plan. To be narrowly tailored, a race-conscious admissions program cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke*, 438 U. S., at 315 (opinion of Powell, J.). Instead, it may consider race or ethnicity only as a "'plus' in a particular applicant's file"; *i. e.*, it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight," *id.*, at 317. It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks. See *id.*, at 315–316. The Law School's admissions program, like the Harvard plan approved by Justice Powell, satisfies these requirements. Moreover, the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. See *id.*, at 317. The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. *Gratz* v. *Bollinger*, *ante*, p. 244, distinguished. Also, the program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Moreover, the Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. The Court rejects the argument that the Law School should have used other race-neutral means to obtain the educational benefits of student body diversity, *e. g.*, a lottery system or decreasing the emphasis on GPA and LSAT scores. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See, *e. g.*, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6. The Court is satisfied that the Law School adequately considered the available alternatives. The Court is also satisfied that, in the context of individualized consideration of the possible diversity contributions of each applicant, the Law School's race-conscious admissions program does not unduly harm nonminority applicants. Finally, race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial

preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. Pp. 333–343.

(e) Because the Law School's use of race in admissions decisions is not prohibited by the Equal Protection Clause, petitioner's statutory claims based on Title VI and § 1981 also fail. See *Bakke*, *supra*, at 287 (opinion of Powell, J.); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389–391. Pp. 343–344.

288 F. 3d 732, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, and in which Scalia and Thomas, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas, J. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined, *post*, p. 344. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Thomas, J., joined, *post*, p. 346. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Scalia, J., joined as to Parts I–VII, *post*, p. 349. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined, *post*, p. 378. Kennedy, J., filed a dissenting opinion, *post*, p. 387.

Kirk O. Kolbo argued the cause for petitioner. With him on the briefs were *David F. Herr*, *R. Lawrence Purdy*, *Michael C. McCarthy*, *Michael E. Rosman*, *Hans Bader*, and *Kerry L. Morgan*.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Boyd* and *Deputy Solicitor General Clement*.

Maureen E. Mahoney argued the cause for respondent Bollinger et al. With her on the brief were *John H. Pickering*, *John Payton*, *Brigida Benitez*, *Craig Goldblatt*, *Terry A. Maroney*, *Marvin Krislov*, *Jonathan Alger*, *Evan Caminker*, *Philip J. Kessler*, and *Leonard M. Niehoff*.

Miranda K. S. Massie and *George B. Washington* filed a brief for respondent James et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Charlie Crist*, Attorney General of Florida, *Christopher M. Kise*, Solicitor General, *Louis F. Hubener*, Deputy Solicitor General, and

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

Daniel Woodring; for the Cato Institute by *Robert A. Levy*, *Timothy Lynch*, *James L. Swanson*, and *Samuel Estreicher;* for the Center for Equal Opportunity et al. by *Roger Clegg* and *C. Mark Pickrell;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Center for New Black Leadership by *Clint Bolick*, *William H. Mellor*, and *Richard D. Komer;* for the Center for the Advancement of Capitalism by *David Reed Burton;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Michigan Association of Scholars by *William F. Mohrman;* for the National Association of Scholars by *William H. Allen*, *Oscar M. Garibaldi*, and *Keith A. Noreika;* for the Pacific Legal Foundation by *John H. Findley;* for Law Professor Larry Alexander et al. by *Erik S. Jaffe;* and for the Reason Foundation by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Andrew H. Baida*, Solicitor General, *Mark J. Davis* and *William F. Brockman*, Assistant Attorneys General, *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, and *Julie Mathy Sheridan* and *Sachin S. Pandya*, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Peggy A. Lautenschlager* of Wisconsin; for the State of New Jersey by *David Samson*, Attorney General, *Jeffrey Burstein*, Assistant Attorney General, and *Donna Arons* and *Anne Marie Kelly*, Deputy Attorneys General; for New York City Council Speaker A. Gifford Miller et al. by *Jack Greenberg* and *Saul B. Shapiro;* for the City of Philadelphia, Pennsylvania, et al. by *Victor A. Bolden* and *Nelson A. Diaz;* for the American Bar Association by *Paul M. Dodyk* and *Rowan D. Wilson;* for the American Educational Re-

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search Association et al. by *Angelo N. Ancheta;* for the American Jewish Committee et al. by *Stewart D. Aaron*, *Thomas M. Jancik*, *Jeffrey P. Sinensky*, *Kara H. Stein*, and *Richard T. Foltin;* for the American Law Deans Association by *Samuel Issacharoff;* for the American Psychological Association by *Paul R. Friedman*,*William F. Sheehan*, and *Nathalie F. P. Gilfoyle;* for the American Sociological Association et al. by *Bill Lann Lee* and *Deborah J. Merritt;* for Amherst College et al. by *Charles S. Sims;* for the Arizona State University College of Law by *Ralph S. Spritzer* and *Paul Bender;* for the Association of American Law Schools by *Pamela S. Karlan;* for the Association of American Medical Colleges et al. by *Robert A. Burgoyne* and *Joseph A. Keyes, Jr.;* for the Bay Mills Indian Community et al. by *Vanya S. Hogen;* for the Clinical Legal Education Association by *Timothy A. Nelsen*, *Frances P. Kao*, and *Eric J. Gorman;* for Columbia University et al. by *Floyd Abrams* and *Susan Buckley;* for the Graduate Management Admission Council et al. by *Stephen M. McNabb;* for the Harvard Black Law Students Association et al. by *George W. Jones, Jr.*, *William J. Jefferson*, *Theodore V. Wells, Jr.*, and *David W. Brown;* for Harvard University et al. by *Laurence H. Tribe*, *Jonathan S. Massey*, *Beverly Ledbetter*, *Robert B. Donin*, and *Wendy S. White;* for the Hispanic National Bar Association et al. by *Gilbert Paul Carrasco;* for Howard University by *Janell M. Byrd;* for Indiana University by *James Fitzpatrick*, *Lauren K. Robel*, and *Jeffrey Evans Stake;* for the King County Bar Association by *John Warner Widell*, *John H. Chun*, and *Melissa O'Loughlin White;* for the Law School Admission Council by *Walter Dellinger*, *Pamela Harris*, and *Jonathan D. Hacker;* for the Lawyers' Committee for Civil Rights Under Law et al. by *John S. Skilton*, *David E. Jones*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Dennis C. Hayes*, *Marcia D. Greenberger*, and *Judith L. Lichtman;* for the Leadership Conference on Civil Rights et al. by *Robert N. Weiner* and *William L. Taylor;* for the Mexican American Legal Defense and Educational Fund et al. by *Antonia Hernandez;* for the Michigan Black Law Alumni Society by *Christopher J. Wright*, *Timothy J. Simeone*, and *Kathleen McCree Lewis;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Theodore M. Shaw*, *Norman J. Chachkin*, *Robert H. Stroup*, *Elise C. Boddie*, and *Christopher A. Hansen;* for the National Center for Fair & Open Testing by *John T. Affeldt* and *Mark Savage;* for the National Coalition of Blacks for Reparations in America et al. by *Kevin Outterson;* for the National Education

of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "sub-

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Association et al. by *Robert H. Chanin*, *John M. West*, *Elliot Mincberg*, *Larry P. Weinberg*, and *John C. Dempsey;* for the National Urban League et al. by *William A. Norris* and *Michael C. Small;* for the New America Alliance by *Thomas R. Julin* and *D. Patricia Wallace;* for the New Mexico Hispanic Bar Association et al. by *Edward Benavidez;* for the NOW Legal Defense and Educational Fund et al. by *Wendy R. Weiser* and *Martha F. Davis;* for the School of Law of the University of North Carolina by *John Charles Boger*, *Julius L. Chambers*, and *Charles E. Daye;* for the Society of American Law Teachers by *Michael Selmi* and *Gabriel J. Chin;* for the UCLA School of Law Students of Color by *Sonia Mercado;* for the United Negro College Fund et al. by *Drew S. Days III* and *Beth S. Brinkmann;* for the University of Michigan Asian Pacific American Law Students Association et al. by *Jerome S. Hirsch;* for the University of Pittsburgh et al. by *David C. Frederick* and *Sean A. Lev;* for Judith Areen et al. by *Neal Katyal* and *Kumiki Gibson;* for Lieutenant General Julius W. Becton, Jr., et al. by *Virginia A. Seitz*, *Joseph R. Reeder*, *Robert P. Charrow*, and *Kevin E. Stern;* for Hillary Browne et al. by *Gregory Alan Berry;* for Senator Thomas A. Daschle et al. by *David T. Goldberg* and *Penny Shane;* for the Hayden Family by *Roy C. Howell;* for Glenn C. Loury by *Jeffrey F. Liss* and *James J. Halpert;* and for 13,922 Current Law Students at Accredited American Law Schools by *Julie R. O'Sullivan* and *Peter J. Rubin.*

Briefs of *amici curiae* were filed for Michigan Governor Jennifer M. Granholm by *John D. Pirich* and *Mark A. Goldsmith;* for Members and Former Members of the Pennsylvania General Assembly et al. by *Mark B. Cohen* and *Eric S. Fillman;* for the American Council on Education et al. by *Martin Michaelson*, *Alexander E. Dreier*, and *Sheldon E. Steinbach;* for the American Federation of Labor and Congress of Industrial Organizations by *Harold Craig Becker*, *David J. Strom*, *Jonathan P. Hiatt*, and *Daniel W. Sherrick;* for the Anti-Defamation League by *Martin E. Karlinsky* and *Steven M. Freeman;* for the Asian American Legal Foundation by *Daniel C. Girard* and *Gordon M. Fauth, Jr.;* for Banks Broadcasting, Inc., by *Elizabeth G. Taylor;* for the Black Women Lawyers Association of Greater Chicago, Inc., by *Sharon E. Jones;* for the Boston Bar Association et al. by *Thomas E. Dwyer, Jr.*, and *Joseph L. Kociubes;* for the Carnegie Mellon University et al. by *W. Thomas McGough, Jr.*, *Kathy M. Banke*, *Gary L. Kaplan*, and *Edward N. Stoner II;* for the Coalition for Economic Equity et al. by *Eva J. Paterson* and *Eric K. Yamamoto;*

stantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978).

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for the Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. by *Mary Mack Adu;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Equal Employment Advisory Council by *Jeffrey A. Norris* and *Ann Elizabeth Reesman;* for Exxon Mobil Corp. by *Richard R. Brann;* for General Motors Corp. by *Kenneth S. Geller*, *Eileen Penner*, and *Thomas A. Gottschalk;* for Human Rights Advocates et al. by *Constance de la Vega;* for the Massachusetts Institute of Technology et al. by *Donald B. Ayer*, *Elizabeth Rees*, *Debra L. Zumwalt*, and *Stacey J. Mobley;* for the Massachusetts School of Law by *Lawrence R. Velvel;* for the National Asian Pacific American Legal Consortium et al. by *Mark A. Packman*, *Karen K. Narasaki*, *Vincent A. Eng*, and *Trang Q. Tran;* for the National School Boards Association et al. by *Julie Underwood* and *Naomi Gittins;* for the New York State Black and Puerto Rican Legislative Caucus by *Victor Goode;* for Veterans of the Southern Civil Rights Movement et al. by *Mitchell Zimmerman;* for 3M et al. by *David W. DeBruin*, *Deanne E. Maynard*, *Daniel Mach*, *Russell W. Porter*, *Jr.*, *Charles R. Wall*, *Martin J. Barrington*, *Deval L. Patrick*, *William J. O'Brien*, *Gary P. Van Graafeiland*, *Kathryn A. Oberly*, *Randall E. Mehrberg*, *Donald M. Remy*, *Ben W. Heineman*, *Jr.*, *Brackett B. Denniston III*, *Elpidio Villarreal*, *Wayne A. Budd*, *J. Richard Smith*, *Stewart S. Hudnut*, *John A. Shutkin*, *Theodore L. Banks*, *Kenneth C. Frazier*, *David R. Andrews*, *Jeffrey B. Kinder*, *Teresa M. Holland*, *Charles W. Gerdts III*, *John L. Sander*, *Mark P. Klein*, and *Stephen P. Sawyer;* for Ward Connerly by *Manuel S. Klausner* and *Patrick J. Manshardt;* for Representative John Conyers, Jr., et al. by *Paul J. Lawrence* and *Anthony R. Miles;* and for Representative Richard A. Gephardt et al. by *Andrew L. Sandler* and *Mary L. Smith.*

Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. *Id.*, at 83–84, 114–121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. *Id.*, at 112. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." *Id.*, at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. *Id.*, at 113. Nor does a low score automatically disqualify an applicant. *Ibid.* Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. *Id.*, at 114. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution." *Ibid.*

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.*, at 118.

The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.*, at 120. By enrolling a " 'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." *Id.*, at 120–121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991

until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U. S. C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." App. 33–34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993).

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as " 'all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.' " App. to Pet. for Cert. 191a–192a.

The District Court heard oral argument on the parties' cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compel-

ling. The District Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School's admissions decisions, and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard.

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a–209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did

not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a "'determinative'" factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's "'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'" Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is pres-

ent, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students. *Id.*, at 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995–2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made "'cell-by-cell'" comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups "'is an extremely strong factor in the decision for acceptance,'" and that applicants from these minority groups "'are given an extremely large allowance for admission'" as compared to applicants who are members of nonfavored groups. *Id.*, at 218a–220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11–13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and it is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity constituted the controlling rationale for the judgment of this Court under the analysis set forth in *Marks* v. *United States*, 430 U. S. 188 (1977). The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F. 3d 732, 746, 749 (CA6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body diversity on the merits and concluded it was not compelling. The fourth dissenter, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissent-

ers, he believed that the Law School's use of race was not narrowly tailored to further that interest.

We granted certiorari, 537 U. S. 1043 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood* v. *Texas*, 78 F. 3d 932 (CA5 1996) *(Hopwood I)* (holding that diversity is not a compelling state interest), with *Smith* v. *University of Wash. Law School*, 233 F. 3d 1188 (CA9 2000) (holding that it is).

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U. S. 265 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." *Id.*, at 325 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.*, at 408 (opinion of STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involv-

ing the competitive consideration of race and ethnic origin." *Id.*, at 320. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." *Ibid.*

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. See, *e. g.*, Brief for Judith Areen et al. as *Amici Curiae* 12–13 (law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke*"); Brief for Amherst College et al. as *Amici Curiae* 27 ("After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion . . . and set sail accordingly"). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U. S., at 289–290. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in " 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' " as an unlawful interest in racial balancing. *Id.*, at 306–307. Second, Justice Powell rejected an interest in remedying societal dis-

crimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.*, at 310. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." *Id.*, at 306, 310.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.*, at 311. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.*, at 312, 314. Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.*, at 313 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967)). In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U. S., at 313. Both "tradition and experience lend support to the view that the contribution of diversity is substantial." *Ibid.*

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*, at 314. For Justice Powell, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that

can justify the use of race. *Id.*, at 315. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*. In that case, we explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U. S., at 193 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, "[t]his test is more easily stated than applied to the various opinions supporting the result in *[Bakke]*." *Nichols* v. *United States*, 511 U. S. 738, 745–746 (1994). Compare, *e. g.*, *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood* v. *Texas*, 236 F. 3d 256, 274–275 (CA5 2000) *(Hopwood II)* (same); *Hopwood I*, 78 F. 3d 932 (CA5 1996) (same), with *Smith* v. *University of Wash. Law School*, 233 F. 3d, at 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols* v. *United States*, *supra*, at 745–746. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

B

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995) (emphasis in original; internal quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S., at 227.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc.* v. *Peña*, *supra*, at 237 (internal quotation marks and citation omitted). Although all gov-

ernmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U. S., at 229–230. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.*, at 230. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343–344 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In *Adarand Constructors, Inc.* v. *Peña*, we made clear that strict scrutiny must take " 'relevant differences' into account." 515 U. S., at 228. Indeed, as we explained, that is its "fundamental purpose." *Ibid.* Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

III

A

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have

throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondent Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e. g.*, *Richmond* v. *J. A. Croson Co.*, *supra*, at 493 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 225 (1985); *Board of Curators of Univ. of Mo.*

v. *Horowitz,* 435 U. S. 78, 96, n. 6 (1978); *Bakke,* 438 U. S., at 319, n. 53 (opinion of Powell, J.).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, *e. g., Wieman* v. *Updegraff,* 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957); *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U. S., at 603. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke, supra,* at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U. S., at 313 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y., supra,* at 603). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U. S., at 318–319.

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondent Bollinger et al. 13. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke,* 438 U. S., at

307 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.; Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 507. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." *Id.*, at 246a, 244a.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e. g.*, W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae*

5; Brief for General Motors Corp. as *Amicus Curiae* 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Ibid.* At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.*, at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. *Plyler* v. *Doe*, 457 U. S. 202, 221 (1982). This Court has long recognized that "education . . . is the very foundation of good citizenship." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American

society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as *Amicus Curiae* 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." *Ibid.* Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt* v. *Painter*, 339 U. S. 629, 634 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5–6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt* v. *Painter*, *supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society

may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw* v. *Hunt*, 517 U. S. 899, 908 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 493 (plurality opinion).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry

must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to JUSTICE KENNEDY's assertions, we do not "abando[n] strict scrutiny," see *post*, at 394 (dissenting opinion). Rather, as we have already explained, *supra*, at 327, we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account." 515 U. S., at 228 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke*, 438 U. S., at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.*, at 317. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.*, at 315–316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid.*

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond* v. *J. A. Croson Co.*, *supra*, at 496 (plurality opinion). Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all other candidates for the available seats," *Bakke*, *supra*, at 317 (opinion of Powell, J.). In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," *Sheet Metal Workers* v. *EEOC*, *supra*, at 495, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants," *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 638 (1987).

Justice Powell's distinction between the medical school's rigid 16-seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. See *Bakke*, *supra*, at 323 (opinion of Powell, J.) ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"). What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some "'plus'" for race, or gave greater "weight" to race than to some other factors, in order to achieve student body diversity. 438 U. S., at 317–318.

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its pro-

gram into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.*, at 323. "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as JUSTICE KENNEDY posits, does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "sugges[t] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. See *post*, at 392 (dissenting opinion). To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondent Bollinger et al. 43, n. 70 (citing App. in Nos. 01–1447 and 01–1516 (CA6), p. 7336). Moreover, as JUSTICE KENNEDY concedes, see *post*, at 390, between 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

THE CHIEF JUSTICE believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. *Post*, at 380–386 (dissenting opinion). But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. See *post*, at 385 (dissenting opinion).

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus"

factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke*, 438 U. S., at 318, n. 52 (opinion of Powell, J.) (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz* v. *Bollinger*, *ante*, p. 244, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See *ante*, at 271–272 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, *supra*, at 317 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With re-

spect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.*, at 118–119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e. g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.*, at 83–84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondent Bollinger et al. 10; App. 121–122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this

flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. JUSTICE KENNEDY speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. *Post*, at 389 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors. See 438 U. S., at 316 ("'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor'").

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (alternatives must serve the interest "'about as well'"); *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 509–510 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant* v. *Jackson Bd. of Ed.*, *supra*, at 280, n. 6 (narrow tailoring

"require[s] consideration" of "lawful alternative and less restrictive means").

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." App. to Pet. for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14–18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke*, 438 U. S., at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 630 (1990) (O'Connor, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke*, *supra*, at 317 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant

> "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 U. S., at 318.

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore* v. *Si-*

doti, 466 U. S. 429, 432 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 510 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools,

58 Chicago Bar Rec. 282, 293 (May–June 1977) ("It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all").

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondent Bollinger et al. 34; *Bakke*, *supra*, at 317–318 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U. S. C. § 1981 also fail. See *Bakke*, *supra*, at 287 (opinion of Powell, J.) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389–391 (1982) (the prohibition against discrimination in § 1981 is coextensive with the Equal Protection Clause). The judgment

of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," *ante,* at 342, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422–423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR, 20th Sess., Res. Supp. (No. 14), p. 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid.;* see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR, 34th Sess., Res. Supp. (No. 46), p. 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").

The Court further observes that "[i]t has been 25 years since Justice Powell [in *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." *Ante,* at 343. For at least part of that

time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See *Hopwood* v. *Texas*, 78 F. 3d 932 (CA5 1996); cf. *Wessmann* v. *Gittens*, 160 F. 3d 790 (CA1 1998); *Tuttle* v. *Arlington Cty. School Bd.*, 195 F. 3d 698 (CA4 1999); *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 2001). Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown* v. *Board of Education*, 347 U. S. 483 (1954); cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. See, *e. g.*, *Gratz* v. *Bollinger*, *ante*, at 298–301 (GINSBURG, J., dissenting); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 272–274 (1995) (GINSBURG, J., dissenting); Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L. Rev. 1251, 1276–1291, 1303 (1998). As to public education, data for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? p. 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (as visited June 16, 2003, and available in Clerk of Court's case file). And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See *id.*, at 11; Brief for National Urban League et al. as *Amici Curiae* 11–12 (citing General Accounting Office, Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area 17 (2002)).

However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, A National Priority: Americans Speak on Teacher Quality 2, 11 (2002) (public opinion research conducted for Educational Testing Service); No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1806, 20 U. S. C. § 7231 (2000 ed., Supp. I), it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

I join the opinion of THE CHIEF JUSTICE. As he demonstrates, the University of Michigan Law School's mystical

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*As the Court explains, the admissions policy challenged here survives review under the standards stated in *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200 (1995), *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), and Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978). This case therefore does not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review. Cf. *Gratz*, *ante*, at 301–302 (GINSBURG, J., dissenting); *Adarand*, 515 U. S., at 274, n. 8 (GINSBURG, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," *ante*, at 325, rank as sufficiently important to justify a race-conscious government program. Cf. *Gratz*, *ante*, at 301–302 (GINSBURG, J., dissenting); *Adarand*, 515 U. S., at 273–274 (GINSBURG, J., dissenting).

"critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

I also join Parts I through VII of JUSTICE THOMAS's opinion.* I find particularly unanswerable his central point: that the allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

I add the following: The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of " 'cross-racial understanding,' " *ante,* at 330, and " 'better prepar[ation of] students for an increasingly diverse workforce and society,' " *ibid.*, all of which is necessary not only for work, but also for good "citizenship," *ante,* at 331. This is not, of course, an "educational benefit" on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, it is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. *And therefore:* If it is appropriate for the Univer-

*Part VII of JUSTICE THOMAS's opinion describes those portions of the Court's opinion in which I concur. See *post,* at 374–378 (opinion concurring in part and dissenting in part).

sity of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," *ante,* at 337, and sufficiently avoids "separate admissions tracks," *ante,* at 334, to fall under *Grutter* rather than *Gratz.* Some will focus on whether a university has gone beyond the bounds of a "'good-faith effort'" and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely "'a permissible goal.'" *Ante,* at 335 (quoting *Sheet Metal Workers* v. *EEOC,* 478 U. S. 421, 495 (1986) (O'CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter;* and while the opinion accords "a degree of deference to a university's academic decisions," *ante,* at 328, "deference does not imply

abandonment or abdication of judicial review," *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003).) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I–VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

> "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of

> their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury." What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 The Frederick Douglass Papers 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only

one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. See *ante*, at 343 (stating that racial discrimination will no longer be narrowly tailored, or "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. *Ante*, at 326. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in *Korematsu* v. *United States*, 323 U. S. 214 (1944). There the Court held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.*, at 216. This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest,"[1] see, *e. g.*, *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 299 (1978) (opinion of Powell, J.). A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy

[1] Throughout I will use the two phrases interchangeably.

past discrimination for which it is responsible. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 504 (1989).

The contours of "pressing public necessity" can be further discerned from those interests the Court has rejected as bases for racial discrimination. For example, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986), found unconstitutional a collective-bargaining agreement between a school board and a teachers' union that favored certain minority races. The school board defended the policy on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. See Brief for Respondents, O. T. 1984, No. 84–1340, pp. 27–28; 476 U. S., at 315 (STEVENS, J., dissenting) ("[A]n integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty"). Nevertheless, the Court found that the use of race violated the Equal Protection Clause, deeming both asserted state interests insufficiently compelling. *Id.*, at 275–276 (plurality opinion); *id.*, at 295 (White, J., concurring in judgment) ("None of the interests asserted by the [school board] . . . justify this racially discriminatory layoff policy").[2]

An even greater governmental interest involves the sensitive role of courts in child custody determinations. In *Palmore* v. *Sidoti*, 466 U. S. 429 (1984), the Court held that even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage. *Id.*, at 433 (finding the interest "substantial" but

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[2] The Court's refusal to address *Wygant*'s rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing. If the Court defers to the Law School's judgment that a racially mixed student body confers educational benefits to all, then why would the *Wygant* Court not defer to the school board's judgment with respect to the benefits a racially mixed faculty confers?

holding the custody decision could not be based on the race of the mother's new husband).

Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. See *Wygant*, *supra*, at 276 (plurality opinion); *Croson*, 488 U. S., at 496–498 (plurality opinion); *id.*, at 520–521 (SCALIA, J., concurring in judgment). "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, *supra*, at 276 (plurality opinion). But see *Gratz* v. *Bollinger*, *ante*, p. 298 (GINSBURG, J., dissenting).

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) *(per curiam)* (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); *Croson*, *supra*, at 521 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]").

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."

Adarand Constructors, Inc. v. *Peña*, 515 U. S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment).

II

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondent Bollinger et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means,[3] is the

[3] "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. Cf. *Orr* v. *Orr*, 440 U. S. 268, 283 (1979) (noting that suspect classifications are especially impermissible when "the choice made by the State appears to redound . . . to the benefit of those without need for special solicitude"). It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.

mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," *ante*, at 330, that the majority expressly rejects?

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably. Compare *ante*, at 328 ("[T]he Law School has a compelling interest in attaining a diverse student body"), with *ante*, at 333 (referring to the "compelling interest in securing the *educational benefits* of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity." But see *ante*, at 332 (citing the need for "openness and integrity of the educational institutions that provide [legal] training" without reference to any consequential educational benefits).

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondent Bollinger et al. 33–36. In other words, the Law School seeks to improve marginally the education it offers

without sacrificing too much of its exclusivity and elite status.[4]

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." *Ante*, at 333. No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling, see Part I, *supra*, or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination. In the absence of any explanation, one might expect the Court to fall back on the judicial policy of *stare decisis*. But the Court eschews even this weak defense of its holding, shunning an analysis of the extent to which Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978),

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[4] The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.

is binding, *ante,* at 325, in favor of an unfounded wholesale adoption of it.

Justice Powell's opinion in *Bakke* and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another. This "we know it when we see it" approach to evaluating state interests is not capable of judicial application. Today, the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class. I can only presume that the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle. See Part VI, *infra.*

B

Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

1

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Additionally, circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity. Evidence that States, in general, engage in a certain activity by no means demonstrates that the activity constitutes a pressing public necessity, given the expansive role of government in today's society. The fact that some fraction of the States reject a particular enterprise, however, creates a presumption that the enterprise itself is not a compelling state interest. In this sense, the absence of a public, American Bar Association (ABA) accredited, law school in

Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island, see ABA–LSAC Official Guide to ABA-Approved Law Schools (W. Margolis, B. Gordon, J. Puskarz, & D. Rosenlieb eds. 2004) (hereinafter ABA–LSAC Guide), provides further evidence that Michigan's maintenance of the Law School does not constitute a compelling state interest.

2

As the foregoing makes clear, Michigan has no compelling interest in having a law school at all, much less an *elite* one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

This Court has limited the scope of equal protection review to interests and activities that occur within that State's jurisdiction. The Court held in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938), that Missouri could not satisfy the demands of "separate but equal" by paying for legal training of blacks at neighboring state law schools, while maintaining a segregated law school within the State. The equal protection

> "obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance *by what another State may do or fail to do.* That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." *Id.*, at 350 (emphasis added).

The Equal Protection Clause, as interpreted by the Court in *Gaines*, does not permit States to justify racial discrimination on the basis of what the rest of the Nation "may do or fail to do." The only interests that can satisfy the Equal

Protection Clause's demands are those found within a State's jurisdiction.

The only cognizable state interests vindicated by operating a public law school are, therefore, the education of that State's citizens and the training of that State's lawyers. James Campbell's address at the opening of the Law Department at the University of Michigan on October 3, 1859, makes this clear:

> "It not only concerns *the State* that every one should have all reasonable facilities for preparing himself for any honest position in life to which he may aspire, but it also concerns *the community* that the Law should be taught and understood. . . . There is not an office *in the State* in which serious legal inquiries may not frequently arise. . . . In all these matters, public and private rights are constantly involved and discussed, and ignorance of the Law has frequently led to results deplorable and alarming. . . . [I]n the history of *this State,* in more than one instance, that ignorance has led to unlawful violence, and the shedding of innocent blood." E. Brown, Legal Education at Michigan 1859–1959, pp. 404–406 (1959) (emphasis added).

The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the Law School made up less than 6% of applicants to the Michigan bar, Michigan Lawyers Weekly, available at http://www.michiganlawyersweekly.com/barpassers0202.cfm,barpassers0702 .cfm (all Internet materials as visited June 13, 2003, and available in Clerk of Court's case file), even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. *Ibid.* Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. ABA–LSAC Guide 427. Thus, while a mere 27% of the Law School's 2002 entering class is from Michigan, see University of

Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm, only half of these, it appears, will stay in Michigan.

In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. ABA–LSAC Guide 775. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.

Again, the fact that few States choose to maintain elite law schools raises a strong inference that there is nothing compelling about elite status. Arguably, only the public law schools of the University of Texas, the University of California, Berkeley (Boalt Hall), and the University of Virginia maintain the same reputation for excellence as the Law School.[5] Two of these States, Texas and California, are so large that they could reasonably be expected to provide elite legal training at a separate law school to students who will, in fact, stay in the State and provide legal services to its citizens. And these two schools far outshine the Law School in producing in-state lawyers. The University of Texas, for example, sends over three-fourths of its graduates on to work in the State of Texas, vindicating the State's interest (compelling or not) in training Texas' lawyers. *Id.*, at 691.

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[5] Cf. U. S. News & World Report, America's Best Graduate Schools 28 (2004 ed.) (placing these schools in the uppermost 15 in the Nation).

3

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies.

IV

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of . . . the academic quality of all admitted students," *ante*, at 340, need not be considered before racial discrimination can be employed.[6] In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work "'about as well.'" *Ante*, at 339 (quoting *Wygant*, 476 U. S., at 280, n. 6). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, at 339, and do "about as well" *in vindicating the compelling state interest.* The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. See Part III–B, *supra.* Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications,

[6] The Court refers to this component of the Law School's compelling state interest variously as "academic quality," avoiding "sacrifice [of] a vital component of its educational mission," and "academic selectivity." *Ante*, at 340.

see Brief for United States as *Amicus Curiae* 13–14, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.

A

The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of "educational autonomy" grounded in the First Amendment. *Ante,* at 329. In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.

The constitutionalization of "academic freedom" began with the concurring opinion of Justice Frankfurter in *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957). Sweezy, a Marxist economist, was investigated by the Attorney General of New Hampshire on suspicion of being a subversive. The prosecution sought, *inter alia,* the contents of a lecture Sweezy had given at the University of New Hampshire. The Court held that the investigation violated due process. *Id.*, at 254.

Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation. *Id.*, at 256–267 (opinion concurring in result). Much of the rhetoric in Justice Frankfurter's opinion was devoted to the personal right of Sweezy to free speech. See, *e. g., id.*, at 265 ("For a citizen to be

made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling"). Still, claiming that the United States Reports "need not be burdened with proof," Justice Frankfurter also asserted that a "free society" depends on "free universities" and "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.*, at 262. According to Justice Frankfurter: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.*, at 263 (citation omitted).

In my view, "[i]t is the business" of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in *Bakke*. Justice Powell, for his part, relied only on Justice Frankfurter's opinion in *Sweezy* and the Court's decision in *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions. *Bakke*, 438 U. S., at 312. *Keyishian* provides no answer to the question whether the Fourteenth Amendment's restrictions are relaxed when applied to public universities. In that case, the Court held that state statutes and regulations designed to prevent the "appointment or retention of 'subversive' persons in state employment," 385 U. S., at 592, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to uni-

versity faculty members, although the Court appeared sympathetic to the notion of academic freedom, calling it a "special concern of the First Amendment." *Id.*, at 603. Again, however, the Court did not relax any independent constitutional restrictions on public universities.

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

B

1

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. See *ante*, at 330–332; but see also Rothman, Lipset, & Nevitte, Racial Diversity Reconsidered, 151 Public Interest 25 (2003) (finding that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality). The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, *e. g.*, Flowers & Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen, The Color of Success: African-American College Stu-

dent Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white colleges).

At oral argument in *Gratz* v. *Bollinger*, *ante*, p. 244, counsel for respondents stated that "most every single one of [the HBCs] do have diverse student bodies." Tr. of Oral Arg. in No. 02–516, p. 52. What precisely counsel meant by "diverse" is indeterminate, but it is reported that in 2000 at Morehouse College, one of the most distinguished HBCs in the Nation, only 0.1% of the student body was white, and only 0.2% was Hispanic. College Admissions Data Handbook 2002–2003, p. 613 (43d ed. 2002) (hereinafter College Admissions Data Handbook). And at Mississippi Valley State University, a public HBC, only 1.1% of the freshman class in 2001 was white. *Id.*, at 603. If there is a "critical mass" of whites at these institutions, then "critical mass" is indeed a very small proportion.

The majority grants deference to the Law School's "assessment that diversity will, in fact, yield educational benefits," *ante*, at 328. It follows, therefore, that an HBC's assessment that racial homogeneity will yield educational benefits would similarly be given deference.[7] An HBC's rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the majority's view of the Equal Protection Clause. But see *United States* v. *Fordice*, 505 U. S. 717, 748 (1992) (THOMAS, J., concurring) ("Obviously, a State cannot maintain . . . traditions by closing particular institutions, historically white or historically black, to particular racial groups"). Contained within today's majority opinion is the seed of a new constitutional

[7] For example, North Carolina A&T State University, which is currently 5.4% white, College Admissions Data Handbook 643, could seek to reduce the representation of whites in order to gain additional educational benefits.

justification for a concept I thought long and rightly rejected—racial segregation.

2

Moreover one would think, in light of the Court's decision in *United States* v. *Virginia*, 518 U. S. 515 (1996), that before being given license to use racial discrimination, the Law School would be required to radically reshape its admissions process, even to the point of sacrificing some elements of its character. In *Virginia*, a majority of the Court, without a word about academic freedom, accepted the all-male Virginia Military Institute's (VMI) representation that some changes in its "adversative" method of education would be required with the admission of women, *id.*, at 540, but did not defer to VMI's judgment that these changes would be too great. Instead, the Court concluded that they were "manageable." *Id.*, at 551, n. 19. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. *Id.*, at 533; *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). So in *Virginia*, where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference. Apparently where the status quo being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

C

Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U. S., at 544–545. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education,"[8] Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics.[9] University of California Law and Medical School Enrollments, available at http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," *ante*, at 339, rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true

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[8] Cal. Const., Art. 1, § 31(a), states in full:

"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See *Coalition for Economic Equity* v. *Wilson*, 122 F. 3d 692 (CA9 1997).

[9] Given the incredible deference the Law School receives from the Court, I think it appropriate to indulge in the presumption that Boalt Hall operates without violating California law.

meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot.[10] I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late-19th century. See H. Wechsler, The Qualified Student 16–39 (1977) (hereinafter Qualified Student). Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplemented, and later virtually replaced (at least in the Midwest), the prior regime of rigor-

[10] Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case.

ous subject-matter entrance examinations. *Id.*, at 57–58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see *ante*, at 340, are in many ways the descendents of the certificate system.

Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. See Qualified Student 155–168 (Columbia); H. Broun & G. Britt, Christians Only: A Study in Prejudice 53–54 (1931) (Harvard).

Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that "'[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews.'" Letter from Herbert E. Hawkes, dean of Columbia College, to E. B. Wilson, June 16, 1922 (reprinted in Qualified Student 160–161). In other words, the tests were adopted with full knowledge of their disparate impact. Cf. *DeFunis* v. *Odegaard*, 416 U. S. 312, 335 (1974) *(per curiam)* (Douglas, J., dissenting).

Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools

continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. See Part IV, *supra*. The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test. See App. 156–203 (showing that, between 1995 and 2000, the Law School admitted 37 students—27 of whom were black; 31 of whom were "underrepresented minorities"—with LSAT scores of 150 or lower). And the Law School's *amici* cannot seem to agree on the fundamental question whether the test itself is useful. Compare Brief for Law School Admission Council as *Amicus Curiae* 12 ("LSAT scores . . . are an effective predictor of students' performance in law school") with Brief for Harvard Black Law Students Association et al. as *Amici Curiae* 27 ("Whether [the LSAT] measure[s] objective merit . . . is certainly questionable").

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.

The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of plati-

tudes rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, see *Adarand*, 515 U. S., at 239 (SCALIA, J., concurring in part and concurring in judgment), and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.

Putting aside what I take to be the Court's implicit rejection of *Adarand*'s holding that beneficial and burdensome racial classifications are equally invalid, I must contest the notion that the Law School's discrimination benefits those admitted as a result of it. The Court spends considerable time discussing the impressive display of *amicus* support for the Law School in this case from all corners of society. *Ante*, at 330–331. But nowhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom).

The silence in this case is deafening to those of us who view higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp,

credentialing process. The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. See T. Sowell, Race and Culture 176–177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education"). Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, see University of Michigan Law School Student Handbook 2002–2003, pp. 39–40 (noting the presence of a "diversity plan" for admission to the review), and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities,"[11] instead continuing their social experiments on other people's children.

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[11] For example, there is no recognition by the Law School in this case that even with their racial discrimination in place, black *men* are "underrepresented" at the Law School. See ABA–LSAC Guide 426 (reporting that the Law School has 46 black women and 28 black men). Why does the Law School not also discriminate in favor of black men over black

Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand*, 515 U. S., at 241 (THOMAS, J., concurring in part and concurring in judgment). "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Ibid.*

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. See Brief for Respondent Bollinger et al. 6. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"? *Ante*, at 332.

Finally, the Court's disturbing reference to the importance of the country's law schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," *ibid.*, through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly

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women, given this underrepresentation? The answer is, again, that all the Law School cares about is its own image among know-it-all elites, not solving real problems like the crisis of black male underperformance.

rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant*, 476 U. S., at 276 (plurality opinion); *Croson*, 488 U. S., at 497 (plurality opinion); *id.*, at 520–521 (SCALIA, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color—an endeavor I have previously rejected. See *Holder* v. *Hall*, 512 U. S. 874, 899 (1994) (THOMAS, J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis*, 416 U. S., at 342 (Douglas, J., dissenting).

VII

As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree.

A

First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains that it does not. See Brief for Respondent Bollinger et al. 32, n. 50, and 6–7, n. 7. I join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. *Ante*, at 326–327. Under today's

decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. This is so because preferring black to Hispanic applicants, for instance, does nothing to further the interest recognized by the majority today.[12] Indeed, the majority describes such racial balancing as "patently unconstitutional." *Ante*, at 330. Like the Court, *ante*, at 336, I express no opinion as to whether the Law School's current admissions program runs afoul of this prohibition.

B

The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. *Ante*, at 343. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white

[12] That interest depends on enrolling a "critical mass" of underrepresented minority students, as the majority repeatedly states. *Ante*, at 316, 318, 319, 330, 333, 335, 340; cf. *ante*, at 333 (referring to the unique experience of being a "racial minority," as opposed to being black, or Native American); *ante*, at 335–336 (rejecting argument that the Law School maintains a disguised quota by referring to the total number of enrolled underrepresented minority students, not specific races). As it relates to the Law School's racial discrimination, the Court clearly approves of only one use of race—the distinction between underrepresented minority applicants and those of all other races. A relative preference awarded to a black applicant over, for example, a similarly situated Native American applicant, does not lead to the enrollment of even one more underrepresented minority student, but only balances the races within the "critical mass."

students is shrinking or will be gone in that timeframe.[13] In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black.[14] In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission Council, National Statistical Report (1994) (hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time.[15]

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[13] I agree with JUSTICE GINSBURG that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a "forecast," *post*, at 346 (concurring opinion). I do not agree with JUSTICE GINSBURG's characterization of the Court's holding as an expression of "hope." *Ibid.*

[14] I use a score of 165 as the benchmark here because the Law School feels it is the relevant score range for applicant consideration (absent race discrimination). See Brief for Respondent Bollinger et al. 5; App. to Pet. for Cert. 309a (showing that the median LSAT score for all accepted applicants from 1995–1998 was 168); *id.*, at 310a–311a (showing the median LSAT score for accepted applicants was 167 for the years 1999 and 2000); University of Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm (showing that the median LSAT score for accepted applicants in 2002 was 166).

[15] The majority's non sequitur observation that since 1978 the number of blacks that have scored in these upper ranges on the LSAT has grown, *ante*, at 343, says nothing about current trends. First, black participation in the LSAT until the early 1990's lagged behind black representation in the general population. For instance, in 1984 only 7.3% of law school applicants were black, whereas in 2000 11.3% of law school applicants were black. See LSAC Statistical Reports (1984 and 2000). Today, however, unless blacks were to begin applying to law school in proportions greater than their representation in the general population, the growth in absolute numbers of high scoring blacks should be expected to plateau, and it has.

Indeed, the very existence of racial discrimination of the type practiced by the Law School may impede the narrowing of the LSAT testing gap. An applicant's LSAT score can improve dramatically with preparation, but such preparation is a cost, and there must be sufficient benefits attached to an improved score to justify additional study. Whites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School, and thus whites aspiring to admission at the Law School have every incentive to improve their score to levels above that range. See App. 199 (showing that in 2000, 209 out of 422 white applicants were rejected in this scoring range). Blacks, on the other hand, are nearly guaranteed admission if they score above 155. *Id.*, at 198 (showing that 63 out of 77 black applicants are accepted with LSAT scores above 155). As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score. It is far from certain that the LSAT test-taker's behavior is responsive to the Law School's admissions policies.[16] Nevertheless, the possibility remains that this racial discrimination will help fulfill the bigot's prophecy about black underperformance—just as it confirms the conspiracy theorist's belief that "institutional racism" is at fault for every racial disparity in our society.

I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to "'eliminat[e]

In 1992, 63 black applicants to law school had LSAT scores above 165. In 2000, that number was 65. See LSAC Statistical Reports (1992 and 2000).

[16] I use the LSAT as an example, but the same incentive structure is in place for any admissions criteria, including undergraduate grades, on which minorities are consistently admitted at thresholds significantly lower than whites.

the [perceived] need for any racial or ethnic'" discrimination because the academic credentials gap will still be there. *Ante*, at 343 (quoting Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chicago Bar Rec. 282, 293 (May–June 1977)). The Court defines this time limit in terms of narrow tailoring, see *ante*, at 343, but I believe this arises from its refusal to define rigorously the broad state interest vindicated today. Cf. Part II, *supra.* With these observations, I join the last sentence of Part III of the opinion of the Court.

* * *

For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

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

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. *Ante*, at 333; see also *Fullilove* v. *Klutznick*, 448 U. S. 448, 498 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the govern-

mental purpose"). I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. Brief for Respondent Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

As we have explained many times, "'"[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."'" *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 223 (1995) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion of Powell, J.)). Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race "'fit'" a compelling state interest "with greater precision than any alternative means." *Id.*, at 280, n. 6; *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 299 (1978) (opinion of Powell, J.) ("When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "'[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Adarand*, *supra*, at 226; *Fullilove*, *supra*, at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"). We likewise re-

jected calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Bakke*, *supra*, at 314.

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.

Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.'" *Ante*, at 328 (quoting Brief for Respondent Bollinger et al. i). They contend that a "critical mass" of underrepresented minorities is necessary to further that interest. *Ante*, at 330. Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. See App. to Pet. for Cert. 211a; Brief for Respondent Bollinger et al. 26. These objectives indicate that "critical mass" relates to the size of the student body. *Id.*, at 5 (claiming that the Law School has enrolled "critical mass," or "enough minority students to provide meaningful integration of its classrooms and residence halls"). Respondents further claim that the Law School is achieving "critical mass." *Id.*, at 4 (noting that the Law School's goals have been "greatly furthered by the presence of . . . a 'critical mass' of" minority students in the student body).

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority

group. See, *e. g.*, *id.*, at 49, n. 79 ("The Law School's . . . current policy . . . provide[s] a special commitment to enrolling a 'critical mass' of 'Hispanics' "). But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass."

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case,* how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

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*Indeed, during this 5-year time period, enrollment of Native American students dropped to as low as *three* such students. Any assertion that such a small group constituted a "critical mass" of Native Americans is simply absurd.

These different numbers, moreover, come only as a result of substantially different treatment among the three underrepresented minority groups, as is apparent in an example offered by the Law School and highlighted by the Court: The school asserts that it "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Ante*, at 338 (citing Brief for Respondent Bollinger et al. 10). Specifically, the Law School states that "[s]ixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 [Grade Point Average (GPA)] and a [score of] 159 or higher on the [Law School Admission Test (LSAT)]" while a number of Caucasian and Asian-American applicants with similar or lower scores were admitted. *Ibid.*

Review of the record reveals only 67 such individuals. Of these 67 individuals, *56* were Hispanic, while only 6 were African-American, and only 5 were Native American. This discrepancy reflects a consistent practice. For example, in 2000, 12 Hispanics who scored between a 159–160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. App. 200–201. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. *Id.*, at 198. Likewise, that same year, 16 Hispanics who scored between a 151–153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. *Id.*, at 200–201. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted. *Id.*, at 198.

These statistics have a significant bearing on petitioner's case. Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve "critical mass" or further student body diversity. They certainly have not explained why Hispanics, who they

have said are among "the groups most isolated by racial barriers in our country," should have their admission capped out in this manner. Brief for Respondent Bollinger et al. 50. True, petitioner is neither Hispanic nor Native American. But the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of "critical mass" is simply a sham. Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation.

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Ante*, at 329 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante*, at 330. The Court concludes, however, that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke*, only pays "'[s]ome attention to numbers.'" *Ante*, at 336 (quoting *Bakke*, *supra*, at 323).

But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

Table 1

Year	Number of law school applicants	Number of African-American applicants	% of applicants who were African-American	Number of applicants admitted by the law school	Number of African-American applicants admitted	% of admitted applicants who were African-American
1995	4147	404	***9.7%***	1130	106	***9.4%***
1996	3677	342	***9.3%***	1170	108	***9.2%***
1997	3429	320	***9.3%***	1218	101	***8.3%***
1998	3537	304	***8.6%***	1310	103	***7.9%***
1999	3400	247	***7.3%***	1280	91	***7.1%***
2000	3432	259	***7.5%***	1249	91	***7.3%***

Table 2

Year	Number of law school applicants	Number of Hispanic applicants	% of applicants who were Hispanic	Number of applicants admitted by the law school	Number of Hispanic applicants admitted	% of admitted applicants who were Hispanic
1995	4147	213	***5.1%***	1130	56	***5.0%***
1996	3677	186	***5.1%***	1170	54	***4.6%***
1997	3429	163	***4.8%***	1218	47	***3.9%***
1998	3537	150	***4.2%***	1310	55	***4.2%***
1999	3400	152	***4.5%***	1280	48	***3.8%***
2000	3432	168	***4.9%***	1249	53	***4.2%***

Table 3

Year	Number of law school applicants	Number of Native American applicants	% of applicants who were Native American	Number of applicants admitted by the law school	Number of Native American applicants admitted	% of admitted applicants who were Native American
1995	4147	45	***1.1%***	1130	14	***1.2%***
1996	3677	31	***0.8%***	1170	13	***1.1%***
1997	3429	37	***1.1%***	1218	19	***1.6%***
1998	3537	40	***1.1%***	1310	18	***1.4%***
1999	3400	25	***0.7%***	1280	13	***1.0%***
2000	3432	35	***1.0%***	1249	14	***1.1%***

For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law School would be significantly smaller if the race of each applicant were not considered. See App. to Pet. for Cert. 223a; Brief for Respondent Bollinger et al. 6 (quoting App. to Pet. for Cert. 299a). But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. See Brief for Respondent Bollinger et al. 43, n. 70 (discussing admissions officers' use of "periodic reports" to track "the racial composition of the developing class").

Not only do respondents fail to explain this phenomenon, they attempt to obscure it. See *id.*, at 32, n. 50 ("The Law School's minority enrollment percentages . . . diverged from the percentages in the applicant pool by as much as 17.7% from 1995–2000"). But the divergence between the percentages of underrepresented minorities in the applicant pool and in the *enrolled* classes is not the only relevant comparison. In fact, it may not be the most relevant comparison. The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School's admissions program

that the Court finds appealing, see *ante*, at 337–338, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional." *Ante*, at 330.

Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. We have emphasized that we will consider "the planned duration of the remedy" in determining whether a race-conscious program is constitutional. *Fullilove*, 448 U. S., at 510 (Powell, J., concurring); see also *United States* v. *Paradise*, 480 U. S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . duration of the relief"). Our previous cases have required some limit on the duration of programs such as this because discrimination on the basis of race is invidious.

The Court suggests a possible 25-year limitation on the Law School's current program. See *ante*, at 343. Respondents, on the other hand, remain more ambiguous, explaining that "[t]he Law School of course recognizes that race-conscious programs must have reasonable durational limits, and the Sixth Circuit properly found such a limit in the Law School's resolve to cease considering race when genuine race-neutral alternatives become available." Brief for Respondent Bollinger et al. 32. These discussions of a time

limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny—that a program be limited in time—is casually subverted.

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.

JUSTICE KENNEDY, dissenting.

The separate opinion by Justice Powell in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–291, 315–318 (1978), is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. *Id.*, at 312–314; *ante*, at 329. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among

students can further its educational task, when supported by empirical evidence. *Ante*, at 329–331.

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Bakke*, *supra*, at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). This Court has reaffirmed, subsequent to *Bakke*, the absolute necessity of strict scrutiny when the State uses race as an operative category. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–494 (1989); see *id.*, at 519 (KENNEDY, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts"). The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's (Law

School) assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." *Ante*, at 330; see also *Bakke*, *supra*, at 307 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.

The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota. 137 F. Supp. 2d 821, 851 (ED Mich. 2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987–1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondent Bollinger et al. 49, n. 79.

Year	Percentage of enrolled minority students
1987	12.3%
1988	13.6%
1989	14.4%
1990	13.4%
1991	19.1%
1992	19.8%
1993	14.5%
1994	20.1%
1995	13.5%
1996	13.8%
1997	13.6%
1998	13.8%

The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict

scrutiny requires the Law School to overcome the inference. Whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment. *Bakke*, 438 U. S., at 289 (opinion of Powell, J.). In this respect the Law School program compares unfavorably with the experience of Little Ivy League colleges. *Amicus* Amherst College, for example, informs us that the offers it extended to students of African-American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers total, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. See Brief for Amherst College et al. as *Amici Curiae* 10–11. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.

The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way. *Adarand Constructors*, 515 U. S., at 224. At the very least, the constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool, discussed by THE CHIEF JUSTICE, *ante*, at 380–386, require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither.

The obvious tension between the pursuit of critical mass and the requirement of individual review increased by the end of the admissions season. Most of the decisions where race may decide the outcome are made during this period. See *supra*, at 389. The admissions officers consulted the daily reports which indicated the composition of the incoming class along racial lines. As Dennis Shields, Director of Admissions from 1991 to 1996, stated, "the further [he] went into the [admissions] season the more frequently [he] would

want to look at these [reports] and see the change from day-to-day." These reports would "track exactly where [the Law School] st[ood] at any given time in assembling the class," and so would tell the admissions personnel whether they were short of assembling a critical mass of minority students. Shields generated these reports because the Law School's admissions policy told him the racial makeup of the entering class was "something [he] need[ed] to be concerned about," and so he had "to find a way of tracking what's going on." Deposition of Dennis Shields in Civ. Action No. 97–75928, pp. 129–130, 141 (ED Mich., Dec. 7, 1998).

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.

The Law School made no effort to guard against this danger. It provided no guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students. The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept. The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning. The Little Ivy League colleges, for instance, do not keep ongoing tallies of racial or ethnic composition of their entering students. See Brief for Amherst College et al. as *Amici Curiae* 10.

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of

considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Dean Allan Stillwagon, who directed the Law School's Office of Admissions from 1979 to 1990, explained the difficulties he encountered in defining racial groups entitled to benefit under the Law School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 34 (2002) (citing Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 577–578 (2000); Rubenfeld, Affirmative Action, 107 Yale L. J. 427, 471 (1997)). This is not to suggest the faculty at Michigan or other law schools do not pursue aspirations they consider laudable and consistent with our constitutional

traditions. It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking. Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. *Ante*, at 341–343. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

As to the interpretation that the opinion contains its own self-destruct mechanism, the majority's abandonment of strict scrutiny undermines this objective. Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith. The majority admits as much: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Ante*, at 343 (quoting Brief for Respondent Bollinger et al. 34).

If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes. Other programs do exist which will be more effective in

bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it.

It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

Syllabus

AMERICAN INSURANCE ASSOCIATION ET AL. *v.* GARAMENDI, INSURANCE COMMISSIONER, STATE OF CALIFORNIA

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

No. 02–722. Argued April 23, 2003—Decided June 23, 2003

The Nazi Government of Germany confiscated the value or proceeds of many Jewish life insurance policies issued before and during the Second World War. After the war, even a policy that had escaped confiscation was likely to be dishonored, whether because insurers denied its existence or claimed it had lapsed from unpaid premiums, or because the German Government would not provide heirs with documentation of the policyholder's death. Responsibility as between the government and insurance companies is disputed, but the fact is that the proceeds of many insurance policies issued to Jews before and during the war were paid to the Third Reich or never paid at all. These confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy after the war. Ultimately, the western Allies placed the obligation to provide restitution to victims of Nazi persecution on the new West German Government, which enacted restitution laws and signed agreements with other countries for the compensation of their nationals. Despite a payout of more than 100 billion deutsch marks as of 2000, however, these measures left out many claimants and certain types of claims. After German reunification, class actions for restitution poured into United States courts against companies doing business in Germany during the Nazi era. Protests by defendant companies and their governments prompted the United States Government to take action to try to resolve the matter. Negotiations at the national level produced the German Foundation Agreement, in which Germany agreed to establish a foundation funded with 10 billion deutsch marks contributed equally by the German Government and German companies to compensate the companies' victims during the Nazi era. The President agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government would (1) submit a statement that it would be in this country's foreign policy interests for the foundation to be the exclusive forum and remedy for such claims, and (2) try to get state and local governments to respect the foundation as the exclusive mechanism. As for insurance claims in particular, both countries agreed that the German

Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization whose mission is to negotiate with European insurers to provide information about and settlement of unpaid insurance policies, and which has set up procedures to that end. The German agreement has served as a model for similar agreements with Austria and France.

Meanwhile, California began its own enquiry into the issue, prompting state legislation designed to force payment by defaulting insurers. Among other laws, California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) requires any insurer doing business in the State to disclose information about all policies sold in Europe between 1920 and 1945 by the company or any one "related" to it upon penalty of loss of its state business license. After HVIRA was enacted, the State issued administrative subpoenas against several subsidiaries of European insurance companies participating in the ICHEIC. Immediately, the Federal Government informed California officials that HVIRA would damage the ICHEIC, the only effective means to process quickly and completely unpaid Holocaust era insurance claims, and that HVIRA would possibly derail the German Foundation Agreement. Nevertheless, the state insurance commissioner announced that he would enforce HVIRA to its fullest. Petitioner insurance entities then filed this suit challenging HVIRA's constitutionality. The District Court issued a preliminary injunction against enforcing HVIRA and later granted petitioners summary judgment. The Ninth Circuit reversed, holding, *inter alia*, that HVIRA did not violate the federal foreign affairs power.

Held: California's HVIRA interferes with the President's conduct of the Nation's foreign policy and is therefore preempted. Pp. 413–429.

(a) There is no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy or that generally there is executive authority to decide what that policy should be. In foreign policymaking, the President, not Congress, has the "lead role." *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759, 767. Specifically, the President has authority to make "executive agreements" with other countries, requiring no ratification by the Senate or approval by Congress. See, *e. g.*, *Dames & Moore* v. *Regan*, 453 U. S. 654, 679, 682–683. Making such agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice. Although the executive agreements with Germany, Austria, and France at issue differ from past agreements in that they address claims associated with formerly belligerent states, but against corporations, not the foreign governments, the distinction does not matter. Insisting on a sharp line between public and private

acts in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies. Generally, then, valid executive agreements are fit to preempt state law, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward. But since these agreements include no preemption clause, petitioners' preemption claim rests on the asserted interference with Presidential foreign policy that the agreements embody. The principal support for this claim of preemption is *Zschernig* v. *Miller*, 389 U. S. 429. In invalidating an Oregon statute, the *Zschernig* majority relied on statements in previous cases that are open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict. See, *e. g.*, *id.*, at 432. Justice Harlan, concurring in the result, disagreed on this point, arguing that its implication of preemption of the entire foreign affairs field was at odds with other cases suggesting that, absent positive federal action, States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations. *Id.*, at 459. Whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in *Zschernig* requires no answer here, for even on Justice Harlan's view, shared by the majority, the likelihood that state legislation will produce something more than incidental effect in conflict with the National Government's express foreign policy would require preemption of the state law. See also *United States* v. *Pink*, 315 U. S. 203, 230–231. And since on his view it is legislation within "areas of . . . traditional competence" that gives a State any claim to prevail, 389 U. S., at 459, it is reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted. Pp. 413–420.

(b) There is a sufficiently clear conflict between HVIRA and the President's foreign policy, as expressed both in the executive agreements with Germany, Austria, and France, and in statements by high-level Executive Branch officials, to require preemption here even without any consideration of the State's interest. The account of negotiations toward those agreements shows that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds and disclosure of policy information, in preference to litigation or coercive sanctions. California has taken a different tack: HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require,

employs "a different, state system of economic pressure," and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it. *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 376. Whereas the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding "the coercive power of the national economy" as a tool of diplomacy, *id.*, at 377, HVIRA denies this, by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own disclosure policies. HVIRA thus compromises the President's very capacity to speak for the Nation with one voice in dealing with other governments to resolve claims arising out of World War II. Although the HVIRA disclosure requirement's goal of obtaining compensation for Holocaust victims is also espoused by the National Government, the fact of a common end hardly neutralizes conflicting means. The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. Pp. 420–425.

(c) If any doubt about the clarity of the conflict remained, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, when evaluated in terms of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA. Even if California's underlying concern for its several thousand Holocaust survivors is recognized as a powerful one, the same objective dignifies the National Government's interest in devising its chosen mechanism for voluntary settlements, there being approximately 100,000 survivors in the country, only a small fraction of them in California. As against the federal responsibility, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy. Pp. 425–427.

(d) California seeks to use an iron fist where the President has consistently chosen kid gloves. The efficacy of the one approach versus the other is beside the point, since preemption turns not on the wisdom of the National Government's policy but on the evidence of conflict. Here, the evidence is more than sufficient to demonstrate that HVIRA stands in the way of the President's diplomatic objectives. P. 427.

(e) The Court rejects the State's submission that even if HVIRA does interfere with Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act and the U. S. Holocaust Assets Commission Act of 1998. To begin with, the effect of any congressional authorization on the preemption enquiry is far from clear, but in any event neither statute does the job the State ascribes to it. McCarran-Ferguson's purpose was to limit congressional preemption of

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state insurance laws under the commerce power, whether dormant or exercised, see, *e. g.*, *Department of Treasury* v. *Fabe*, 508 U. S. 491, 499–500, and it cannot plausibly be read to address preemption by executive conduct in foreign affairs. Nor is HVIRA authorized by the Holocaust Commission Act, which set up a Presidential Commission to study Holocaust-era assets that came into the Government's control, § 3(a)(1), and directed the Commission to encourage state insurance commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies doing business in this country after January 30, 1933, § 3(a)(4)(A). The Commission's focus was limited to assets held by the Government, and the Act's reference to the state insurance commissioners' report was expressly limited "to the degree the information is available," § 3(a)(4)(B), which can hardly be read to condone state sanctions interfering with federal efforts to resolve claims. Finally, Congress has done nothing to express disapproval of the President's policy. Given the President's considerable independent authority in this area, Congress's silence cannot be equated with disapproval. Pp. 427–429.

296 F. 3d 832, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SCALIA, and THOMAS, JJ., joined, *post*, p. 430.

Kenneth S. Geller argued the cause for petitioners. With him on the briefs were *John J. Sullivan*, *Stephen M. Shapiro*, *Neil M. Soltman*, *Peter Simshauser*, *William H. Webster*, *Linda Dakin-Grimm*, and *Sally Agel*. *Frederick W. Reif* filed briefs for respondents Gerling Companies urging reversal. With him on the briefs were *Dina G. Daskalakis*, *Keith D. Barrack*, *George L. O'Connell*, and *Timothy P. Grieve*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Acting Solicitor General Clement*, *Assistant Attorney General McCallum*, *Barbara McDowell*, *Mark B. Stern*, *Douglas Hallward-Driemeier*, and *William H. Taft IV*.

Frank Kaplan argued the cause for respondent. With him on the brief were *Jesse J. Contreras*, *Larry G. Simon*, *Andrew W. Stroud*, *Michael D. Ramsey*, and *Leslie Tick*.*

JUSTICE SOUTER delivered the opinion of the Court.

California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA or Act), Cal. Ins. Code Ann. §§ 13800–13807 (West Cum. Supp. 2003), requires any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one "related" to it. The issue here is whether HVIRA interferes with the National Government's conduct of foreign relations. We hold that it does, with the consequence that the state statute is preempted.

I

A

The Nazi Government of Germany engaged not only in genocide and enslavement but theft of Jewish assets, includ-

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States et al. by *Kim Heebner Price* and *Robin S. Conrad;* for the Federal Republic of Germany by *Roger M. Witten;* for the Government of Switzerland by *Stephan E. Becker;* and for Mitsubishi Materials Corp. et al. by *Walter Dellinger*, *John H. Beisner*, *David M. Balabanian*, *Margaret K. Pfeiffer*, *Arne D. Wagner*, and *Paul J. Hall.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *J. Matthew Rodriquez*, Senior Assistant Attorney General, and *Daniel L. Siegel*, Supervising Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.*, of Alabama, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Brian Sandoval* of Nevada, *Peter C. Harvey* of New Jersey, *Eliot Spitzer* of New York, *Jim Petro* of Ohio, *Anabelle Rodríguez* of Puerto Rico, *Greg Abbott* of Texas, and *Christine O. Gregoire* of Washington; for Bet Tzedek Legal Services et al. by *Gregory R. Smith*, *Elizabeth K. Penfil*, *David A. Lash*, and *Martin Mendelsohn;* for the National Association of Insurance Commissioners by *Ross S. Myers;* and for Representative Henry A. Waxman et al. by *Kenneth Chesebro.*

ing the value of insurance policies, and in particular policies of life insurance, a form of savings held by many Jews in Europe before the Second World War. Early on in the Nazi era, loss of livelihood forced Jews to cash in life insurance policies prematurely, only to have the government seize the proceeds of the repurchase, and many who tried to emigrate from Germany were forced to liquidate insurance policies to pay the steep "flight taxes" and other levies imposed by the Third Reich to keep Jewish assets from leaving the country. See G. Feldman, Allianz and the German Insurance Business, 1933–1945, pp. 249–262 (2001). Before long, the Reich began simply seizing the remaining policies outright.[1] In 1941, the 11th Decree of the Reich Citizenship Law declared the confiscation of assets (including insurance policies) of Jews deported to the concentration camps, and two years later the 13th Decree did the same with respect to property of the dead, each decree requiring banks and insurance companies to identify Jewish accounts and transmit the funds to the Reich treasury. *Id.*, at 264–274. After the war, even a policy that had escaped confiscation was likely to be dishonored, whether because insurers denied its existence or claimed it had lapsed from unpaid premiums during the persecution, or because the government would not provide heirs with documentation of the policyholder's death. See M. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 117–122 (2003). Responsibility as between the government and insurance companies is disputed, but at the end

[1] A vivid precursor of the kind of direct confiscation that would become widespread by 1941 was the Reich's seizure of property and casualty insurance proceeds in the aftermath of the November 1938 Kristallnacht, in which Nazi looting and vandalism inflicted damage to Jewish businesses, homes, and synagogues worth nearly 50 million deutsch marks. Days afterward, a Reich decree mandated that all proceeds of all insurance claims arising from the damage be paid directly to the state treasury, an obligation ultimately settled by German insurance companies with the Reich at a mere pittance relative to full value. See Feldman, Allianz and the German Insurance Business, at 190–235.

of the day, the fact is that the value or proceeds of many insurance policies issued to Jews before and during the war were paid to the Reich or never paid at all.

These confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war. At the Potsdam Conference, the United States, Britain, and the Soviet Union took reparations for wartime losses by seizing industrial assets from their respective occupation zones, putting into effect the plan originally envisioned at the Yalta Conference months before. Protocol of Proceedings of the Berlin (Potsdam) Conference, 1945, in 3 Dept. of State, Treaties and Other International Agreements of the United States of America 1776–1949, pp. 1207, 1213–1214 (C. Bevans comp. 1969) (hereinafter Bevans); Report of the Crimea (Yalta) Conference, 1945, in 3 Bevans 1005; Protocol of the Crimea (Yalta) Conference on the Question of the German Reparation in Kind, 1945, in 3 Bevans 1020. A year later, the United States was among the parties to an agreement to share seized assets with other western allies as settlement, as to each signatory nation, of "all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war." Agreement on Reparation from Germany, on the Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, 61 Stat. 3163, Art. 2(A), T. I. A. S. No. 1655 (hereinafter Paris Agreement).

The effect of the Paris Agreement was curtailed, however, and attention to reparations intentionally deferred, when the western Allies moved to end their occupation and reestablish a sovereign Germany as a buffer against Soviet expansion. They worried that continued reparations would cripple the new Federal Republic of Germany economically, and so decided in the London Debt Agreement to put off "[c]onsideration of claims arising out of the second World War by countries which were at war with or were occupied by Germany

during that war, and by nationals of such countries, against the Reich and agencies of the Reich . . . until the final settlement of the problem of reparation." Agreement on German External Debts, Feb. 27, 1953, 4 U. S. T. 443, 449, T. I. A. S. No. 2792. These terms were construed by German courts as postponing resolution of foreign claims against both the German Government and German industry, to await the terms of an ultimate postwar treaty. See Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 Wash. U. L. Q. 795, 813–814, and n. 62 (2002).

In the meantime, the western Allies placed the obligation to provide restitution to victims of Nazi persecution on the new West German Government. See Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U. S. T. 4411, 4452–4484, as amended by Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, [1955] 6 U. S. T. 4117, T. I. A. S. No. 3425. This had previously been a responsibility of the western military governments, which had issued several decrees for the return of property confiscated by the Nazis. See N. Robinson, Restitution Legislation in Germany: A Survey of Enactments (1949); U. S. Military Law Nos. 52 and 59 (reprinted in U. S. Military Government Gazette, Germany, Issue A, p. 24 (June 1, 1946) and Issue G, p. 1 (Nov. 10, 1947)). West Germany enacted its own restitution laws in 1953 and 1956, see Institute of Jewish Affairs, The (West German) Federal Compensation Law (BEG) and its Implementary Regulations (1957), and signed agreements with 16 countries for the compensation of their nationals, including the Luxembourg Agreement with Israel, Sept. 10, 1952, 162 U. N. T. S. 205; see Supplemental Excerpts of Record in No. 01–17023 (CA9) (SER), p. 1244. Despite a payout of more than 100 billion deutsch marks as of 2000, see *ibid.*, these measures left out many claimants and certain types of claims, and when the agreement reunifying East and West

Germany, see Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U. N. T. S. 124, was read by the German courts as lifting the London Debt Agreement's moratorium on Holocaust claims by foreign nationals, class-action lawsuits for restitution poured into United States courts against companies doing business in Germany during the Nazi era. See Neuborne, *supra,* at 796, n. 2, 813–814; see generally Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 Rich. L. Rev. 1 (2000) (describing the flood of lawsuits after 1996).

These suits generated much protest by the defendant companies and their governments, to the point that the Government of the United States took action to try to resolve "the last great compensation related negotiation arising out of World War II." SER 940 (press briefing by Deputy Secretary of Treasury Eizenstat); see S. Eizenstat, Imperfect Justice 208–212 (2003). From the beginning, the Government's position, represented principally by Under Secretary of State (later Deputy Treasury Secretary) Stuart Eizenstat, stressed mediated settlement "as an alternative to endless litigation" promising little relief to aging Holocaust survivors. SER 953 (press conference by Secretary of State Albright). Ensuing negotiations at the national level produced the German Foundation Agreement, signed by President Clinton and German Chancellor Schröder in July 2000, in which Germany agreed to enact legislation establishing a foundation funded with 10 billion deutsch marks contributed equally by the German Government and German companies, to be used to compensate all those "who suffered at the hands of German companies during the National Socialist era." Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 Int'l Legal Materials 1298 (2000).

The willingness of the Germans to create a voluntary compensation fund was conditioned on some expectation of security from lawsuits in United States courts, and after

extended dickering President Clinton put his weight behind two specific measures toward that end. SER 937 (letter from President Clinton to Chancellor Schröder committing to a "mechanism to provide the legal peace desired by the German government and German companies"); see also Eizenstat, *supra*, at 253–258. First, the Government agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." 39 Int'l Legal Materials, at 1303. Though unwilling to guarantee that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," that being an issue for the courts, the Government agreed to tell courts "that U. S. policy interests favor dismissal on any valid legal ground." *Id.*, at 1304. On top of that undertaking, the Government promised to use its "best efforts, in a manner it considers appropriate," to get state and local governments to respect the foundation as the exclusive mechanism. *Id.*, at 1300.[2]

As for insurance claims specifically, both countries agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National

[2] The executive agreement was accompanied by a joint statement signed by the American and German Governments, the Governments of Israel and five Eastern European countries, and the Conference on Jewish Material Claims Against Germany, Inc., "[r]ecognizing that it would be in the participants' interests for the Foundation to be the exclusive remedy and forum" for all Holocaust-era claims against German companies. Excerpt of Record in No. 01–17023 (CA9) (ER), pp. 812–816.

Association of Insurance Commissioners, the organization of American state insurance commissioners. The job of the ICHEIC, chaired by former Secretary of State Eagleburger, includes negotiation with European insurers to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them. It has thus set up procedures for handling demands against participating insurers, including "a reasonable review . . . of the participating companies' files" for production of unpaid policies, "an investigatory process to determine the current status" of insurance policies for which claims are filed, and a "claims and valuation process to settle and pay individual claims," employing "relaxed standards of proof." SER 1236–1237.

In the pact with the United States, Germany stipulated that "insurance claims that come within the scope of the current claims handling procedures adopted by the [ICHEIC] and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." 39 Int'l Legal Materials, at 1299. And in a supplemental agreement formalized in October 2002, the German Foundation agreed to set aside 200 million deutsch marks, to be used for insurance claims approved by the ICHEIC and a portion of the ICHEIC's operating expenses, with another 100 million in reserve if the initial fund should run out. Agreement Concerning Holocaust Era Insurance Claims, in Lodging of Petitioners in *Gerling Global Reinsurance Corp.* v. *Garamendi,* No. 02–733, pp. L–70 to L–71, L–78 to L–79, cert. pending. [REPORTER'S NOTE: See *post*, p. 955.] The foundation also bound itself to contribute 350 million deutsch marks to a "humanitarian fund" administered by the ICHEIC, *id.*, at L–80, and it agreed to work with the German Insurance Association and the German insurers who

had joined the ICHEIC, "with a view to publishing as comprehensive a list as possible of holders of insurance policies issued by German companies who may have been Holocaust victims," *id.*, at L–147. Those efforts, which control release of information in ways that respect German privacy laws limiting publication of business records, have resulted in the recent release of the names of over 360,000 Holocaust victims owning life insurance policies issued by German insurers. See Treaster, Holocaust List Is Unsealed by Insurers, N. Y. Times, Apr. 29, 2003, section A, p. 26, col. 6.

The German Foundation pact has served as a model for similar agreements with Austria and France,[3] and the United States Government continues to pursue comparable agreements with other countries. Reply Brief for Petitioners 6, n. 2.

B

While these international efforts were underway, California's Department of Insurance began its own enquiry into the issue of unpaid claims under Nazi-era insurance policies, prompting state legislation designed to force payment by defaulting insurers. In 1998, the state legislature made it an

[3] Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, Jan. 18, 2001, 2001 WL 416465; Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," 40 Int'l Legal Materials 523 (2001); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, 2001 WL 935261, Annex A, § 2(n). Though the French agreement does not address insurance, the agreement with Austria does. Austria agreed to devote a $25 million fund for payment of claims processed according to the ICHEIC's procedures. See *ibid.* Austria also agreed to "make the lists of Holocaust era policy holders publicly accessible, to the extent available." *Ibid.* The United States Government agreed, in turn, that the settlement fund should be viewed as "the exclusive . . . forum" for the resolution of Holocaust-era claims asserted against the Austrian Government or Austrian companies. 40 Int'l Legal Materials, at 524.

unfair business practice for any insurer operating in the State to "fai[l] to pay any valid claim from Holocaust survivors." Cal. Ins. Code Ann. § 790.15(a) (West Cum. Supp. 2003). The legislature placed "an affirmative duty" on the Department of Insurance "to play an independent role in representing the interests of Holocaust survivors," including an obligation to "gather, review, and analyze the archives of insurers . . . to provide for research and investigation" into unpaid insurance claims. §§ 12967(a)(1), (2).

State legislative efforts culminated the next year with passage of Assembly Bill No. 600, 1999 Cal. Stats. ch. 827, the first section of which amended the State's Code of Civil Procedure to allow state residents to sue in state court on insurance claims based on acts perpetrated in the Holocaust and extended the governing statute of limitations to December 31, 2010. Cal. Civ. Proc. Code Ann. § 354.5 (West Cum. Supp. 2003). The section of the bill codified as HVIRA, at issue here,[4] requires "[a]ny insurer currently doing business in the state" to disclose the details of "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" issued "to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code Ann. § 13804(a) (West Cum. Supp. 2003). The duty is to make disclosure not only about policies the particular insurer sold, but also about those sold by any "related company," *ibid.*, including "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer," § 13802(b),[5] whether or not the companies were related dur-

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[4] Challenges to Cal. Civ. Proc. Code Ann. § 354.5 (West Cum. Supp. 2003) and Cal. Ins. Code Ann. § 790.15 (West Cum. Supp. 2003) were dismissed by the District Court for lack of standing, a ruling that was not appealed. See *Gerling Global Reinsurance Corp. of America* v. *Low*, 240 F. 3d 739, 742–743 (CA9 2001).

[5] These terms are further defined in the commissioner's regulations. Cal. Code Regs., Tit. 10, § 2278.1 (1996). An "affiliate" company is one that "directly, or indirectly, through one or more intermediaries, controls,

ing the time when the policies subject to disclosure were sold, § 13804(a). Nor is the obligation restricted to policies sold to "Holocaust victims" as defined in the Act, § 13802(a); it covers policies sold to anyone during that time, § 13804(a). The insurer must report the current status of each policy, the city of origin, domicile, or address of each policyholder, and the names of the beneficiaries, § 13804(a), all of which is to be put in a central registry open to the public, § 13803. The mandatory penalty for default is suspension of the company's license to do business in the State, § 13806, and there are misdemeanor criminal sanctions for falsehood in certain required representations about whether and to whom the proceeds of each policy have been distributed, § 13804(b).

HVIRA was meant to enhance enforcement of both the unfair business practice provision (§ 790.15) and the provision for suit on the policies in question (§ 354.5) by "ensur[ing] that any involvement [that licensed California insurers] or their related companies may have had with insurance policies of Holocaust victims are *[sic]* disclosed to the state." § 13801(e); see *ibid.* (HVIRA is designed to "ensure the rapid resolution" of unpaid insurance claims, "eliminating the further victimization of these policyholders and their families"); Excerpt of Record in No. 01–17023 (CA9) (ER), p. 994 (California Senate Committee on Insurance report) (HVIRA was proposed to "ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims"). While the legislature acknowledged that "[t]he international Jewish community is in active

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or is controlled by, or is under common control with, the [insurer]." Cal. Ins. Code Ann. § 1215(a) (West 1993) (cross-referenced in § 2278.1(e)). A "[m]anaging [g]eneral [a]gent" is a company that "negotiates and binds ceding reinsurance contracts on behalf of an insurer or manages all or part of the insurance business of an insurer." § 769.819(c) (cross-referenced in § 2278.1(c)). A "reinsurer" is "a parent, subsidiary or affiliate of the insurer that provides reinsurance." Cal. Code Regs., Tit. 10, § 2278.1(i) (1996).

negotiations with responsible insurance companies through the [ICHEIC] to resolve all outstanding insurance claims issues," it still thought the Act "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." § 13801(f).

After HVIRA was enacted, administrative subpoenas were issued against several subsidiaries of European insurance companies participating in the ICHEIC. See, *e. g.*, SER 785, 791. Immediately, in November 1999, Deputy Secretary Eizenstat wrote to the insurance commissioner of California that although HVIRA "reflects a genuine commitment to justice for Holocaust victims and their families, it has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the [ICHEIC]." *Id.*, at 975. The Deputy Secretary said that "actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors," and he also noted that ICHEIC Chairman Eagleburger had expressed his opposition to "sanctions and other pressures brought by California on companies with whom he is obtaining real cooperation." *Id.*, at 976. The same day, Deputy Secretary Eizenstat also wrote to California's Governor making the same points, and stressing that HVIRA would possibly derail the German Foundation Agreement: "Clearly, for this deal to work . . . German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." *Id.*, at 970. These expressions of the National Government's concern proved to be of no consequence, for the state commissioner announced at an investigatory hearing in December 1999 that he would enforce HVIRA to its

fullest, requiring the affected insurers to make the disclosures, leave the State voluntarily, or lose their licenses. ER 1097.

II

After this ultimatum, the petitioners here, several American and European insurance companies and the American Insurance Association (a national trade association), filed suit for injunctive relief against respondent insurance commissioner of California, challenging the constitutionality of HVIRA. The District Court issued a preliminary injunction against enforcing the Act, reflecting its probability judgment that "HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause." App. to Pet. for Cert. 110a. On appeal, the Ninth Circuit rejected these grounds for questioning the Act but left the preliminary injunction in place until the District Court could consider whether petitioners were likely to succeed on their due process claim. *Gerling Global Reinsurance Corp. of America* v. *Low*, 240 F. 3d 739, 754 (2001).

On remand, the District Court addressed two points. Although it held the Act to be within the State's "legislative jurisdiction," as it applied only to insurers licensed to do business in the State, the District Court granted summary judgment to the petitioners on the ground of a procedural due process violation in "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling Global Reinsurance Corp. of America* v. *Low*, 186 F. Supp. 2d 1099, 1108, 1113 (ED Cal. 2001). In a second appeal, the same panel of the Ninth Circuit reversed again. While it agreed that the Act was not beyond the State's legislative authority, the Court of Appeals rejected the conclusion that procedural due process required an opportunity for insurers to raise an impossibility excuse for noncompliance with the law, 296 F. 3d 832, 845–848 (2002), and it reaffirmed its prior ruling that

the Act violated neither the foreign affairs nor the foreign commerce powers, *id.*, at 849. Given the importance of the issue,[6] we granted certiorari, 537 U. S. 1100 (2003), and now reverse.[7]

III

The principal argument for preemption made by petitioners and the United States as *amicus curiae* is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France. The major premises of the argument, at least, are beyond dispute. There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 427, n. 25 (1964); see *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363,

[6] Several other States have passed laws similar to HVIRA. See Holocaust Victims Insurance Act, Fla. Stat. § 626.9543 (Cum. Supp. 2003); Holocaust Victims Insurance Act, Md. Ins. Code Ann. §§ 28–101 to 28–110 (2002); Holocaust Victims Insurance Relief Act of 2000, Minn. Stat. § 60A.053 (Cum. Supp. 2003); Holocaust Victims Insurance Act of 1998, N. Y. Ins. Law §§ 2701–2711 (Consol. 2000); Holocaust Victims Insurance Relief Act of 1999, Wash. Rev. Code §§ 48.104.010–48.104.903 (2003); see also Ariz. Rev. Stat. Ann. § 20–490 (West Cum. Supp. 2003); Tex. Ins. Code Ann., Art. 21.74 (Vernon 2003). And similar bills have been proposed in other States. See, *e. g.*, Mass. Senate Bill No. 843 (Jan. 1, 2003).

[7] Two petitions for certiorari were filed, one by the petitioners in this case (No. 02–722), and one, raising additional issues, by the Gerling Companies (No. 02–733), which were also appellees below. Our grant of certiorari in No. 02–722 encompassed three of the questions addressed by the Ninth Circuit: whether HVIRA intrudes on the federal foreign affairs power, violates the self-executing element of the Foreign Commerce Clause, or exceeds the State's "legislative jurisdiction." Pet. for Cert. I. Because we hold that HVIRA is preempted under the foreign affairs doctrine, we have no reason to address the other questions.

381–382, n. 16 (2000) ("'[T]he peace of the WHOLE ought not to be left at the disposal of a PART'" (quoting The Federalist No. 80, pp. 535–536 (J. Cooke ed. 1961) (A. Hamilton))); *Id.*, No. 44, at 299 (J. Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"); *Id.*, No. 42, at 279 (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"); see also *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759, 769 (1972) (plurality opinion) (act of state doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations"); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 449 (1979) (negative Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries (internal quotation marks omitted)).

Nor is there any question generally that there is executive authority to decide what that policy should be. Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring). While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act. See, *e. g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *Youngstown*, *supra*, at 635–636, n. 2 (Jackson, J., concurring in judgment and opinion of Court) (the President can "act in external affairs without congressional authority" (citing *United States* v. *Curtiss-*

Wright Export Corp., 299 U. S. 304 (1936))); *First Nat. City Bank* v. *Banco Nacional de Cuba*, *supra*, at 767 (the President has "the lead role . . . in foreign policy" (citing *Sabbatino*, *supra*)); *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 188 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs").

At a more specific level, our cases have recognized that the President has authority to make "executive agreements" with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic. See *Dames & Moore* v. *Regan*, 453 U. S. 654, 679, 682–683 (1981); *United States* v. *Pink*, 315 U. S. 203, 223, 230 (1942); *United States* v. *Belmont*, 301 U. S. 324, 330–331 (1937); see also L. Henkin, Foreign Affairs and the United States Constitution 219, 496, n. 163 (2d ed. 1996) ("Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U. S. foreign relations"). Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799, when the Adams administration settled demands against the Dutch Government by American citizens who lost their cargo when Dutch privateers overtook the schooner *Wilmington Packet*. See *Dames & Moore*, *supra*, at 679–680, and n. 8; 5 Dept. of State, Treaties and Other International Acts of the United States 1075, 1078–1079 (H. Miller ed. 1937). Given the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history, the conclusion "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable." *Pink*, *supra*, at 240 (Frankfurter, J., concurring); see 315 U. S., at 223–225 (opinion of the Court); *Belmont*, *supra*, at 330–331; *Dames & Moore*, *supra*, at 682.

The executive agreements at issue here do differ in one respect from those just mentioned insofar as they address

claims associated with formerly belligerent states, but against corporations, not the foreign governments. But the distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy, and three of the postwar settlements dealing with reparations implicating private parties were made by the Executive alone.[8] Acceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience. As shown by the history of insurance confiscation mentioned earlier, untangling government policy from private initiative during wartime is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments. While a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies. Cf. *Pink*, *supra*, at 234–242 (Frankfurter, J., concurring) (noting the unsoundness of transplanting "judicial subtleties" of domestic law into "the solution of analogous problems between friendly nations").

Generally, then, valid executive agreements are fit to preempt state law, just as treaties are,[9] and if the agreements

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[8] The Yalta and Potsdam Agreements envisioning dismantling of Germany's industrial assets, public and private, and the followup Paris Agreement aspiring to settle the claims of western nationals against the German Government and private agencies were made as executive agreements. See *supra*, at 403 (citing agreements); see also L. Margolis, Executive Agreements and Presidential Power in Foreign Policy 15–16 (1986).

[9] Subject, that is, to the Constitution's guarantees of individual rights. See *Reid* v. *Covert*, 354 U. S. 1, 15–19 (1957); *Boos* v. *Barry*, 485 U. S. 312, 324 (1988). Even Justice Sutherland's reading of the National Government's "inherent" foreign affairs power in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), contained the caveat that the power,

here had expressly preempted laws like HVIRA, the issue would be straightforward. See *Belmont*, *supra*, at 327, 331; *Pink*, *supra*, at 223, 230–231. But petitioners and the United States as *amicus curiae* both have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody. Reliance is placed on our decision in *Zschernig* v. *Miller*, 389 U. S. 429 (1968).

Zschernig dealt with an Oregon probate statute prohibiting inheritance by a nonresident alien, absent showings that the foreign heir would take the property "without confiscation" by his home country and that American citizens would enjoy reciprocal rights of inheritance there. *Id.*, at 430–431. Two decades earlier, *Clark* v. *Allen*, 331 U. S. 503 (1947), had held that a similar California reciprocity law "did not on its face intrude on the federal domain," *Zschernig*, *supra*, at 432, but by the time Zschernig (an East German resident) brought his challenge, it was clear that the Oregon law in practice had invited "minute inquiries concerning the actual administration of foreign law," 389 U. S., at 435, and so was providing occasions for state judges to disparage certain foreign regimes, employing the language of the anti-Communism prevalent here at the height of the Cold War, see *id.*, at 440 (the Oregon law had made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own"). Although the Solicitor General, speaking for the State Department, denied that the state statute "unduly interfere[d] with the United States' conduct of foreign relations," *id.*, at 434 (internal quotation marks omitted), the Court was not deterred from exercising its own judgment to invalidate the law as an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress," *id.*, at 432.

"like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.*, at 320.

The *Zschernig* majority relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict. The Court cited the pronouncement in *Hines* v. *Davidowitz*, 312 U. S. 52, 63 (1941), that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." See 389 U. S., at 432; *id.*, at 442–443 (Stewart, J., concurring) (setting out the foregoing quotation). Likewise, Justice Stewart's concurring opinion viewed the Oregon statute as intruding "into a domain of exclusively federal competence." *Id.*, at 442; see also *Belmont*, 301 U. S., at 331 ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states" (citing *Curtiss-Wright Export Corp.*, 299 U. S., at 316 *et seq.*)).

Justice Harlan, joined substantially by Justice White, disagreed with the *Zschernig* majority on this point, arguing that its implication of preemption of the entire field of foreign affairs was at odds with some other cases suggesting that in the absence of positive federal action "the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." 389 U. S., at 459 (opinion concurring in result) (citing cases); see *id.*, at 462 (White, J., dissenting).[10] Thus, for Justice Harlan it was crucial that the challenge to the Oregon

[10] Justice Harlan concurred in the majority's result because he would have found the Oregon statute preempted by a 1923 treaty with Germany. 389 U. S., at 457. This required overruling the Court's construction of that treaty in *Clark* v. *Allen*, 331 U. S. 503 (1947), which Justice White, in dissent, declined to do, 389 U. S., at 462.

statute presented no evidence of a "specific interest of the Federal Government which might be interfered with" by the law. *Id.*, at 459 (opinion concurring in result); see *id.*, at 461 (finding "no evidence of adverse effect in the record"). He would, however, have found preemption in a case of "conflicting federal policy," see *id.*, at 458–459, and on this point the majority and Justices Harlan and White basically agreed: state laws "must give way if they impair the effective exercise of the Nation's foreign policy," *id.*, at 440 (opinion of the Court). See also *Pink*, 315 U. S., at 230–231 ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement"); *id.*, at 240 (Frankfurter, J., concurring) (state law may not be allowed to "interfer[e] with the conduct of our foreign relations by the Executive").

It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions,[11] but the question requires

[11] The two positions can be seen as complementary. If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, *e. g.*, *Hines* v. *Davidowitz*, 312 U. S. 52, 63 (1941). Where, however, a State has acted within what Justice Harlan called its "traditional competence," 389 U. S., at 459, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question. Cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) (congressional occupation of the field is not to be presumed "in a field which the States have traditionally occupied"); *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507–508 (1988) ("In an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption").

no answer here. For even on Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law. And since on his view it is legislation within "areas of . . . traditional competence" that gives a State any claim to prevail, 389 U. S., at 459, it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted. Cf. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 768–769 (1945) (under negative Commerce Clause, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved"); Henkin, Foreign Affairs and the United States Constitution, at 164 (suggesting a test that "balance[s] the state's interest in a regulation against the impact on U. S. foreign relations"); Maier, Preemption of State Law: A Recommended Analysis, 83 Am. J. Int'l L. 832, 834 (1989) (similar). Judged by these standards, we think petitioners and the Government have demonstrated a sufficiently clear conflict to require finding preemption here.

IV

A

To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, *Pink*, *supra*, at 225, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries, *Dames & Moore*, 453 U. S., at 679. The issue of

restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.

The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two. The foregoing account of negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions. See also, *e. g.*, Hearings on H. R. 2693 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (statement of Ambassador Randolph M. Bell that it is the "policy of the U. S. Government" "to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation"); Hearings on the Status of Insurance Restitution for Holocaust Victims and the Heirs before the House Committee on Government Reform, 107th Cong., 1st Sess., 77 (2001) (statement of Ambassador J. D. Bindenagel to the same effect). As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information.

See German Foundation Agreement, 39 Int'l Legal Materials, at 1299, 1303 (declaring the German Foundation to be the "exclusive forum" for demands against German companies and agreeing to have insurance claims resolved under procedures developed through negotiation with the ICHEIC); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, 2001 WL 935261, Annex A, § 2(n) (same for Austria). This position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch, as mentioned already, *supra*, at 411. See also, *e. g.*, Hearing before the Committee on House Banking and Financial Services, 106th Cong., 2d Sess., 173 (2000) (Deputy Secretary Eizenstat statement that "[t]he U. S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era"); Hearings on H. R. 2693, at 24 (statement by Ambassador Bell to the same effect); Hearing on the Legacies of the Holocaust before the Senate Committee on Foreign Relations, 106th Cong., 2d Sess., 23 (2000) (Eizenstat testimony that a company's participation in the ICHEIC should give it "'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period").[12] The approach taken serves to resolve the several competing matters of national concern apparent in the German Foundation Agreement: the national interest in maintaining amica-

[12] In *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 328–330 (1994), we declined to give policy statements by Executive Branch officials conclusive weight as against an opposing congressional policy in determining whether California's "worldwide combined reporting" tax method violated the Foreign Commerce Clause. The reason, we said, is that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.*, at 329 (quoting Art. I, § 8, cl. 3). As we have discussed, however, in the field of foreign policy the President has the "lead role." *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759, 767 (1972).

ble relationships with current European allies; survivors' interests in a "fair and prompt" but nonadversarial resolution of their claims so as to "bring some measure of justice . . . in their lifetimes"; and the companies' interest in securing "legal peace" when they settle claims in this fashion. 39 Int'l Legal Materials, at 1304. As a way for dealing with insurance claims, moreover, the voluntary scheme protects the companies' ability to abide by their own countries' domestic privacy laws limiting disclosure of policy information. See Brief for Federal Republic of Germany as *Amicus Curiae* 12–13.[13]

California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail. The situation created by the California legislation calls to mind the impact of the Massachusetts Burma law on the effective exercise of the President's power, as recounted in the statutory preemption case, *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363 (2000). HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, employs "a different, state system of economic pressure," and in doing so undercuts the Presi-

[13] The dissent would discount the executive agreements as evidence of the Government's foreign policy governing disclosure, saying they "do not refer to state disclosure laws specifically, or even to information disclosure generally." *Post*, at 441 (opinion of GINSBURG, J.). But this assertion gives short shrift to the agreements' express endorsement of the ICHEIC's voluntary mechanism, which encompasses production of policy information, not just actual payment of unpaid claims. See *supra*, at 406–407. The dissent would also dismiss the other Executive Branch expressions of the Government's policy, see *supra*, at 411, 422, insisting on nothing short of a formal statement by the President himself, see *post*, at 441–443. But there is no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is no apparent reason for adopting the dissent's "nondelegation" rule to apply within the Executive Branch.

dent's diplomatic discretion and the choice he has made exercising it. *Id.*, at 376. Whereas the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding "the coercive power of the national economy" as a tool of diplomacy, *id.*, at 377, HVIRA denies this, by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure. "Quite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Ibid.* (citing *Dames & Moore*, 453 U. S., at 673). The law thus "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" to resolve claims against European companies arising out of World War II. 530 U. S., at 381.[14]

Crosby's facts are replicated again in the way HVIRA threatens to frustrate the operation of the particular mechanism the President has chosen. The letters from Deputy Secretary Eizenstat to California officials show well enough how the portent of further litigation and sanctions has in fact placed the Government at a disadvantage in obtaining practical results from persuading "foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC." Brief for United States as *Amicus Curiae* 15; see also SER 1267, 1272 (Joint Statement with Switzerland noting the "potentially disruptive and counterproductive effects" of laws like HVIRA and promising effort by

[14] It is true that the President in this case is acting without express congressional authority, and thus does not have the "plenitude of Executive authority" that "controll[ed] the issue of preemption" in *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 376 (2000). But in *Crosby* we were careful to note that the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, *id.*, at 381, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.

the United States to call on state legislatures "to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers"). In addition to thwarting the Government's policy of repose for companies that pay through the ICHEIC, California's indiscriminate disclosure provisions place a handicap on the ICHEIC's effectiveness (and raise a further irritant to the European allies) by undercutting European privacy protections. See ER 1182, 3131 (opinions of the German Government that public disclosure of all European insurance policies "is not permissible" under German privacy law); Brief for United States as *Amicus Curiae* 18 (noting protests from the German and Swiss Governments). It is true, of course, as it is probably true of all elements of HVIRA, that the disclosure requirement's object of obtaining compensation for Holocaust victims is a goal espoused by the National Government as well. But "[t]he fact of a common end hardly neutralizes conflicting means," *Crosby*, *supra*, at 379, and here HVIRA is an obstacle to the success of the National Government's chosen "calibration of force" in dealing with the Europeans using a voluntary approach, 530 U. S., at 380.

B

The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.

The commissioner would justify HVIRA's ambitious disclosure requirement as protecting "legitimate consumer protection interests" in knowing which insurers have failed to pay insurance claims. Brief for Respondent 1, 42–44. But, quite unlike a generally applicable "blue sky" law, HVIRA

effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago. Cal. Ins. Code Ann. § 13804(a) (West Cum. Supp. 2003); see also § 790.15(a) (mandating license suspension only for "fail[ure] to pay any valid claim from Holocaust survivors"). Limiting the public disclosure requirement to these policies raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State.

Indeed, there is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State. § 13801(d) (legislative finding that roughly 5,600 documented Holocaust survivors reside in California). But this fact does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one. "Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance." *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 820 (1985); see *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 311 (1981) ("[A] postoccurrence change of residence to the forum State—standing alone—[i]s insufficient to justify application of forum law").

But should the general standard not be displaced, and the State's interest recognized as a powerful one, by virtue of the fact that California seeks to vindicate the claims of Holocaust survivors? The answer lies in recalling that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements, there being about 100,000 survivors in the country, only a small fraction of them in California. ER 870 (press release of insurance commissioner of California); Bazyler, 34 Rich. L. Rev., at 8, n. 11. As against the responsibility of the United States of America, the humanity underlying the

state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.

C

The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European Allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives." *Crosby*, *supra*, at 386.

V

The State's remaining submission is that even if HVIRA does interfere with Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act, 59 Stat. 33, ch. 20, 15 U. S. C. §§ 1011–1015, and the more recent U. S. Holocaust Assets Commission Act of 1998 (Holocaust Commission Act), 112 Stat. 611, note following 22 U. S. C. § 1621. There is, however, no need to consider the possible significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy, cf. generally *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S., at 637–638 (Jackson, J., concurring in judgment and opinion of Court), for neither statute does the job the commissioner ascribes to it.

The provisions of the McCarran-Ferguson Act said to be relevant here specify that "[t]he business of insurance" shall be recognized as a subject of state regulation, 15 U. S. C.

§ 1012(a), which will be good against preemption by federal legislation unless that legislation "specifically relates to the business of insurance," § 1012(b); see also § 1011 (policy behind § 1012 is that "continued regulation and taxation by the several States of the business of insurance is in the public interest" and "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"). As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised. Compare *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429–430 (1946), with *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944); see *Department of Treasury* v. *Fabe*, 508 U. S. 491, 499–500 (1993). Quite apart, then, from any doubt whether HVIRA would qualify as regulating "the business of insurance" given its tangential relation to present-day insuring in the State, see *FTC* v. *Travelers Health Assn.*, 362 U. S. 293, 300–301 (1960) (McCarran-Ferguson was not intended to allow a State to "regulate activities carried on beyond its own borders"), a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.

Nor does the Holocaust Commission Act authorize HVIRA. That Act set up a Presidential Commission to "study and develop a historical record of the collection and disposition" of Holocaust-era assets that "came into the possession or control of the Federal Government." Pub. L. 105–186, § 3(a)(1), 112 Stat. 612. For this purpose, Congress directed the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the

United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 613. These provisions are no help to HVIRA. The Commission's focus was limited to assets in the possession of the Government, and if anything, the federal Act assumed it was the National Government's responsibility to deal with returning those assets. See § 3(d), 112 Stat. 614 (President to collect recommendations from the commission and submit a suggested plan for "legislative, administrative, or other action" to Congress). In any event, the federal Act's reference to the state insurance commissioners as compiling information was expressly limited "to the degree the information is available," § 3(a)(4)(B), 112 Stat. 613, a proviso that can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims.

Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law. See H. R. 1210, 108th Cong., 1st Sess. (2003); S. 972, 108th Cong., 1st Sess. (2003); H. R. 2693, 107th Cong., 1st Sess. (2001); H. R. 126, 106th Cong., 1st Sess. (1999).

In sum, Congress has not acted on the matter addressed here. Given the President's independent authority "in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval." *Haig* v. *Agee*, 453 U. S. 280, 291 (1981).

VI

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

So ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Responding to Holocaust victims' and their descendents' long-frustrated efforts to collect unpaid insurance proceeds, California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code Ann. § 13800 *et seq.* (West Cum. Supp. 2003), requires insurance companies operating in the State to disclose certain information about insurance policies they or their affiliates wrote in Europe between 1920 and 1945. In recent years, the Executive Branch of the Federal Government has become more visible in this area, undertaking foreign policy initiatives aimed at resolving Holocaust-era insurance claims. Although the federal approach differs from California's, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA. Absent a clear statement aimed at disclosure requirements by the "one voice" to which courts properly defer in matters of foreign affairs, I would leave intact California's enactment.

I

As the Court observes, *ante*, at 401–402, and n. 1, the Nazi regimentation of inhumanity we characterize as the Holocaust, marked most horrifically by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews. For insurance policies issued in Germany and other countries under Nazi control, historical evidence bears out, the combined forces of the German Government and the insurance industry engaged in larcenous takings of gigantic proportions. For example, insurance policies covered many of the Jewish homes and businesses destroyed in the state-sponsored pogrom known as Kristallnacht. By order of the Nazi regime, claims arising out of the officially enabled destruction were made payable not to the insured parties, but to the State. M. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 114 (2003). In what one historian called a "charade

concocted by insurers and ministerial officials," insurers satisfied property loss claims by paying the State only a fraction of their full value. G. Feldman, Allianz and the German Insurance Business, 1933–1945, p. 227 (2001); see Bazyler, *supra*, at 114; App. 27–28 (declaration of Rabbi Abraham Cooper, Assoc. Dean, Simon Wiesenthal Center) ("There is documentary evidence that the insurance companies paid only one-half of the Jewish insurance proceeds to the Reich and kept the other half for themselves.").

The Court depicts Allied diplomacy after World War II as aimed in part at settling confiscated and unpaid insurance claims. *Ante*, at 403. But the multilateral negotiations that produced the Potsdam, Yalta, and like accords failed to achieve any global resolution of such claims. European insurers, encountering no official compulsion, were themselves scarcely inclined to settle claims; turning claimants away, they relied on the absence of formal documentation and other technical infirmities that legions of Holocaust survivors were in no position to remedy. See, *e. g.*, Hearings on H. R. 2693 before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 14–15 (2002) (statement of Rep. Waxman) ("Some survivors were rejected because they could not produce death certificates for loved ones who perished in Nazi concentration camps. Other insurance companies took advantage of the fact that claimants had no policy documents to prove their policy existed."). For over five decades, untold Holocaust-era insurance claims went unpaid. *Id.*, at 38 (statement of Leslie Tick, California Dept. of Insurance).

In the late 1990's, litigation in American courts provided a spur to action. See Bazyler, *supra*, at xi; Feldman, *supra*, at vii; Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 Wash. U. L. Q. 795, 796 (2002). Holocaust survivors and their descendents initiated class-action suits against German and

other European firms seeking compensation for, *inter alia*, the confiscation of Jewish bank assets, the use of Jewish slave labor, and the failure to pay Jewish insurance claims. See generally Bazyler, *supra*, at 1–171.

In the insurance industry, the litigation propelled a number of European companies to agree on a framework for resolving unpaid claims outside the courts. This concord prompted the 1998 creation of the International Commission on Holocaust Era Insurance Claims (ICHEIC). A voluntary claims settlement organization, ICHEIC comprises several European insurers, Jewish and Holocaust survivor organizations, the State of Israel, and this country's National Association of Insurance Commissioners. See S. Eizenstat, Imperfect Justice 266 (2003); Bazyler, *supra*, at 132.

As the Court observes, *ante*, at 407, ICHEIC has formulated procedures for the filing, investigation, valuation, and resolution of Holocaust-era insurance claims. At least until very recently, however, ICHEIC's progress has been slow and insecure. See *In re Assicurazioni Generali S. p. A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 358 (SDNY 2002) (quoting a 2001 press account describing ICHEIC as having "repeatedly been at the point of collapse since its inception in 1998"). Initially, ICHEIC's insurance company members represented little more than one-third of the Holocaust-era insurance market. See App. 32 (declaration of Leslie Tick, California Dept. of Insurance) ("The five insurance company members of the ICHEIC represent approximately 35.5% of the pre-World War II European insurance market."); Eizenstat, *supra*, at 268 (despite repeated assurances that *all* German insurance companies would join ICHEIC, "[t]hey never have to this day"). Petitioners note that participation in ICHEIC has expanded in the past year, see Reply Brief 8–9, but it remains unclear whether ICHEIC does now or will ever encompass all relevant insurers.

Moreover, ICHEIC has thus far settled only a tiny proportion of the claims it has received. See Eizenstat, *supra*, at

267 ("ICHEIC's administrative failings led to few claims paid and large costs."). Evidence submitted in a series of class actions filed against Italian insurer Generali indicated that by November 2001, ICHEIC had resolved only 797 of 77,000 claims. See *In re Assicurazioni Generali*, 228 F. Supp. 2d, at 357. The latest reports show only modest increases. See Treaster, Holocaust List Is Unsealed by Insurers, N. Y. Times, Apr. 29, 2003, section A, p. 26, col. 6 ("In more than four years of operation [ICHEIC] has offered $38.2 million—or just short of the $40 million it had spent on expenses as of 18 months ago—to 3,006 claimants.").

Finally, although ICHEIC has directed its members to publish lists of unpaid Holocaust-era policies, that nonbinding directive had not yielded significant compliance at the time this case reached the Court. See Brief for Respondent 10; Bazyler, Holocaust Justice, at 132 ("Using the ICHEIC process, the European insurers have been able to . . . avoid revealing the names of possible claim holders."). Shortly after oral argument, ICHEIC-participating German insurers made more substantial disclosures. See N. Y. Times, *supra*, at 26 (list of 363,232 names published in April 2003). But other insurers have been less forthcoming. For a prime example, Generali—which may have sold more life insurance and annuity policies in Eastern Europe during the Holocaust than any other company, see Bazyler, *supra*, at 113—reportedly maintains a 340,000-name list of persons to whom it sold insurance between 1918 and 1945, but has refused to disclose the bulk of the information on the list. See App. 37–38 (declaration of Leslie Tick, California Dept. of Insurance); Brief for Respondent 5.

II

A

California's disclosure law, the HVIRA, was enacted a year after ICHEIC's formation. Observing that at least 5,600 documented Holocaust survivors reside in California,

Cal. Ins. Code Ann. § 13801(d) (West Cum. Supp. 2003), the HVIRA declares that "[i]nsurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims [is] disclosed to the state," § 13801(e). The HVIRA accordingly requires insurance companies doing business in California to disclose information concerning insurance policies they or their affiliates sold in Europe between 1920 and 1945, § 13804(a), and directs California's Insurance Commissioner to store the information in a publicly accessible "Holocaust Era Insurance Registry," § 13803. The Commissioner is further directed to suspend the license of any insurer that fails to comply with the HVIRA's reporting requirements. § 13806.

These measures, the HVIRA declares, are "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." § 13801(f). Information published in the HVIRA's registry could, for example, reveal to a Holocaust survivor residing in California the existence of a viable claim, which she could then present to ICHEIC for resolution.[1]

The Court refers, *ante*, at 408–409, 426, to a number of other California statutory provisions enabling the litigation

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[1] In addition, California may deem an insurer's or its affiliate's continuing failure to resolve Holocaust-era claims relevant marketplace information for California consumers. See Brief for Respondent 42–44; Brief for National Association of Insurance Commissioners as *Amicus Curiae* 11–13. The Court discounts the HVIRA's pursuit of this objective, stressing that the HVIRA covers only certain policies issued in Europe more than 50 years ago. *Ante*, at 425–426. But States have broad authority to regulate the insurance industry, *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 653–655 (1981), and a State does not exceed that authority by assigning special significance to an insurer's treatment of claims arising out of an era in which government and industry collaborated to rob countless Holocaust victims of their property.

of Holocaust-era insurance claims in California courts. Those provisions, it bears emphasis, are not at issue here. The HVIRA imposes no duty to pay any claim, nor does it authorize litigation on any claim. It mandates only information *disclosure,* and our assessment of the HVIRA is properly confined to that requirement alone.

B

The Federal Government, after prolonged inaction, has responded to the Holocaust-era insurance issue by diplomatic means. Executive agreements with Germany, Austria, and France, the Court observes, are the principal expressions of the federal approach. *Ante,* at 413. Signed in July 2000, the German Foundation Agreement establishes a voluntary foundation, funded by public and private sources, to address Holocaust-era claims. Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 Int'l Legal Materials 1298 (2000).[2] "[I]t would be in the interests of both parties," the agreement declares, "for the Foundation to be the exclusive remedy and forum for addressing . . . all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." *Id.,* at 1299. In the case of insurance, the agreement endorses ICHEIC as the appropriate forum for claims resolution. *Ibid.*

The German Foundation Agreement commits the Federal Government to certain conduct. It provides, for example, that when a German company is sued in a United States court on a Holocaust-era claim, the Federal Government will file with the court a statement that "the President of the United States has concluded that it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising

[2] The executive agreements with Austria and France are comparable. See *ante,* at 408, and n. 3.

from their involvement in the National Socialist era and World War II." *Id.*, at 1303. The agreement also provides that "[t]he United States will recommend dismissal on any valid legal ground (which, under the U. S. system of jurisprudence, will be for the U. S. courts to determine)." *Ibid.* The agreement makes clear, however, that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal." *Id.*, at 1304.

III

A

The President's primacy in foreign affairs, I agree with the Court, empowers him to conclude executive agreements with other countries. *Ante*, at 415. Our cases do not catalog the subject matter meet for executive agreement,[3] but we have repeatedly acknowledged the President's authority to make such agreements to settle international claims. *Ante*, at 415–416. And in settling such claims, we have recognized, an executive agreement may preempt otherwise permissible state laws or litigation. *Ante*, at 416–417. The executive agreements to which we have accorded preemptive effect, however, warrant closer inspection than the Court today endeavors.

In *United States* v. *Belmont*, 301 U. S. 324 (1937), the Court addressed the Litvinov Assignment, an executive agreement incidental to the United States' recognition of the Soviet Union. Under the terms of the agreement, the Soviet Union assigned to the United States all its claims against American nationals, including claims against New

[3] "One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *United States* v. *Belmont*, 301 U. S. 324 (1937)] nor any one else has told us which are which." L. Henkin, Foreign Affairs and the United States Constitution 222 (2d ed. 1996).

York banks holding accounts of Russian nationals that the Soviet Government had earlier nationalized. The Federal Government sued to recover the accounts thus assigned to it. Applying New York law, the lower courts refused to enforce the assignment; those courts held that the account-nationalization upon which the assignment rested contravened public policy. *Id.*, at 325–327. This Court reversed, concluding that "no state policy can prevail against the international compact here involved." *Id.*, at 327. The Litvinov Assignment clearly assigned to the United States the claims in issue; the enforceability of that assignment, the Court stressed, "is not and cannot be subject to any curtailment or interference on the part of the several states." *Id.*, at 331.

United States v. *Pink*, 315 U. S. 203 (1942), again addressed state-imposed obstacles to the Litvinov Assignment. Reiterating its holding in *Belmont*, the Court confirmed that no State may "deny enforcement of a claim under the Litvinov Assignment because of an overriding policy of the State." 315 U. S., at 222. Pointing both to the assignment itself and to a later exchange of diplomatic correspondence clarifying its scope, see *id.*, at 224–225, and n. 7, the Court saw no "serious doubt that claims of the kind here in question were included" in the "broad and inclusive" assignment, *id.*, at 224.

Four decades later, in *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981), the Court gave effect to an executive agreement arising out of the Iran hostage crisis. One of the agreement's announced "purpose[s]" was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." *Id.*, at 665 (quoting the agreement). The agreement called for the formation of an Iran-United States Claims Tribunal to arbitrate claims not settled within six months. *Ibid.* In addition, under the agreement the United States undertook

> "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." *Ibid.* (internal quotation marks omitted).

In line with these firm commitments, the Court held that the agreement and the executive order implementing it validly "suspended" litigation in United States courts against Iranian interests. See *id.*, at 686–688.

Notably, the Court in *Dames & Moore* was emphatic about the "narrowness" of its decision. *Id.*, at 688. "We do not decide," the Court cautioned, "that the President possesses plenary power to settle claims, even as against foreign governmental entities." *Ibid.* Before sustaining the President's action, the Court determined: (1) Congress "had implicitly approved" the practice of claim settlement by executive agreement, *id.*, at 680; (2) the alternative forum created under the executive agreement was "capable of providing meaningful relief," *id.*, at 687; (3) Congress had not in any way disapproved or resisted the President's action, *id.*, at 687–688; and (4) the settlement of claims was "a necessary incident to the resolution of a major foreign policy dispute between our country and another," *id.*, at 688.

Together, *Belmont*, *Pink*, and *Dames & Moore* confirm that executive agreements directed at claims settlement may sometimes preempt state law. The Court states that if the executive "agreements here had expressly preempted laws like HVIRA, the issue would be straightforward." *Ante*, at 416–417. One can safely demur to that statement, for, as the Court acknowledges, no executive agreement before us expressly preempts the HVIRA. *Ante*, at 417. Indeed, no agreement so much as mentions the HVIRA's sole concern: public disclosure.

B

Despite the absence of express preemption, the Court holds that the HVIRA interferes with foreign policy objectives implicit in the executive agreements. See *ibid.* I would not venture down that path.

The Court's analysis draws substantially on *Zschernig* v. *Miller*, 389 U. S. 429 (1968). In that case, the Oregon courts had applied an Oregon escheat statute to deny an inheritance to a resident of a Communist bloc country. The Oregon courts so ruled because the claimant failed to satisfy them that his country's laws would allow U. S. nationals to inherit estates, nor had the claimant shown he would actually receive payments from the Oregon estate with no confiscation by his home government. *Id.*, at 432. Applying Oregon's statutory conditions, the Court concluded, required Oregon courts to "launc[h] inquiries into the type of governments that obtain in particular foreign nations," *id.*, at 434, rendering "unavoidable judicial criticism of nations established on a more authoritarian basis than our own," *id.*, at 440. Such criticism had a "direct impact upon foreign relations," the Court said, *id.*, at 441, and threatened to "impair the effective exercise of the Nation's foreign policy," *id.*, at 440. The Court therefore held the statute unconstitutional as applied in that case. *Id.*, at 433–434. But see *id.*, at 432 ("We do not accept the invitation to re-examine our ruling in *Clark* v. *Allen* [331 U. S. 503 (1947)]," which held a substantively similar California statute facially constitutional.).

We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here. The notion of "dormant foreign affairs preemption" with which *Zschernig* is associated resonates most audibly when a state action "reflect[s] a state policy critical of foreign governments and involve[s] 'sitting in judgment' on them." L. Henkin, Foreign Affairs and the United States Constitution 164 (2d ed. 1996); see Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal

Counsel 49, 50 (1986) ("[W]e believe that *[Zschernig]* represents the Court's reaction to a particular regulatory statute, the operation of which intruded extraordinarily deeply into foreign affairs."). The HVIRA entails no such state action or policy. It takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime. It is directed solely at private insurers doing business in California, and it requires them solely to disclose information in their or their affiliates' possession or control. I would not extend *Zschernig* into this dissimilar domain.[4]

Neither would I stretch *Belmont*, *Pink*, or *Dames & Moore* to support implied preemption by executive agreement. In each of those cases, the Court gave effect to the express terms of an executive agreement. In *Dames & Moore*, for example, the Court addressed an agreement explicitly extinguishing certain suits in domestic courts. 453 U. S., at 665; see *supra*, at 437–438. Here, however, none of the executive agreements extinguish any underlying claim for relief. See Neuborne, 80 Wash. U. L. Q., at 824, n. 101. The United States has agreed to file precatory statements advising courts that dismissing Holocaust-era claims accords with American foreign policy, but the German Foundation Agreement confirms that such statements have no legally binding effect. See 39 Int'l Legal Materials, at 1304; *supra*, at 436. It remains uncertain, therefore, whether even *litigation* on Holocaust-era insurance claims must be abated in deference to the German Foundation Agreement or the parallel agreements with Austria and France. Indeed, ambigu-

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[4] The Court also places considerable weight on *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363 (2000). As the Court acknowledges, however, *ante*, at 423, *Crosby* was a statutory preemption case. The state law there at issue posed "an obstacle to the accomplishment of Congress's full objectives under the [relevant] federal Act." 530 U. S., at 373. That statutory decision provides little support for preempting a state law by inferring preclusive foreign policy objectives from precatory language in executive agreements.

ity on this point appears to have been the studied aim of the American negotiating team. See Eizenstat, Imperfect Justice, at 272–273 (describing the "double negative" that satisfied German negotiators and preserved the flexibility sought by Justice Department litigators).

If it is uncertain whether insurance *litigation* may continue given the executive agreements on which the Court relies, it should be abundantly clear that those agreements leave *disclosure* laws like the HVIRA untouched. The contrast with the Litvinov Assignment at issue in *Belmont* and *Pink* is marked. That agreement spoke directly to claim assignment in no uncertain terms; *Belmont* and *Pink* confirmed that state law could not invalidate the very assignments accomplished by the agreement. See *supra*, at 436–437. Here, the Court invalidates a state disclosure law on grounds of conflict with foreign policy "embod[ied]" in certain executive agreements, *ante*, at 417, although those agreements do not refer to state disclosure laws specifically, or even to information disclosure generally.[5] It therefore is surely an exaggeration to assert that the "HVIRA threatens to frustrate the operation of the particular mechanism the President has chosen" to resolve Holocaust-era claims. *Ante*, at 424. If that were so, one might expect to find some reference to laws like the HVIRA in the later-in-time executive agreements. There is none.

To fill the agreements' silences, the Court points to statements by individual members of the Executive Branch. See *ante*, at 411 (letters from Deputy Secretary of the Treas-

[5] The Court apparently finds in the executive agreements' "express endorsement of ICHEIC's voluntary mechanism" a federal purpose to preempt any information disclosure mechanism not controlled by ICHEIC itself. *Ante*, at 423, n. 13. But nothing in the executive agreements suggests that the Federal Government supports the resolution of Holocaust-era insurance claims only to the extent they are based upon information disclosed by ICHEIC. The executive agreements do not, for example, prohibit recourse to ICHEIC to resolve claims based upon information disclosed through laws like the HVIRA.

ury Stuart Eizenstat to California Governor Gray Davis and the Insurance Commissioner of California); *ante*, at 422 (testimony before Congress by Eizenstat, stating that a company's participation in ICHEIC should give it "safe haven from sanctions, subpoenas, and hearings relative to the Holocaust period" (internal quotation marks omitted)). But we have never premised foreign affairs preemption on statements of that order. Cf. *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 329–330 (1994) ("Executive Branch actions—press releases, letters, and *amicus* briefs"—that "express federal policy but lack the force of law" cannot render a state law unconstitutional under the Foreign Commerce Clause.). We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. Executive officials of any rank may of course be expected "faithfully [to] represen[t] the President's chosen policy," *ante*, at 423, n. 13, but no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive's views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.

Sustaining the HVIRA would not compromise the President's ability to speak with one voice for the Nation. See *ante*, at 424. To the contrary, by declining to invalidate the HVIRA in this case, we would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand. "[T]he Framers did not make the judiciary the overseer of our government." *Dames & Moore*, 453 U. S., at 660 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 594 (1952) (Frankfurter, J., concurring)). And judges should not be the expositors of the Nation's foreign policy, which is the role they play by acting when the President himself has not taken a clear

stand. As I see it, courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds.

In sum, assuming, *arguendo*, that an executive agreement or similarly formal foreign policy statement targeting disclosure could override the HVIRA, there is no such declaration here. Accordingly, I would leave California's enactment in place, and affirm the judgment of the Court of Appeals.

Syllabus

GREEN TREE FINANCIAL CORP., NKA CONSECO FINANCE CORP. *v.* BAZZLE ET AL., IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED, ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 02–634. Argued April 22, 2003—Decided June 23, 2003

The Bazzle respondents and the Lackey and Buggs respondents separately entered into contracts with petitioner Green Tree Financial Corp. that were governed by South Carolina law and included an arbitration clause governed by the Federal Arbitration Act. Each set of respondents filed a state-court action, complaining that Green Tree's failure to provide them with a form that would have told them of their right to name their own lawyers and insurance agents violated South Carolina law, and seeking damages. The Bazzles moved for class certification, and Green Tree sought to stay the court proceedings and compel arbitration. After the court certified a class and compelled arbitration, Green Tree selected, with the Bazzles' consent, an arbitrator who later awarded the class damages and attorney's fees. The trial court confirmed the award, and Green Tree appealed, claiming, among other things, that class arbitration was legally impermissible. Lackey and the Buggses also sought class certification and Green Tree moved to compel arbitration. The trial court denied Green Tree's motion, finding the agreement unenforceable, but the state appeals court reversed. The parties then chose an arbitrator, the same arbitrator who was later chosen to arbitrate the Bazzles' dispute. The arbitrator certified a class and awarded it damages and attorney's fees. The trial court confirmed the award, and Green Tree appealed. The State Supreme Court withdrew both cases from the appeals court, assumed jurisdiction, and consolidated the proceedings. That court held that the contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form.

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

351 S. C. 244, 569 S. E. 2d 349, vacated and remanded.

JUSTICE BREYER, joined by JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded that an arbitrator must determine whether the contracts forbid class arbitration. Pp. 450–454.

(a) Green Tree argues that the contracts are not silent—that they forbid arbitration. If the contracts are not silent, then the state court's

holding is flawed on its own terms; that court neither said nor implied that it would have authorized class arbitration had the parties' arbitration agreement forbidden it. Whether Green Tree is right about the contracts presents a disputed issue of contract interpretation. The contracts say that disputes "shall be resolved . . . by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]." The class arbitrator *was* "selected by" Green Tree "with consent of" Green Tree's customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well. Green Tree did *not* independently select *this* arbitrator to arbitrate its dispute with the *other* class members, but whether the contracts contain such a requirement is not decided by the literal contract terms. Whether "selected by [Green Tree]" means "selected by [Green Tree] to arbitrate this dispute and no other (even identical) dispute with another customer" is the question at issue: Do the contracts forbid class arbitration? Given the broad authority they elsewhere bestow upon the arbitrator, the answer is not completely obvious. The parties agreed to submit to the arbitrator *"[a]ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." And the dispute about what the arbitration contracts mean is a dispute "relating to this contract" and the resulting "relationships." Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question, and any doubt about the "'scope of arbitrable issues'" should be resolved "'in favor of arbitration.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626. The question here does not fall into the limited circumstances where courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter, as it concerns neither the arbitration clause's validity nor its applicability to the underlying dispute. The relevant question here is what *kind of arbitration proceeding* the parties agreed to, which does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, but rather contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Pp. 450–453.

(b) With respect to the question whether the contracts forbid class arbitration, the parties have not yet obtained the arbitration decision that their contracts foresee. Regarding *Bazzle* plaintiffs, the State Supreme Court wrote that the trial court issued an order granting class certification and the arbitrator subsequently administered class arbitration proceedings without the trial court's further involvement. As for *Lackey* plaintiffs, the arbitrator decided to certify the class after the trial court had determined that the identical contract in the *Bazzle* case

Syllabus

authorized class arbitration procedures, and there is no question that the arbitrator was aware of that decision. On balance, there is at least a strong likelihood that in both proceedings the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation. Pp. 453–454.

JUSTICE STEVENS concluded that in order to have a controlling judgment of the Court, and because JUSTICE BREYER's opinion expresses a view of the case close to his own, he concurs in the judgment. Pp. 454–455.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which SCALIA, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment and dissenting in part, *post*, p. 454. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 455. THOMAS, J., filed a dissenting opinion, *post*, p. 460.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Paul J. Zidlicky*, *Alan S. Kaplinsky*, *Mark J. Levin*, *Wilburn Brewer, Jr.*, *Robert C. Byrd*, and *Herbert W. Hamilton.*

Cornelia T. L. Pillard argued the cause for respondents. With her on the brief were *Mary Leigh Arnold*, *Steven W. Hamm*, *Bradford P. Simpson*, *B. Randall Dong*, *T. Alexander Beard*, *Charles L. Dibble*, and *Charles Richard Kelly.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Louis R. Cohen*, *Christopher R. Lipsett*, *Eric J. Mogilnicki*, and *Michael D. Leffel;* for the Chamber of Commerce of the United States by *Evan M. Tager*, *Miriam R. Nemetz*, *Jeffrey W. Sarles*, and *Robin S. Conrad;* for the National Council of Chain Restaurants by *Robert P. Floyd III;* for DirectTV, Inc., by *Christopher Landau* and *Dale H. Oliver;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman* and *Rae T. Vann;* for the New England Legal Foundation et al. by *Christopher M. Mason* and *Michael E. Malamut;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the AARP by *Stacy J. Canan*, *Michael R. Schuster*, *Deborah M. Zuckerman*, *Nina Simon*, and *Jean Constantine-Davis;* for Law Professors by *David S. Schwartz*, *Richard M. Alderman*, *Robert Belton*, *Dwight Golann*, *Catherine Fisk*, *Peter Linzer*, *Jeffrey W. Stempel*, *Clyde W. Summers*, *Katherine*

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE GINSBURG join.

This case concerns contracts between a commercial lender and its customers, each of which contains a clause providing for arbitration of all contract-related disputes. The Supreme Court of South Carolina held (1) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitration, and (2) that, in that circumstance, South Carolina law interprets the contracts as permitting class arbitration. 351 S. C. 244, 569 S. E. 2d 349 (2002). We granted certiorari to determine whether this holding is consistent with the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.*

We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? Given the South Carolina Supreme Court's holding, it is important to resolve that question. But we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide. Because the record suggests that the parties have not yet received an arbitrator's decision on that question of contract interpretation, we vacate the judgment of the South Carolina Supreme Court and remand the case so that this question may be resolved in arbitration.

I

In 1995, respondents Lynn and Burt Bazzle secured a home improvement loan from petitioner Green Tree. The

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Van Wezel Stone, and *Gerald J. Thain;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Richard T. Seymour*, *Paul W. Mollica*, *Gary T. Johnson*, *Stuart Meiklejohn*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Dennis C. Hayes*, *Vincent A. Eng*, *Elaine R. Jones*, *Norman J. Chachkin*, *Robert H. Stroup*, *Judith L. Lichtman*, and *Jocelyn C. Frye;* and for Trial Lawyers for Public Justice by *F. Paul Bland, Jr.*

Bazzles and Green Tree entered into a contract, governed by South Carolina law, which included the following arbitration clause:

> "ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U. S. C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." App. 34 (emphasis added, capitalization in original).

Respondents Daniel Lackey and George and Florine Buggs entered into loan contracts and security agreements for the purchase of mobile homes with Green Tree. These agreements contained arbitration clauses that were, in all relevant respects, identical to the Bazzles' arbitration clause. (Their contracts substitute the word "you" with the word "Buyer[s]" in the italicized phrase.) 351 S. C., at 264, n. 18, 569 S. E. 2d, at 359, n. 18 (emphasis deleted).

At the time of the loan transactions, Green Tree apparently failed to provide these customers with a legally required form that would have told them that they had a right to name their own lawyers and insurance agents and would have provided space for them to write in those names. See

S. C. Code Ann. § 37–10–102 (West 2002). The two sets of customers before us now as respondents each filed separate actions in South Carolina state courts, complaining that this failure violated South Carolina law and seeking damages.

In April 1997, the Bazzles asked the court to certify their claims as a class action. Green Tree sought to stay the court proceedings and compel arbitration. On January 5, 1998, the court both (1) certified a class action and (2) entered an order compelling arbitration. App. 7. Green Tree then selected an arbitrator with the Bazzles' consent. And the arbitrator, administering the proceeding as a class arbitration, eventually awarded the class $10,935,000 in statutory damages, along with attorney's fees. The trial court confirmed the award, App. to Pet. for Cert. 27a–35a, and Green Tree appealed to the South Carolina Court of Appeals claiming, among other things, that class arbitration was legally impermissible.

Lackey and the Buggses had earlier begun a similar court proceeding in which they, too, sought class certification. Green Tree moved to compel arbitration. The trial court initially denied the motion, finding the arbitration agreement unenforceable, but Green Tree pursued an interlocutory appeal and the State Court of Appeals reversed. *Lackey* v. *Green Tree Financial Corp.*, 330 S. C. 388, 498 S. E. 2d 898 (1998). The parties then chose an arbitrator, indeed the same arbitrator who was subsequently selected to arbitrate the Bazzles' dispute.

In December 1998, the arbitrator certified a class in arbitration. App. 18. The arbitrator proceeded to hear the matter, ultimately ruled in favor of the class, and awarded the class $9,200,000 in statutory damages in addition to attorney's fees. The trial court confirmed the award. App. to Pet. for Cert. 36a–54a. Green Tree appealed to the South Carolina Court of Appeals claiming, among other things, that class arbitration was legally impermissible.

The South Carolina Supreme Court withdrew both cases from the Court of Appeals, assumed jurisdiction, and consolidated the proceedings. 351 S. C., at 249, 569 S. E. 2d, at 351. That court then held that the contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. We granted certiorari to consider whether that holding is consistent with the Federal Arbitration Act.

II

The South Carolina Supreme Court's determination that the contracts are silent in respect to class arbitration raises a preliminary question. Green Tree argued there, as it argues here, that the contracts are not silent—that they forbid class arbitration. And we must deal with that argument at the outset, for if it is right, then the South Carolina court's holding is flawed on its own terms; that court neither said nor implied that it would have authorized class arbitration had the parties' arbitration agreement forbidden it.

Whether Green Tree is right about the contracts themselves presents a disputed issue of contract interpretation. THE CHIEF JUSTICE believes that Green Tree is right; indeed, that Green Tree is so clearly right that we should ignore the fact that state law, not federal law, normally governs such matters, see *post*, at 454 (STEVENS, J., concurring in judgment and dissenting in part), and reverse the South Carolina Supreme Court outright, see *post*, at 458–460 (REHNQUIST, C. J., dissenting). THE CHIEF JUSTICE points out that the contracts say that disputes "shall be resolved . . . by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]." App. to Pet. for Cert. 110a. See *post*, at 458. And it finds that class arbitration is clearly inconsistent with this requirement. After all, class arbitration involves an arbitration, not simply between Green Tree and a *named customer*, but also between Green Tree and *other* (represented) customers, all taking place before the

arbitrator chosen to arbitrate the initial, *named customer's* dispute.

We do not believe, however, that the contracts' language is as clear as THE CHIEF JUSTICE believes. The class arbitrator *was* "selected by" Green Tree "with consent of" Green Tree's customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well.

Of course, Green Tree did *not* independently select *this* arbitrator to arbitrate its disputes with the *other* class members. But whether the contracts contain this additional requirement is a question that the literal terms of the contracts do not decide. The contracts simply say (I) "selected by us [Green Tree]." And that is literally what occurred. The contracts do not say (II) "selected by us [Green Tree] to arbitrate this dispute and no other (even identical) dispute with another customer." The question whether (I) in fact implicitly means (II) is the question at issue: Do the contracts forbid class arbitration? Given the broad authority the contracts elsewhere bestow upon the arbitrator, see, *e. g.*, App. to Pet. for Cert. 110a (the contracts grant to the arbitrator "all powers," including certain equitable powers "provided by the law and the contract"), the answer to this question is not completely obvious.

At the same time, we cannot automatically accept the South Carolina Supreme Court's resolution of this contract-interpretation question. Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide. The parties agreed to submit to the arbitrator "*[a]ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." *Ibid.* (emphasis added). And the dispute about what the arbitration contract in each case means (*i. e.*, whether it forbids the use of class arbitration procedures) is a dispute "relating to this contract" and the resulting "relationships." Hence the

parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943 (1995) (arbitration is a "matter of contract"). And if there is doubt about that matter—about the "'scope of arbitrable issues'"—we should resolve that doubt "'in favor of arbitration.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985).

In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986). These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. See generally *Howsam*, *supra*. See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 546–547 (1964) (whether an arbitration agreement survives a corporate merger); *AT&T*, *supra*, at 651–652 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).

The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. 514 U. S., at 942–945. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford*

Junior Univ., 489 U. S. 468, 474–476 (1989). It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide. Cf. *Howsam*, *supra*, at 83 (finding for roughly similar reasons that the arbitrator should determine a certain procedural "gateway matter").

III

With respect to this underlying question—whether the arbitration contracts forbid class arbitration—the parties have not yet obtained the arbitration decision that their contracts foresee. As far as concerns the *Bazzle* plaintiffs, the South Carolina Supreme Court wrote that the "trial court" issued "an order granting class certification" and the arbitrator subsequently "administered" class arbitration proceedings "without further involvement of the trial court." 351 S. C., at 250–251, 569 S. E. 2d, at 352. Green Tree adds that "the class arbitration was imposed on the parties and the arbitrator by the South Carolina trial court." Brief for Petitioner 30. Respondents now deny that this was so, Brief for Respondents 13, but we can find no convincing record support for that denial.

As far as concerns the *Lackey* plaintiffs, what happened in arbitration is less clear. On the one hand, the *Lackey* arbitrator (the same individual who later arbitrated the *Bazzle* dispute) wrote: "*I* determined that a class action should proceed in arbitration based upon *my* careful review of the broadly drafted arbitration clause prepared by Green Tree." App. to Pet. for Cert. 84a (emphasis added). And respondents suggested at oral argument that the arbitrator's decision was independently made. Tr. of Oral Arg. 39.

On the other hand, the *Lackey* arbitrator decided this question after the South Carolina trial court had determined

that the identical contract in the *Bazzle* case authorized class arbitration procedures. And there is no question that the arbitrator was aware of the *Bazzle* decision, since the *Lackey* plaintiffs had argued to the arbitrator that it should impose class arbitration procedures in part because the state trial court in *Bazzle* had done so. Record on Appeal 516–518. In the court proceedings below (where Green Tree took the opposite position), the *Lackey* plaintiffs maintained that "to the extent" the arbitrator decided that the contracts permitted class procedures (in the *Lackey* case or the *Bazzle* case), "it was a reaffirmation and/or adoption of [the *Bazzle* c]ourt's prior determination." Record on Appeal 1708, n. 2. See also App. 31–32, n. 2.

On balance, there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation. That being so, we remand the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms. 9 U. S. C. § 2; *Volt*, *supra*, at 478–479.

The judgment of the South Carolina Supreme Court is vacated, and the case is remanded for further proceedings.

So ordered.

JUSTICE STEVENS, concurring in the judgment and dissenting in part.

The parties agreed that South Carolina law would govern their arbitration agreement. The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. 351 S. C. 244, 262–266, 569 S. E. 2d 349, 359–360 (2002). There is nothing in the Federal Arbitration Act that precludes either of these deter-

minations by the Supreme Court of South Carolina. See *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 475–476 (1989).

Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79 (2002). Because the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker, there is no need to remand the case to correct that possible error.

Accordingly, I would simply affirm the judgment of the Supreme Court of South Carolina. Were I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because JUSTICE BREYER's opinion expresses a view of the case close to my own, I concur in the judgment. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, dissenting.

The parties entered into contracts with an arbitration clause that is governed by the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* The Supreme Court of South Carolina held that arbitration under the contracts could proceed as a class action even though the contracts do not by their terms permit class-action arbitration. The plurality now vacates that judgment and remands the case for the arbitrator to make this determination. I would reverse because this determination is one for the courts, not for the arbitrator, and the holding of the Supreme Court of South Carolina contravenes the terms of the contracts and is therefore pre-empted by the FAA.

The agreement to arbitrate involved here, like many such agreements, is terse. Its operative language is contained in one sentence:

> "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." App. 34.

The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts. See *Major League Baseball Players Assn.* v. *Garvey,* 532 U. S. 504, 509–510 (2001) *(per curiam).* The Supreme Court of South Carolina relied on this principle in deciding that the arbitrator in this case did not abuse his discretion in allowing a class action. 351 S. C. 244, 266–268, 569 S. E. 2d 349, 361–362 (2002). But the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator. As we stated in *First Options of Chicago, Inc.* v. *Kaplan,* 514 U. S. 938, 945 (1995):

> "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted. Those are the two provisions in the sentence quoted above, and it is difficult to say that one is more important than the other. I have no hesitation in saying that the choice of arbitrator is as important a component of the agree-

ment to arbitrate as is the choice of what is to be submitted to him.

Thus, this case is controlled by *First Options*, and not by our more recent decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79 (2002). There, the agreement provided that any dispute "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." *Id.*, at 81 (internal quotation marks omitted). Howsam chose the National Association of Securities Dealers (NASD), and agreed to that organization's "Uniform Submission Agreement" which provided that the arbitration would be governed by NASD's "Code of Arbitration Procedure." *Id.*, at 82. That code, in turn, contained a limitation. This Court held that it was for the arbitrator to interpret that limitation provision:

> "'"[P]rocedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide. *John Wiley* [*& Sons, Inc.* v. *Livingston*, 376 U. S. 543, 557 (1964)] (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.*, at 84.

I think that the parties' agreement as to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options*, than it is to "allegations of waiver, delay, or like defenses to arbitrability," which are questions for the arbitrator under *Howsam*.

"States may regulate contracts, including arbitration clauses, under general contract law principles," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 281 (1995). "[T]he interpretation of private contracts is ordinarily a question of

state law, which this Court does not sit to review." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989). But "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 477 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)).

The parties do not dispute that these contracts fall within the coverage of the FAA. 351 S. C., at 257, 569 S. E. 2d, at 355. The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 53–54 (1995) (quoting *Volt*, *supra*, at 479 (internal quotation marks omitted)). See also *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 688 (1996); *First Options*, *supra*, at 947. In other words, Congress sought simply to "place such agreements upon the same footing as other contracts." *Volt*, *supra*, at 474 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974) (internal quotation marks omitted)). This aim "requires that we rigorously enforce agreements to arbitrate," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985) (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221 (1985) (internal quotation marks omitted)), in order to "give effect to the contractual rights and expectations of the parties," *Volt*, *supra*, at 479. See also *Mitsubishi Motors*, *supra*, at 626 ("[A]s with any other contract, the parties' intentions control").

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, *supra*, at 479. Here, the parties saw fit to agree that any disputes arising out of the contracts "shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." App. 34. Each contract expressly defines "us" as petitioner, and "you" as the respondent or respondents

named in that specific contract. *Id.*, at 33 ("'We' and 'us' means the Seller *above*, its successors and assigns"; "'You' and 'your' means each Buyer *above* and guarantor, jointly and severally" (emphasis added)). Each contract also specifies that it governs all "disputes . . . arising from . . . *this* contract or the relationships which result from *this* contract." *Id.*, at 34 (emphasis added). These provisions, which the plurality simply ignores, see *ante*, at 450–451, make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer.

While the observation of the Supreme Court of South Carolina that the agreement of the parties was silent as to the availability of class-wide arbitration is literally true, the imposition of class-wide arbitration contravenes the just-quoted provision about the selection of an arbitrator. To be sure, the arbitrator that administered the proceedings was "selected by [petitioner] with consent of" the Bazzles, Lackey, and the Buggses. App. 34–36. But petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well. Petitioner may well have chosen different arbitrators for some or all of these other disputes; indeed, it would have been reasonable for petitioner to do so, in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator. As petitioner correctly concedes, Brief for Petitioner 32, 42, the FAA does not prohibit parties from choosing to proceed on a classwide basis. Here, however, the parties simply did not so choose.

"Arbitration under the Act is a matter of consent, not coercion." *Volt*, *supra*, at 479. Here, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen. It did not enforce the "agreemen[t]

to arbitrate . . . according to [its] terms." *Mastrobuono*, *supra*, at 54 (internal quotation marks omitted). I would therefore reverse the judgment of the Supreme Court of South Carolina.

JUSTICE THOMAS, dissenting.

I continue to believe that the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.*, does not apply to proceedings in state courts. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 285–297 (1995) (THOMAS, J., dissenting). See also *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 689 (1996) (THOMAS, J., dissenting). For that reason, the FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement. Accordingly, I would leave undisturbed the judgment of the Supreme Court of South Carolina.

Syllabus

GEORGIA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL.

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

No. 02–182. Argued April 29, 2003—Decided June 26, 2003

Georgia's 1997 State Senate districting plan is the benchmark plan for this litigation. That plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts. After the 2000 census, the Georgia General Assembly began redistricting the Senate once again. It is uncontested that a substantial majority of Georgia's black voters vote Democratic, and that all elected black representatives in the General Assembly are Democrats. The Senator who chaired the subcommittee that developed the new plan testified he believed that as a district's black voting age population increased beyond what was necessary to elect a candidate, it would push the Senate more toward the Republicans, and correspondingly diminish the power of African-Americans overall. Thus, part of the Democrats' strategy was not only to maintain the number of majority-minority districts and increase the number of Democratic Senate seats, but also to increase the number of so-called "influence" districts, where black voters would be able to exert a significant—if not decisive—force in the election process. The new plan therefore "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts, drawing 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30%–50%, and 4 other districts with a black voting age population of between 25%–30%. When the Senate adopted the new plan, 10 of the 11 black Senators voted for it. The Georgia House of Representatives passed the plan with 33 of the 34 black Representatives voting for it. No Republican in either body voted for the plan, making the votes of the black legislators necessary for passage. The Governor signed the Senate plan into law in 2001.

Because Georgia is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, it must submit any new voting "standard, practice, or procedure" for preclearance by either the United States Attorney General or the District Court for the District of Columbia in order to ensure that the change "does not have the purpose [or] effect of denying

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or abridging the right to vote on account of race or color," 42 U. S. C. § 1973c. No change should be precleared if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141. In order to preclear its 2001 plan, Georgia filed suit in the District Court seeking a declaratory judgment that the plan does not violate § 5. To satisfy its burden of proving nonretrogression, Georgia submitted detailed evidence documenting, among other things, the total population, total black population, black voting age population, percentage of black registered voters, and the overall percentage of Democratic votes in each district; evidence about how each of these statistics compared to the benchmark districts; testimony from numerous participants in the plan's enactment that it was designed to increase black voting strength throughout the State as well as to help ensure a continued Democratic majority in the Senate; expert testimony that black and nonblack voters have equal chances of electing their preferred candidate when the black voting age population of a district is at 44.3%; and, in response to the United States' objections, more detailed statistical evidence with respect to three proposed Senate districts that the United States found objectionable—Districts 2, 12, and 26—and two districts challenged by the intervenors—Districts 15 and 22. The United States argued that the plan should not be precleared because the changes to the boundaries of Districts 2, 12, and 26 unlawfully reduced black voters' ability to elect candidates of their choice. The United States' evidence focused only on those three districts and was not designed to permit the court to assess the plan's overall impact. The intervenors, four African-Americans, argued that retrogression had occurred in Districts 15 and 22, and presented proposed alternative plans and an expert report critiquing the State's expert report. A three-judge District Court panel held that the plan violated § 5, and was therefore not entitled to preclearance.

Held:

1. The District Court did not err in allowing the private litigants to intervene. That court found that the intervenors' analysis of the plan identifies interests not adequately represented by the existing parties. Private parties may intervene in § 5 actions assuming they meet the requirements of Federal Rule of Civil Procedure 24, *NAACP* v. *New York*, 413 U. S. 345, 365, and the District Court did not abuse its discretion in allowing intervention in this case, see *id.*, at 367. *Morris* v. *Gressette*, 432 U. S. 491, 504–505, in which the Court held that the decision to object belongs only to the Attorney General, is distinguished because it concerned the administrative, not the judicial, preclearance

process. *Morris* itself recognized the difference between the two. See *id.*, at 503–507. Pp. 476–477.

2. The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. Pp. 477–491.

(a) Georgia's argument that a plan should be precleared under § 5 if it would satisfy § 2 of the Voting Rights Act, 42 U. S. C. § 1973, is rejected. A § 2 vote dilution violation is not an independent reason to deny § 5 preclearance, because that would inevitably make § 5 compliance contingent on § 2 compliance and thereby replace § 5 retrogression standards with those for § 2. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 477. Instead of showing that its plan is nondilutive under § 2, Georgia must prove that it is nonretrogressive under § 5. Pp. 477–479.

(b) To determine the meaning of "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, *supra*, at 141, the statewide plan must first be examined as a whole: First, the diminution of a minority group's effective exercise of the electoral franchise violates § 5 only if the State cannot show that the gains in the plan as a whole offset the loss in a particular district. Second, all of the relevant circumstances must be examined, such as minority voters' ability to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e. g.*, *Johnson* v. *De Grandy*, 512 U. S. 997, 1011–1012, 1020–1021. In assessing the totality of the circumstances, a minority group's comparative ability to elect a candidate of its choice is an important factor, but it cannot be dispositive or exclusive. See, *e. g.*, *Thornburg* v. *Gingles*, 478 U. S. 30, 47–50. To maximize such a group's electoral success, a State may choose to create either a certain number of "safe" districts in which it is highly likely that minority voters will be able to elect the candidate of their choice, see, *e. g.*, *id.*, at 48–49, or a greater number of districts in which it is likely, although perhaps not quite as likely as under the benchmark plan, that minority voters will be able to elect their candidates, see, *e. g.*, *id.*, at 88–89 (O'Connor, J., concurring in judgment). Section 5 does not dictate that a State must pick one of these redistricting methods over the other. *Id.*, at 89. In considering the other highly relevant factor in a retrogression inquiry—the extent to which a new plan changes the minority group's opportunity to participate in the political process—a court must examine whether the plan adds or subtracts "influence districts" where minority voters may not be able to elect a candidate of choice but can play a substantial, if not

decisive, role in the electoral process, cf., *e. g.*, *Johnson*, *supra*, at 1007. In assessing these influence districts' comparative weight, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Thornburg*, 478 U. S., at 100 (O'Connor, J., concurring in judgment). Various studies suggest that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts. Section 5 allows States to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters. See, *e. g.*, *id.*, at 87–89, 99. Another method of assessing the group's opportunity to participate in the political process is to examine the comparative position of black representatives' legislative leadership, influence, and power. See *Johnson*, *supra*, at 1020. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect. And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new plan. Pp. 479–485.

(c) The District Court failed to consider all the relevant factors. First, although acknowledging the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26, without examining the increases in the black voting age population that occurred in many of the other districts. Second, the court did not consider any factor beyond black voters' comparative ability to elect a candidate of their choice. It improperly rejected other evidence that the legislators representing the benchmark majority-minority districts support the plan; that the plan maintains those representatives' legislative influence; and that Georgia affirmatively decided that the best way to maximize black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts. In the face of Georgia's evidence of nonretrogression, the United States' only evidence was that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. Given the evidence submitted in this case, Georgia likely met its burden of showing nonretrogression. Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance—a plan that increases the number of districts with a majority-black voting age population, even if it means that minority voters in some of those districts will face a somewhat reduced opportunity to elect a candidate of their choice. Cf. *Thornburg*, *supra*, at 89 (O'Connor, J., concurring in judgment). While courts and the

Justice Department should be vigilant in ensuring that States neither reduce minority voters' effective exercise of the electoral franchise nor discriminate against them, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters. Pp. 485–491.

(d) The District Court is in a better position to reweigh all the facts in the record in the first instance in light of this Court's explication of retrogression. P. 491.

195 F. Supp. 2d 25, vacated and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., *post*, p. 491, and Thomas, J., *post*, p. 492, filed concurring opinions. Souter, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer, JJ., joined, *post*, p. 492.

David F. Walbert argued the cause for appellant. With him on the briefs were *Thurbert E. Baker*, Attorney General of Georgia, *Dennis R. Dunn*, Deputy Attorney General, and *Mark H. Cohen*.

Malcolm L. Stewart argued the cause for the federal appellees. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Deputy Solicitor General Clement*, and *Mark L. Gross*.

E. Marshall Braden argued the cause for appellee intervenors. With him on the brief were *Amy M. Henson*, *Frank B. Strickland*, and *Anne W. Lewis*.*

Justice O'Connor delivered the opinion of the Court.

In this case, we decide whether Georgia's State Senate redistricting plan should have been precleared under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as renumbered and amended, 42 U. S. C. § 1973c. Section 5 requires that before a covered jurisdiction's new voting "standard, prac-

*A brief of *amicus curiae* urging affirmance was filed for the Georgia Coalition for the Peoples' Agenda by *Laughlin McDonald*, *Neil Bradley*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Anita Hodgkiss*, *Elaine R. Jones*, *Norman J. Chachkin*, and *Todd A. Cox*.

tice, or procedure" goes into effect, it must be precleared by either the Attorney General of the United States or a federal court to ensure that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c. Whether a voting procedure change should be precleared depends on whether the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). We therefore must decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan.

I

A

Over the past decade, the propriety of Georgia's state and congressional districts has been the subject of repeated litigation. In 1991, the Georgia General Assembly began the process of redistricting after the 1990 census. Because Georgia is a covered jurisdiction under § 5 of the Voting Rights Act, see *Miller* v. *Johnson*, 515 U. S. 900, 905 (1995), Georgia submitted its revised State Senate plan to the United States Department of Justice for preclearance. The plan as enacted into law increased the number of majority-minority districts from the previous Senate plan. The Department of Justice nevertheless refused preclearance because of Georgia's failure to maximize the number of majority-minority districts. See *Johnson* v. *Miller*, 929 F. Supp. 1529, 1537, and n. 23 (SD Ga. 1996). After Georgia made changes to the Senate plan in an attempt to satisfy the United States' objections, the State again submitted it to the Department of Justice for preclearance. Again, the Department of Justice refused preclearance because the plan did not contain a sufficient number of majority-minority districts. See *id.*, at 1537, 1539. Finally, the United States precleared

Georgia's third redistricting plan, approving it in the spring of 1992. See *id.*, at 1537.

Georgia's 1992 Senate plan was not challenged in court. See *id.*, at 1533–1534. Its congressional districting plan, however, was challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. See *Shaw* v. *Reno*, 509 U. S. 630 (1993). In 1995, we held in *Miller* v. *Johnson* that Georgia's congressional districting plan was unconstitutional because it engaged in "the very racial stereotyping the Fourteenth Amendment forbids" by making race the "predominant, overriding factor explaining" Georgia's congressional districting decisions. 515 U. S., at 928, 920. And even though it was "safe to say that the congressional plan enacted in the end was required in order to obtain preclearance," this justification did not permit Georgia to engage in racial gerrymandering. See *id.*, at 921. Georgia's State Senate districts served as "building blocks" to create the congressional districting plan found unconstitutional in *Miller* v. *Johnson*. *Johnson* v. *Miller*, 929 F. Supp., at 1533, n. 8 (internal quotation marks omitted); see also *id.*, at 1536.

Georgia recognized that after *Miller* v. *Johnson*, its legislative districts were unconstitutional under the Equal Protection Clause. See 929 F. Supp., at 1533, 1540. Accordingly, Georgia attempted to cure the perceived constitutional problems with the 1992 State Senate districting plan by passing another plan in 1995. The Department of Justice refused to preclear the 1995 plan, maintaining that it retrogressed from the 1992 plan and that *Miller* v. *Johnson* concerned only Georgia's congressional districts, not Georgia's State Senate districts. See 929 F. Supp., at 1540–1541.

Private litigants subsequently brought an action challenging the constitutionality of the 1995 Senate plan. See *id.*, at 1533. The three-judge panel of the District Court reviewing the 1995 Senate plan found that "[i]t is clear that a black maximization policy had become an integral part of the sec-

tion 5 preclearance process . . . when the Georgia redistricting plans were under review. The net effect of the DOJ's preclearance objection[s] . . . was to require the State of Georgia to increase the number of majority black districts in its redistricting plans, which were already ameliorative plans, beyond any reasonable concept of non-retrogression." *Id.*, at 1539–1540. The court noted that in *Miller* v. *Johnson*, we specifically disapproved of the Department of Justice's policy that the maximization of black districts was a part of the § 5 retrogression analysis. See 929 F. Supp., at 1539. Indeed, in *Miller*, we found that the Department of Justice's objections to Georgia's redistricting plans were "driven by its policy of maximizing majority-black districts." 515 U. S., at 924. And "[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.*, at 925.

The District Court stated that the maximization of majority-minority districts in Georgia "artificially push[ed] the percentage of black voters within some majority black districts as high as possible." 929 F. Supp., at 1536. The plan that eventually received the Department of Justice's preclearance in 1992 "represented the General Assembly's surrender to the black maximization policy of the DOJ." *Id.*, at 1540. The court then found that the 1995 plan was an unconstitutional racial gerrymander. See *id.*, at 1543.

Under court direction, Georgia and the Department of Justice reached a mediated agreement on the constitutionality of the 1995 Senate plan. Georgia passed a new plan in 1997, and the Department of Justice quickly precleared it. The redrawn map resembled to a large degree the 1992 plan that eventually received preclearance from the Department of Justice, with some changes to accommodate the decision of this Court in *Miller* v. *Johnson*, and of the District Court in *Johnson* v. *Miller*.

All parties here concede that the 1997 plan is the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort. The 1997 plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. See Record, Doc. No. 148, Pl. Exh. 1C (hereinafter Pl. Exh.). The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts. See 195 F. Supp. 2d 25, 39 (DC 2002).

After the 2000 census, the Georgia General Assembly began the process of redistricting the Senate once again. No party contests that a substantial majority of black voters in Georgia vote Democratic, or that all elected black representatives in the General Assembly are Democrats. The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats. See *id.*, at 41–42. For example, the Director of Georgia's Legislative Redistricting Office, Linda Meggers, testified that the Senate Black Caucus "'wanted to maintain'" the existing majority-minority districts and at the same time "'not waste'" votes. *Id.*, at 41.

The Vice Chairman of the Senate Reapportionment Committee, Senator Robert Brown, also testified about the goals of the redistricting effort. Senator Brown, who is black, chaired the subcommittee that developed the Senate plan at issue here. See *id.*, at 42. Senator Brown believed when he designed the Senate plan that as the black voting age population in a district increased beyond what was necessary, it would "pus[h] the whole thing more towards [the] Republican[s]." Pl. Exh. 20, at 24. And "correspondingly," Senator Brown stated, "the more you diminish the power of African-Americans overall." *Ibid.* Senator Charles Walker was the majority leader of the Senate. Senator Walker

testified that it was important to attempt to maintain a Democratic majority in the Senate because "we [African-Americans] have a better chance to participate in the political process under the Democratic majority than we would have under a Republican majority." Pl. Exh. 24, at 19. At least 7 of the 11 black members of the Senate could chair committees. See 195 F. Supp. 2d, at 41.

The plan as designed by Senator Brown's committee kept true to the dual goals of maintaining at least as many majority-minority districts while also attempting to increase Democratic strength in the Senate. Part of the Democrats' strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called "influence" districts, where black voters would be able to exert a significant—if not decisive—force in the election process. As the majority leader testified, "in the past, you know, what we would end up doing was packing. You put all blacks in one district and all whites in one district, so what you end up with is [a] black Democratic district and [a] white Republican district. That's not a good strategy. That does not bring the people together, it divides the population. But if you put people together on voting precincts it brings people together." Pl. Exh. 24, at 19.

The plan as designed by the Senate "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts. The new plan drew 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30% and 50%, and 4 other districts with a black voting age population of between 25% and 30%. See Pl. Exh. 2C. According to the 2000 census, as compared to the benchmark plan, the new plan reduced by five the number of districts with a black voting age population in excess of 60%. Compare Pl. Exh. 1D with Pl. Exh. 2C. Yet it increased the number of majority-black voting age population districts by one, and it increased the number

of districts with a black voting age population of between 25% and 50% by four. As compared to the benchmark plan enacted in 1997, the difference is even larger. Under the old census figures, Georgia had 10 Senate districts with a majority-black voting age population, and 8 Senate districts with a black voting age population of between 30% and 50%. See Pl. Exh. 1C. The new plan thus increased the number of districts with a majority black voting age population by three, and increased the number of districts with a black voting age population of between 30% and 50% by another five. Compare Pl. Exh. 1C with Pl. Exh. 2C.

The Senate adopted its new districting plan on August 10, 2001, by a vote of 29 to 26. Ten of the eleven black Senators voted for the plan. 195 F. Supp. 2d, at 55. The Georgia House of Representatives passed the Senate plan by a vote of 101 to 71. Thirty-three of the thirty-four black Representatives voted for the plan. *Ibid.* No Republican in either the House or the Senate voted for the plan, making the votes of the black legislators necessary for passage. See *id.*, at 41. The Governor signed the Senate plan into law on August 24, 2001, and Georgia subsequently sought to obtain preclearance.

B

Pursuant to § 5 of the Voting Rights Act, a covered jurisdiction like Georgia has the option of either seeking administrative preclearance through the Attorney General of the United States or seeking judicial preclearance by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment that the voting change comports with § 5. 42 U. S. C. § 1973c; *Georgia* v. *United States*, 411 U. S. 526 (1973). Georgia chose the latter method, filing suit seeking a declaratory judgment that the State Senate plan does not violate § 5.

Georgia, which bears the burden of proof in this action, see *Pleasant Grove* v. *United States*, 479 U. S. 462 (1987), attempted to prove that its Senate plan was not retrogres-

sive either in intent or in effect. It submitted detailed evidence documenting in each district the total population, the total black population, the black voting age population, the percentage of black registered voters, and the overall percentage of Democratic votes (*i. e.*, the overall likelihood that voters in a particular district will vote Democratic), among other things. See 195 F. Supp. 2d, at 36; see also Pl. Exhs. 2C, 2D. The State also submitted evidence about how each of these statistics compared to the benchmark districts. See 195 F. Supp. 2d, at 36; see also Pl. Exhs. 1C, 1D, 1E (revised).

Georgia also submitted testimony from numerous people who had participated in enacting the Senate plan into law, and from United States Congressman John Lewis, who represents the Atlanta area. These witnesses testified that the new Senate plan was designed to increase black voting strength throughout the State as well as to help ensure a continued Democratic majority in the Senate. The State also submitted expert testimony that African-American and non-African-American voters have equal chances of electing their preferred candidate when the black voting age population of a district is at 44.3%. Finally, in response to objections raised by the United States, Georgia submitted more detailed statistical evidence with respect to three proposed Senate districts that the United States found objectionable—Districts 2, 12, and 26—and two districts that the intervenors challenged—Districts 15 and 22.

The United States, through the Attorney General, argued in District Court that Georgia's 2001 Senate redistricting plan should not be precleared. It argued that the plan's changes to the boundaries of Districts 2, 12, and 26 unlawfully reduced the ability of black voters to elect candidates of their choice. See Brief for Federal Appellees 8; 195 F. Supp. 2d, at 72. The United States noted that in District 2, the black voting age population dropped from 60.58% to 50.31%; in District 12, the black voting age population dropped from 55.43% to 50.66%; and in District 26, the black

voting age population dropped from 62.45% to 50.80%.[1] Moreover, in all three of these districts, the percentage of black registered voters dropped to just under 50%. The United States also submitted expert evidence that voting is racially polarized in Senate Districts 2, 12, and 26. See *id.*, at 69–71. The United States acknowledged that some limited percentage of whites would vote for a black candidate, but maintained that the percentage was not sufficient for black voters to elect their candidate of choice. See *id.*, at 70–71. The United States also offered testimony from various witnesses, including lay witnesses living in the three districts, who asserted that the new contours of Districts 2, 12, and 26 would reduce the opportunity for blacks to elect a candidate of their choice in those districts; Senator Regina Thomas of District 2, the only black Senator who voted against the plan; Senator Eric Johnson, the Republican leader of the Senate; and some black legislators who voted

[1] Georgia and the United States have submitted slightly different figures regarding the black voting age population of each district. The differing figures depend upon whether the total number of blacks includes those people who self-identify as both black and a member of another minority group, such as Hispanic. Georgia counts this group of people, while the United States does not do so. Like the District Court, we consider all the record information, "including total black population, black registration numbers and both [black voting age population] numbers." 195 F. Supp. 2d 25, 79 (DC 2002). We focus in particular on Georgia's black voting age population numbers in this case because all parties rely on them to some extent and because Georgia used its own black voting age population numbers when it enacted the Senate plan. Moreover, the United States does not count all persons who identify themselves as black. It counts those who say they are black and those who say that they are both black and white, but it does not count those who say they are both black and a member of another minority group. Using the United States' numbers may have more relevance if the case involves a comparison of different minority groups. Cf. *Johnson* v. *De Grandy*, 512 U. S. 997 (1994); *Bush* v. *Vera*, 517 U. S. 952 (1996). Here, however, the case involves an examination of only one minority group's effective exercise of the electoral franchise. In such circumstances, we believe it is proper to look at *all* individuals who identify themselves as black.

for the plan but questioned how the plan would affect black voters. See Vols. 25–27 Record, Doc. No. 177, United States Exhs. 707–736 (Depositions). As the District Court stated, "the United States' evidence was extremely limited in scope—focusing only on three contested districts in the State Senate plan. That evidence was not designed to permit the court to assess the overall impact of [the Senate plan]." 195 F. Supp. 2d, at 37.

Pursuant to Federal Rule of Civil Procedure 24, the District Court also permitted four African-American citizens of Georgia to intervene. The intervenors identified two other districts—Districts 15 and 22—where they alleged retrogression had occurred. The intervenors "present[ed] little evidence other than proposed alternative plans and an expert report critiquing the State's expert report." 195 F. Supp. 2d, at 37.

A three-judge panel of the District Court held that Georgia's State Senate apportionment violated § 5, and was therefore not entitled to preclearance. See *id.*, at 97. Judge Sullivan, joined by Judge Edwards, concluded that Georgia had "not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters" effective exercise of the electoral franchise. *Ibid.* The court found that Senate Districts 2, 12, and 26 were retrogressive because in each district, a lesser opportunity existed for the black candidate of choice to win election under the new plan than under the benchmark plan. See *id.*, at 93–94. The court found that the reductions in black voting age population in Districts 2, 12, and 26 would "diminish African American voting strength in these districts," and that Georgia had "failed to present any . . . evidence" that the retrogression in those districts "will be offset by gains in other districts." *Id.*, at 88.

Judge Edwards, joined by Judge Sullivan, concurred. Judge Edwards emphasized that §§ 5 and 2 are "procedurally and substantively distinct provisions." *Id.*, at 97. He therefore rejected Georgia's argument that a plan preserving an equal opportunity for minorities to elect candidates of their choice satisfies § 5. Judge Edwards also rejected the testimony of the black Georgia politicians who supported the Senate plan. In his view, the testimony did not address whether racial polarization was occurring in Senate Districts 2, 12, and 26. See *id.*, at 101–102.

Judge Oberdorfer dissented. He would have given "greater credence to the political expertise and motivation of Georgia's African-American political leaders and reasonable inferences drawn from their testimony and the voting data and statistics." *Id.*, at 102. He noted that this Court has not answered "whether a redistricting plan that preserves or increases the number of districts statewide in which minorities have a fair or reasonable opportunity to elect candidates of choice is entitled to preclearance, or whether every district must remain at or improve on the benchmark probability of victory, even if doing so maintains a minority supermajority far in excess of the level needed for effective exercise of [the] electoral franchise." *Id.*, at 117.

After the District Court refused to preclear the plan, Georgia enacted another plan, largely similar to the one at issue here, except that it added black voters to Districts 2, 12, and 26. The District Court precleared this plan. See 204 F. Supp. 2d 4 (2002). No party has contested the propriety of the District Court's preclearance of the Senate plan as amended. Georgia asserts that it will use the plan as originally enacted if it receives preclearance.

We noted probable jurisdiction to consider whether the District Court should have precleared the plan as originally enacted by Georgia in 2001, 537 U. S. 1151 (2003), and now vacate the judgment below.

II

Before addressing the merits of Georgia's preclearance claim, we address the State's argument that the District Court was incorrect in allowing the private litigants to intervene in this lawsuit. Georgia maintains that private parties should not be allowed to intervene in § 5 actions because States should not be subjected to the political stratagems of intervenors. While the United States disagrees with Georgia on the propriety of intervention here, the United States argues that this question is moot because the participation of the intervenors did not affect the District Court's ruling on the merits and the intervenors did not appeal the court's ruling.

We do not think Georgia's argument is moot. The intervenors did not have to appeal because they were prevailing parties below. Moreover, the District Court addressed the evidence that the intervenors submitted, which is now in front of this Court. The issue whether intervenors are proper parties still has relevance in this Court because they argue here that the District Court correctly found that the Senate plan was retrogressive.

The District Court properly found that Federal Rule of Civil Procedure 24 governs intervention in this case. Section 5 permits a State to bring "an action in the United States District Court for the District of Columbia for a declaratory judgment." 42 U. S. C. § 1973c. Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit, and the statute by its terms does not bar private parties from intervening. In *NAACP* v. *New York*, 413 U. S. 345, 365 (1973), we held that in an action under § 5, "[i]ntervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24."

To support its argument, Georgia relies on *Morris* v. *Gressette*, 432 U. S. 491 (1977). In *Morris*, we held that in an *administrative* preclearance action, the decision to object belongs only to the Attorney General and is not judicially

reviewable. See *id.*, at 504–505. But *Morris* concerned the administrative preclearance process, not the judicial preclearance process. *Morris* itself recognized the difference between administrative preclearance and judicial preclearance. See *id.*, at 503–507.

Here, the District Court granted the motion to intervene because it found that the intervenors' "analysis of the . . . Senate redistricting pla[n] identifies interests that are not adequately represented by the existing parties." App. to Juris. Statement 218a. Private parties may intervene in § 5 actions assuming they meet the requirements of Rule 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case. See *NAACP* v. *New York*, *supra*, at 367.

III

A

Section 5 of the Voting Rights Act "has a limited substantive goal: "'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Miller*, 515 U. S., at 926 (quoting *Beer* v. *United States*, 425 U. S., [at 141])." *Bush* v. *Vera*, 517 U. S. 952, 982–983 (1996). Thus, a plan that merely preserves "current minority voting strength" is entitled to § 5 preclearance. *City of Lockhart* v. *United States*, 460 U. S. 125, 134, n. 10 (1983); *Bush* v. *Vera*, *supra*, at 983. Indeed, a voting change with a discriminatory but nonretrogressive purpose or effect does not violate § 5. See *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 341 (2000). And "*no matter how unconstitutional it may be*," a plan that is not retrogressive should be precleared under § 5. *Id.*, at 336. "[P]reclearance under § 5 affirms nothing but the absence of backsliding." *Id.*, at 335.

Georgia argues that a plan should be precleared under § 5 if the plan would satisfy § 2 of the Voting Rights Act of 1965,

42 U. S. C. § 1973. We have, however, "consistently understood" § 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 477 (1997) *(Bossier Parish I)*. For example, while § 5 is limited to particular covered jurisdictions, § 2 applies to all States. And the § 2 inquiry differs in significant respects from a § 5 inquiry. In contrast to § 5's retrogression standard, the "essence" of a § 2 vote dilution claim is that "a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg* v. *Gingles*, 478 U. S. 30, 47 (1986); see also *id.*, at 48–50 (enunciating a three-part test to establish vote dilution); *id.*, at 85–100 (O'Connor, J., concurring in judgment); 42 U. S. C. § 1973(b). Unlike an inquiry under § 2, a retrogression inquiry under § 5, "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Bossier Parish I*, *supra*, at 478. While some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections "differ in structure, purpose, and application." *Holder* v. *Hall*, 512 U. S. 874, 883 (1994) (plurality opinion).

In *Bossier Parish I*, we specifically held that a violation of § 2 is not an independent reason to deny preclearance under § 5. See 520 U. S., at 477. The reason for this holding was straightforward: "[R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Ibid.*

Georgia here makes the flip side of the argument that failed in *Bossier Parish I*—compliance with § 2 suffices for preclearance under § 5. Yet the argument fails here for the same reasons the argument failed in *Bossier Parish I*. We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard. Georgia's argument, like the argument

in *Bossier Parish I*, would "shift the focus of § 5 from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.*, at 480. Instead of showing that the Senate plan is nondilutive under § 2, Georgia must prove that its plan is nonretrogressive under § 5.

B

Georgia argues that even if compliance with § 2 does not automatically result in preclearance under § 5, its State Senate plan should be precleared because it does not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, *supra*, at 141. See, *e. g.*, Brief for Appellant 32, 36.

While we have never determined the meaning of "effective exercise of the electoral franchise," this case requires us to do so in some detail. First, the United States and the District Court correctly acknowledge that in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. See 195 F. Supp. 2d, at 73; Tr. of Oral Arg. 28–29. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.

Second, any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e. g.*, *Johnson* v. *De Grandy*, 512 U. S. 997, 1011–1012, 1020–1021 (1994); *Richmond* v. *United States*, 422 U. S. 358, 371–372 (1975); *Thornburg*

v. *Gingles*, *supra*, at 97–100 (O'CONNOR, J., concurring in judgment). "No single statistic provides courts with a shortcut to determine whether" a voting change retrogresses from the benchmark. *Johnson* v. *De Grandy*, *supra*, at 1020–1021.

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. The standard in § 5 is simple—whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S., at 141.

The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. See *Thornburg* v. *Gingles*, 478 U. S., at 48–49; *id.*, at 87–89 (O'CONNOR, J., concurring in judgment). Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice. See *id.*, at 88–89 (O'CONNOR, J., concurring in judgment); cf. Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517 (2002).

Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg* v. *Gingles*, *supra*, at 89 (O'CONNOR, J., concurring in judgment). On one hand, a smaller number of safe

majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, see *Voinovich* v. *Quilter*, 507 U. S. 146, 153–154 (1993), such a plan risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts. Cf. *Shaw* v. *Reno*, 509 U. S., at 648–650. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas. See H. Pitkin, The Concept of Representation 60–91 (1967).

On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. See *id.*, at 114. It also, however, creates the risk that the minority group's preferred candidate may lose. Yet as we stated in *Johnson* v. *De Grandy*, *supra*, at 1020:

> "[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics."

Section 5 gives States the flexibility to choose one theory of effective representation over the other.

In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process. "'[T]he power to influence the political process is not limited to winning elections.'" *Thornburg* v. *Gingles*, *supra*, at 99 (O'CONNOR, J., concurring in judgment) (quoting *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986)); see also *White* v. *Regester*, 412 U. S. 755, 766–767 (1973); *Whitcomb* v. *Chavis*, 403 U. S. 124, 149–160 (1971); *Johnson* v. *De Grandy*, 512 U. S., at 1011–1012.

Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. Cf. *Shaw* v. *Hunt*, 517 U. S. 899, 947, n. 21 (1996) (STEVENS, J., dissenting); *Hays* v. *Louisiana*, 936 F. Supp. 360, 364, n. 17 (WD La. 1996); *Johnson* v. *De Grandy*, *supra*, at 1011–1012; *Thornburg* v. *Gingles*, 478 U. S., at 98–100 (O'CONNOR, J., concurring in judgment). In assessing the comparative weight of these influence districts, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.*, at 100 (O'CONNOR, J., concurring in judgment). In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts. See, *e. g.*, Lublin, Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" 93 Am. Pol. Sci. Rev. 183, 185 (1999) (noting that racial redistricting in the early 1990's, which created more majority-minority districts, made Congress "less likely to adopt initiatives supported by blacks"); Cameron, Epstein, &

O'Halloran, Do Majority-Minority Districts Maximize Substantive Black Representation in Congress? 90 Am. Pol. Sci. Rev. 794, 808 (1996) (concluding that the "[d]istricting schemes that maximize the number of minority representatives do not necessarily maximize substantive minority representation"); C. Swain, Black Faces, Black Interests 193–234 (1995); Pildes, 80 N. C. L. Rev., at 1517; Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N. C. L. Rev. 1383 (2001).

Section 5 leaves room for States to use these types of influence and coalitional districts. Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. See Pitkin, *supra,* at 142; Swain, *supra,* at 5. The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters. See *Thornburg* v. *Gingles, supra,* at 87–89, 99 (O'Connor, J., concurring in judgment); cf. *Johnson* v. *De Grandy,* 512 U. S., at 1020.

In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul, and trade to find common political ground." *Ibid.* Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to

shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.

And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan. The District Court held that the support of legislators from benchmark majority-minority districts may show retrogressive purpose, but it is not relevant in assessing retrogressive effect. See 195 F. Supp. 2d, at 89; see also *post*, at 503 (SOUTER, J., dissenting). But we think this evidence is also relevant for retrogressive effect. As the dissent recognizes, the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." *Post*, at 509. The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.

The dissent maintains that standards for determining nonretrogression under § 5 that we announce today create a situation where "[i]t is very hard to see anything left of" § 5. *Post*, at 495. But the dissent ignores that the ability of a minority group to elect a candidate of choice remains an integral feature in any § 5 analysis. Cf. *Thornburg* v. *Gingles*, *supra*, at 98 (O'CONNOR, J., concurring in judgment). And the dissent agrees that the addition or subtraction of coalitional districts is relevant to the § 5 inquiry. See *post*, at 492, 504. Yet assessing whether a plan with coalitional districts is retrogressive is just as fact-intensive as whether a plan with both influence and coalitional districts is retrogressive. As JUSTICE SOUTER recognized for the Court in the § 2 context, a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5. See *Johnson* v. *De Grandy*, *supra*, at

1020–1021. And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district. See *Thornburg* v. *Gingles*, 478 U. S., at 37; *id.*, at 100–104 (O'Connor, J., concurring in judgment); see also *White* v. *Regester*, 412 U. S. 755 (1973); *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973) (en banc).

The dissent nevertheless asserts that it "cannot be right" that the § 5 inquiry goes beyond assessing whether a minority group can elect a candidate of its choice. *Post*, at 494. But except for the general statement of retrogression in *Beer*, the dissent cites no law to support its contention that retrogression should focus solely on the ability of a minority group to elect a candidate of choice. As Justice Souter himself, writing for the Court in *Johnson* v. *De Grandy*, *supra*, at 1011–1012, has recognized, the "extent of the opportunities minority voters enjoy to participate in the political processes" is an important factor to consider in assessing a § 2 vote-dilution inquiry. See also *Thornburg* v. *Gingles*, *supra*, at 98–100 (O'Connor, J., concurring in judgment). In determining how the new districting plan differs from the benchmark plan, the same standard should apply to § 5.

C

The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-

minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

The District Court correctly recognized that the increase in districts with a substantial minority of black voters is an important factor in the retrogression inquiry. See 195 F. Supp. 2d, at 75–78. Nevertheless, it did not adequately apply this consideration to the facts of this case. The District Court ignored the evidence of numerous other districts showing an increase in black voting age population, as well as the other evidence that Georgia decided that a way to increase black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts. Its statement that Georgia did not "presen[t] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26" is therefore clearly erroneous. *Id.*, at 94. Like the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts, although we note that Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in those districts, see *id.*, at 66, and that the United States' own expert admitted that the results of statewide elections in Georgia show that "there would be a 'very good chance' that . . . African American candidates would win election in the reconstituted districts." *Id.*, at 71; see also *id.*, at 84–85. Nevertheless, regardless of any racially polarized voting or diminished opportunity for black voters to elect a candidate of their choice in proposed Districts 2, 12, and 26, the District Court's inquiry was too narrow.

In the face of Georgia's evidence that the Senate plan as a whole is not retrogressive, the United States introduced nothing apart from the evidence that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. As the District Court stated, the United States did not introduce any evidence to rebut Georgia's evidence that the increase in black voting age population in the other districts offsets any decrease in black voting age population in the three contested districts: "[T]he United States' evidence was extremely limited in scope—focusing only on three contested districts in the State Senate plan." *Id.*, at 37. Indeed, the District Court noted that the United States' evidence "was not designed to permit the court to assess the overall impact" of the Senate plan. *Ibid.*

Given the evidence submitted in this case, we find that Georgia likely met its burden of showing nonretrogression. The increase in black voting age population in the other districts likely offsets any marginal decrease in the black voting age population in the three districts that the District Court found retrogressive. Using the overlay of the 2000 census numbers, Georgia's strategy of "unpacking" minority voters in some districts to create more influence and coalitional districts is apparent. Under the 2000 census numbers, the number of majority black voting age population districts in the new plan increases by one, the number of districts with a black voting age population of between 30% and 50% increases by two, and the number of districts with a black voting age population of between 25% and 30% increases by another 2. See Pl. Exhs. 1D, 2C; see also *supra*, at 470–471.

Using the census numbers in effect at the time the benchmark plan was enacted to assess the benchmark plan, the difference is even more striking. Under those figures, the new plan increases from 10 to 13 the number of districts with a majority-black voting age population and increases from 8 to 13 the number of districts with a black voting age population of between 30% and 50%. See Pl. Exhs. 1C, 2C. Thus,

the new plan creates 8 new districts—out of 56—where black voters as a group can play a substantial or decisive role in the electoral process. Indeed, under the census figures in use at the time Georgia enacted its benchmark plan, the black voting age population in Districts 2, 12, and 26 does not decrease to the extent indicated by the District Court. District 2 drops from 59.27% black voting age population to 50.31%. District 26 drops from 53.45% black voting age population to 50.80%. And District 12 actually *increases*, from 46.50% black voting age population to 50.66%. See Pl. Exhs. 1C, 2C.[2] And regardless of any potential retrogression in some districts, § 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts. The testimony from those who designed the Senate plan confirms what the statistics suggest—that Georgia's goal was to "unpack" the minority voters from a few districts to increase blacks' effective exer-

[2] The dissent summarily rejects any inquiry into the benchmark plan using the census numbers in effect at the time the redistricting plan was passed. See *post*, at 506. Yet we think it is relevant to examine how the new plan differs from the benchmark plan as originally enacted by the legislature. The § 5 inquiry, after all, revolves around the change from the previous plan. The 1990 census numbers are far from "irrelevant." *Ibid.* Rather, examining the benchmark plan with the census numbers in effect at the time the State enacted its plan comports with the one-person, one-vote principle of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny. When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned. After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election. See, *e. g.*, *Branch* v. *Smith*, 538 U. S. 254 (2003); *Lawyer* v. *Department of Justice*, 521 U. S. 567 (1997); *Growe* v. *Emison*, 507 U. S. 25 (1993).

cise of the electoral franchise in more districts. See *supra*, at 469–471.

Other evidence supports the implausibility of finding retrogression here. An examination of black voters' opportunities to participate in the political process shows, if anything, an increase in the effective exercise of the electoral franchise. It certainly does not indicate retrogression. The 34 districts in the proposed plan with a black voting age population of above 20% consist almost entirely of districts that have an overall percentage of Democratic votes of above 50%. See Pl. Exh. 2D. The one exception is proposed District 4, with a black voting age population of 30.51% and an overall Democratic percentage of 48.86%. See *ibid.* These statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc, even if they cannot always elect the candidate of their choice. See *Thornburg* v. *Gingles*, 478 U. S., at 100 (O'Connor, J., concurring in judgment). These statistics also buttress the testimony of the designers of the plan such as Senator Brown, who stated that the goal of the plan was to maintain or increase black voting strength and relatedly to increase the prospects of Democratic victory. See *supra*, at 469–470.

The testimony of Congressman John Lewis is not so easily dismissed. Congressman Lewis is not a member of the State Senate and thus has less at stake personally in the outcome of this litigation. Congressman Lewis testified that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive." Pl. Exh. 21, at 21–23. Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance—a plan that increases the number of districts with a majority-black voting age population, even if it means that in some of those districts, minority voters will face a

somewhat reduced opportunity to elect a candidate of their choice. Cf. *Thornburg* v. *Gingles*, *supra*, at 89 (O'CONNOR, J., concurring in judgment).

The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive. See *post*, at 501–508. To the contrary, we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. While the District Court engaged in a thorough analysis of the issue, we must remand the case for the District Court to examine the facts using the standard that we announce today. We leave it for the District Court to determine whether Georgia has indeed met its burden of proof. The dissent justifies its conclusion here on the ground that the District Court did not clearly err in its factual determination. But the dissent does not appear to dispute that if the District Court's legal standard was incorrect, the decision below should be vacated.

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. Cf. *Johnson* v. *De Grandy*, 512 U. S., at 1020; *Shaw* v. *Reno*, 509 U. S., at 657. As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." Pl. Exh. 21, at 14. While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration

and color-blindness are not just qualities to be proud of, but are simple facts of life. See *Shaw* v. *Reno*, *supra*, at 657.

IV

The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression. The judgment of the District Court for the District of Columbia, accordingly, is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

As is evident from the Court's accurate description of the facts in this case, race was a predominant factor in drawing the lines of Georgia's State Senate redistricting map. If the Court's statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under § 2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed. Race cannot be the predominant factor in redistricting under our decision in *Miller* v. *Johnson*, 515 U. S. 900 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.

I agree that our decisions controlling the § 5 analysis require the Court's ruling here. See, *e. g.*, *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471 (1997); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320 (2000). The discord and inconsistency between §§ 2 and 5 should be noted, however; and in a case where that issue is raised, it should be confronted. There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive. This serious issue has not been raised here, and, as already ob-

served, the Court is accurate both in its summary of the facts and in its application of the controlling precedents. With these observations, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

I continue to adhere to the views expressed in my opinion in *Holder* v. *Hall*, 512 U. S. 874, 891 (1994) (opinion concurring in judgment). I join the Court's opinion because it is fully consistent with our § 5 precedents.

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

I

I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965. See *ante*, at 480–482. The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters. Cf. *Johnson* v. *De Grandy*, 512 U. S. 997, 1020 (1994) (explaining in the context of § 2 that although "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice").

Before a State shifts from majority-minority to coalition districts, however, the State bears the burden of proving that nonminority voters will reliably vote along with the minority. See, *e. g.*, *Reno* v. *Bossier Parish School Bd.*, 520

U. S. 471, 478 (1997). It must show not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State must do more than produce reports of minority voting age percentages; it must show that the probable voting behavior of nonminority voters will make coalitions with minorities a real prospect. See, *e. g.*, Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517, 1539 (2002). If the State's evidence fails to convince a factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness, a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State.

The District Court majority perfectly well understood all this and committed no error. Error enters this case here in this Court, whose majority unmoors § 5 from any practical and administrable conception of minority influence that would rule out retrogression in a transition from majority-minority districts, and mistakes the significance of the evidence supporting the District Court's decision.

II

The Court goes beyond recognizing the possibility of coalition districts as nonretrogressive alternatives to those with majorities of minority voters when it redefines effective voting power in § 5 analysis without the anchoring reference to electing a candidate of choice. It does this by alternatively suggesting that a potentially retrogressive redistricting plan could satisfy § 5 if a sufficient number of so-called "influence districts," in addition to "coalitio[n] districts," were created, *ante,* at 483, 484, or if the new plan provided minority groups

with an opportunity to elect a particularly powerful candidate, *ante,* at 483–484. On either alternative, the § 5 requirement that voting changes be nonretrogressive is substantially diminished and left practically unadministrable.

A

The Court holds that a State can carry its burden to show a nonretrogressive degree of minority "influence" by demonstrating that "'candidates elected without decisive minority support would be willing to take the minority's interests into account.'" *Ante,* at 482 (quoting *Thornburg* v. *Gingles*, 478 U. S. 30, 100 (1986) (O'CONNOR, J., concurring in judgment)). But this cannot be right.

The history of § 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power. When this Court held that a State must show that any change in voting procedure is free of retrogression it meant that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976); see, *e. g.*, *id.*, at 140–141 ("Section 5 was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques'" (quoting S. Rep. No. 94–295, p. 19 (1975))). In addressing the burden to show no retrogression, therefore, "influence" must mean an opportunity to exercise power effectively.

The Court, however, says that influence may be adequate to avoid retrogression from majority-minority districts when it consists not of decisive minority voting power but of sentiment on the part of politicians: influence may be sufficient

when it reflects a willingness on the part of politicians to consider the interests of minority voters, even when they do not need the minority votes to be elected. The Court holds, in other words, that there would be no retrogression when the power of a voting majority of minority voters is eliminated, so long as elected politicians can be expected to give some consideration to minority interests.

The power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is very hard to see anything left of the standard of nonretrogression, and it is no surprise that the Court's cited precedential support for this reconception, see *ante*, at 482, consists of a footnote from a dissenting opinion in *Shaw* v. *Hunt*, 517 U. S. 899 (1996), and footnote dictum in a case from the Western District of Louisiana.

Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem*, looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

B

Identical problems of comparability and administrability count at least as much against the Court's further gloss on nonretrogression, in its novel holding that a State may trade off minority voters' ability to elect a candidate of their choice against their ability to exert some undefined degree of influence over a candidate likely to occupy a position of official legislative power. See *ante*, at 483–484. The Court implies that one majority-minority district in which minority voters could elect a legislative leader could replace a larger number of majority-minority districts with ordinary candidates, without retrogression of overall minority voting strength. Under this approach to § 5, a State may value minority votes in a district in which a potential committee chairman might be elected differently from minority votes in a district with ordinary candidates.

It is impossible to believe that Congress could ever have imagined § 5 preclearance actually turning on any such distinctions. In any event, if the Court is going to allow a State to weigh minority votes by the ambitiousness of candidates the votes might be cast for, it is hard to see any stopping point. I suppose the Court would not go so far as to give extra points to an incumbent with the charisma to attract a legislative following, but would it value all committee chairmen equally? (The committee chairmen certainly would not.) And what about a legislator with a network of influence that has made him a proven dealmaker? Thus, again, the problem of measurement: is a shift from 10 majority-minority districts to 8 offset by a good chance that 1 of the 8 may elect a new Speaker of the House?

I do not fault the Court for having no answers to these questions, for there are no answers of any use under § 5. The fault is more fundamental, and the very fact that the Court's interpretation of nonretrogression under § 5 invites unanswerable questions points to the error of a § 5 preclearance regime that defies reviewable administration. We are

left with little hope of determining practically whether a districting shift to one party's overall political advantage can be expected to offset a loss of majority-minority voting power in particular districts; there will simply be greater opportunity to reduce minority voting strength in the guise of obtaining party advantage.

One is left to ask who will suffer most from the Court's new and unquantifiable standard. If it should turn out that an actual, serious burden of persuasion remains on the States, States that rely on the new theory of influence should be guaranteed losers: nonretrogression cannot be demonstrated by districts with minority influence too amorphous for objective comparison. But that outcome is unlikely, and if in subsequent cases the Court allows the State's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, § 5 will simply drop out as a safeguard against the "unremitting and ingenious defiance of the Constitution" that required the procedure of preclearance in the first place. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966).

III

The District Court never reached the question the Court addresses, of what kind of influence districts (coalition or not) might demonstrate that a decrease in majority-minority districts was not retrogressive. It did not reach this question because it found that the State had not satisfied its burden of persuasion on an issue that should be crucial on any administrable theory:[1] the State had not shown the possibility

[1] The District Court correctly recognized that the State bears the burden of proof in establishing that its proposed redistricting plan satisfied the standards of § 5. See, *e. g.*, 195 F. Supp. 2d 25, 86 (DC 2002) ("We look to the State to explain why retrogression is not present"); see also *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 478 (1997) (covered jurisdiction "bears the burden of proving that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on

of actual coalitions in the affected districts that would allow any retreat from majority-minority districts without a retrogressive effect. This central evidentiary finding is invulnerable under the correct standard of review.

This Court's review of the District Court's factual findings is for clear error. See, *e. g.*, *Miller* v. *Johnson*, 515 U. S. 900, 917 (1995); *Pleasant Grove* v. *United States*, 479 U. S. 462, 469 (1987); *McCain* v. *Lybrand*, 465 U. S. 236, 258 (1984); *City of Lockhart* v. *United States*, 460 U. S. 125, 136 (1983). We have no business disturbing the District Court's ruling "simply because we would have decided the case differently," but only if based "on the entire evidence, [we are] left with the definite and firm conviction that a mistake has been committed." *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001) (internal quotation marks omitted). It is not, then, up to us to "decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan." *Ante*, at 466. Our sole responsibility is to see whether the District Court committed clear error in refusing to preclear the plan. It did not.

A

The District Court began with the acknowledgment (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive:

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account of race or color" (internal quotation marks omitted)); *id.*, at 480 (Section 5 "imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect"); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 332 (2000) ("In the specific context of § 5 . . . the covered jurisdiction has the burden of persuasion"); cf. *Beer* v. *United States*, 425 U. S. 130, 140 (1976) (Congress in passing § 5 sought to "freez[e] election procedures in the covered areas unless the changes can be shown to be nondiscriminatory" (internal quotation marks omitted)).

> "'Unpacking' African American districts may have positive or negative consequences for the statewide electoral strength of African American voters. To the extent that voting patterns suggest that minority voters are in a better position to join forces with other segments of the population to elect minority preferred candidates, a decrease in a district's BVAP may have little or no effect on minority voting strength." 195 F. Supp. 2d 25, 76 (DC 2002).

See *id.*, at 78 ("[T]he Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power"); *id.*, at 84 ("[T]he mere fact that BVAP decreases in certain districts is not enough to deny preclearance to a plan under Section 5").[2]

The District Court recognized that the key to understanding the impact of drops in a district's BVAP on the minority group's "effective exercise of the electoral franchise," *Beer*, 425 U. S., at 141, is the level of racial polarization. If racial elements consistently vote in separate blocs, decreasing the proportion of black voters will generally reduce the chance that the minority group's favored candidate will be elected; whereas in districts with low racial bloc voting or significant white crossover voting, a decrease in the black proportion may have no effect at all on the minority's opportunity to elect their candidate of choice. See, *e. g.*, 195 F. Supp. 2d, at 84 ("[R]acial polarization is critically important because its presence or absence in the Senate Districts challenged by the United States goes a long way to determining whether

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[2] Indeed, the other plans approved by the District Court, Georgia's State House plan, 195 F. Supp. 2d, at 95, congressional plan, *ibid.*, and the interim plan approved for the State Senate, 204 F. Supp. 2d 4, 7 (DC 2002), all included decreases in BVAP in particular districts.

or not the decreases in BVAP and African American voter registration in those districts are likely to produce retrogressive effects").

This indisputable recognition, that context determines the effect of decreasing minority numbers for purposes of the § 5 enquiry, points to the nub of this case, and the District Court's decision boils down to a judgment about what the evidence showed about that context. The District Court found that the United States had offered evidence of racial polarization in the contested districts,[3] *id.*, at 86, and it found that Georgia had failed to present anything relevant on that issue. Georgia, the District Court said, had "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State." *Id.*, at 88. In particular, the District Court found it "impossible to extrapolate" anything about the level of racial polarization from the statistical submissions of Georgia's lone expert witness. *Id.*, at 85. And the panel majority took note that Georgia's expert "admitted on cross-examination" that his evidence simply did not address racial polarization: "the whole point of my analysis," the expert stated, "is not to look at polarization per se. The question is not whether or not blacks and whites in general vote for different candidates." *Ibid.* (internal quotation marks omitted).

Accordingly, the District Court explained that Georgia's expert:

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[3] The majority cites the District Court's comment that "'the United States' evidence was extremely limited in scope—focusing only on three contested districts in the State Senate plan.'" *Ante*, at 474 (quoting 195 F. Supp. 2d, at 37). The District Court correctly did not require the United States to prove that the plan was retrogressive. As the District Court explained: "[u]ltimately, the burden of proof in this matter lies with the State. We look to the State to explain why retrogression is not present, and to prove the absence of racially polarized voting that might diminish African American voting strength in light of several districts' decreased BVAPs." *Id.*, at 86.

"made no attempt to address the central issue before the court: whether the State's proposal is retrogressive. He failed even to identify the decreases in BVAP that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice. The paucity of information in [the expert's] report thus leaves us unable to use his analysis to assess the expected change in African American voting strength statewide that will be brought by the proposed Senate plan." *Id.*, at 81.

B

How is it, then, that the majority of this Court speaks of "Georgia's evidence that the Senate plan as a whole is not retrogressive," against which "the United States did not introduce any evidence [in] rebut[tal]," *ante*, at 487? The answer is that the Court is not engaging in review for clear error. Instead, it is reweighing evidence *de novo*, discovering what it thinks the District Court overlooked, and drawing evidentiary conclusions the District Court supposedly did not see. The Court is mistaken on all points.

1

Implicitly recognizing that evidence of voting behavior by majority voters is crucial to any showing of nonretrogression when minority numbers drop under a proposed plan, the Court tries to find evidence to fill the record's gap. It says, for example, that "Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in [the contested] districts." *Ante*, at 486. In support of this claim, however, the majority focuses on testimony offered by Georgia's expert relating to crossover voting in the pre-existing rather than proposed districts. 195 F. Supp. 2d, at 66. The District Court specifically noted that the expert did not calculate crossover voting under the proposed plan. *Id.*, at 65, n. 31 ("The court also emphasizes

that Epstein did not attempt to rely on the table's calculations to demonstrate voting patterns in the districts, and calculated crossover in the existing, and not the proposed, Senate districts"). Indeed, in relying on this evidence the majority attributes a significance to it that Georgia's own expert disclaimed, as the District Court pointed out. See *id.*, at 85 ("[I]t is impossible to extrapolate these voting patterns from Epstein's database. As Epstein admitted on cross-examination: the whole point of my analysis is not to look at polarization per se. The question is not whether or not blacks and whites in general vote for different candidates" (internal quotation marks omitted)).

2

In another effort to revise the record, the Court faults the District Court, alleging that it "focused too narrowly on proposed Senate Districts 2, 12, and 26." *Ante,* at 485. In fact, however, it is Georgia that asked the District Court to consider only the contested districts, and the District Court explicitly refused to limit its review in any such fashion: "we reject the State's argument that this court's review is limited only to those districts challenged by the United States, and should not encompass the redistricting plans in their entirety. . . . [T]he court's review necessarily extends to the entire proposed plan." 195 F. Supp. 2d, at 73. The District Court explained that it "is vested with the final authority to approve or disapprove the proposed change as a whole." *Ibid.* "The question before us is whether the proposed Senate plan as a whole, has the 'purpose or effect of denying or abridging the right to vote on account of race or color.'" *Id.*, at 103 (Oberdorfer, J., concurring in part and dissenting in part) (quoting 42 U. S. C. § 1973c). Though the majority asserts that "[t]he District Court ignored the evidence of numerous other districts showing an increase in black voting age population," *ante,* at 486, the District Court, in fact, specifically considered the parties' dispute over the statewide

impact of the change in black voting age population. See, *e. g.*, 195 F. Supp. 2d, at 93 ("The number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven").

3

In a further try to improve the record, the Court focuses on the testimony of certain lay witnesses, politicians presented by the State to support its claim that the Senate plan is not retrogressive. Georgia, indeed, relied heavily on the near unanimity of minority legislators' support for the plan. But the District Court did not overlook this evidence; it simply found it inadequate to carry the State's burden of showing nonretrogression. The District Court majority explained that the "legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*." *Id.*, at 89 (emphasis in original). As against the politicians' testimony, the District Court had contrary "credible," *id.*, at 88, evidence of retrogressive effect. This evidence was the testimony of the expert witness presented by the United States, which "suggests the existence of highly racially polarized voting in the proposed districts," *ibid.*, evidence of retrogressive effect to which Georgia offered "no competent" response, *ibid.* The District Court was clearly within bounds in finding that (1) Georgia's proposed plan decreased BVAP in the relevant districts, (2) the United States offered evidence of significant racial polarization in those districts, and (3) Georgia offered no adequate response to this evidence.

The reasonableness of the District Court's treatment of the evidence is underscored in its concluding reflection that it was possible Georgia could have shown the plan to be nonretrogressive, but the evidence the State had actually offered simply failed to do that. "There are, without doubt,

numerous other ways, given the limited evidence of racially polarized voting in State Senate and local elections, that Georgia could have met its burden of proof in this case. Yet, the court is limited to reviewing the evidence presented by the parties, and is compelled to hold that the State has not met its burden." *Id.*, at 94. "[T]he lack of positive racial polarization data was the gap at the center of the State's case [and] the evidence presented by [the] estimable [legislators] does not come close to filling that void." *Id.*, at 100.

As must be plain, in overturning the District Court's thoughtful consideration of the evidence before it, the majority of this Court is simply rejecting the District Court's evidentiary finding in favor of its own. It is reweighing testimony and making judgments about the competence, interest, and character of witnesses. The Court is not conducting clear error review.

4

Next, the Court attempts to fill the holes in the State's evidence on retrogression by drawing inferences favorable to the State from undisputed statistics. See *ante*, at 487–489. This exercise comes no closer to demonstrating clear error than the others considered so far.

In the first place, the District Court has already explained the futility of the Court's effort. Knowing whether the number of majority BVAP districts increases, decreases, or stays the same under a proposed plan does not alone allow any firm conclusion that minorities will have a better, or worse, or unvarying opportunity to elect their candidates of choice. Any such inference must depend not only on trends in BVAP levels, but on evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, likelihood of white crossover voting, and so on.[4] In-

[4] The fact that the Court premises its analysis on BVAP alone is ironic given that the Court, incorrectly, chastises the District Court for committing the very error the Court now engages in, "fail[ing] to consider all the relevant factors." *Ante*, at 485.

deed, the core holding of the Court today, with which I agree, that nonretrogression does not necessarily require maintenance of existing supermajority minority districts, turns on this very point; comparing the number of majority-minority districts under existing and proposed plans does not alone reliably indicate whether the new plan is retrogressive.

Lack of contextual evidence is not, however, the only flaw in the Court's numerical arguments. Thus, in its first example, *ante*, at 487, the Court points out that under the proposed plan the number of districts with majority BVAP increases by one over the existing plan,[5] but the Court does not mention that the number of districts with BVAP levels over 55% decreases by four. See Record, Doc. No. 148, Pl. Exhs. 1D, 2C. Similarly, the Court points to an increase of two in districts with BVAP in the 30% to 50% range, along with a further increase of two in the 25% to 30% range. *Ante*, at 487. It fails to mention, however, that Georgia's own expert argued that 44.3% was the critical threshold for BVAP levels, 195 F. Supp. 2d, at 107, and the data on which the Court relies shows the number of districts with BVAP over 40% actually decreasing by one, see Record, Doc. No. 148, Pl. Exhs. 1D, 2C. My point is not that these figures conclusively demonstrate retrogression; I mean to say only that percentages tell us nothing in isolation, and that without contextual evidence the raw facts about population levels fail to get close to indicating that the State carried its burden to show no retrogression. They do not come close to showing clear error.

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[5] Though the Court does not acknowledge it in its discussion of why "Georgia likely met its burden," *ante*, at 487, even this claim was disputed. As the District Court explained: "[t]he number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven." 195 F. Supp. 2d, at 93.

5

Nor could error, clear or otherwise, be shown by the Court's comparison of the proposed plan with the description of the State and its districts provided by the 1990 census. *Ante*, at 487–489. The 1990 census is irrelevant. We have the 2000 census, and precedent confirms in no uncertain terms that the issue for § 5 purposes is not whether Georgia's proposed plan would have had a retrogressive effect 13 years ago: the question is whether the proposed plan would be retrogressive now. See, *e. g.*, *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 334 (2000) (Under § 5 "the baseline is the status quo that is proposed to be changed"); *Holder* v. *Hall*, 512 U. S. 874, 883 (1994) (plurality opinion) (Under § 5, "[t]he baseline for comparison is present by definition; it is the existing status"); *City of Lockhart* v. *United States*, 460 U. S., at 132 ("The proper comparison is between the new system and the system actually in effect"); Cf. 28 CFR § 51.54(b)(2) (2002) (when determining if a change is retrogressive under § 5 "[t]he Attorney General will make the comparison based on the conditions existing at the time of the submission"). The Court's assumption that a proper § 5 analysis may proceed on the basis of obsolete data from a superseded census is thus as puzzling as it is unprecedented. It is also an invitation to perverse results, for if a State could carry its burden under § 5 merely by showing no retrogression from the state of affairs 13 years ago, it could demand preclearance for a plan flatly diminishing minority voting strength under § 5.[6]

[6] For example, if a covered jurisdiction had two majority-minority districts in 1990, but rapidly changing demography had produced two more during the ensuing decade, a new redistricting plan, setting the number of majority-minority districts at three would conclusively rule out retrogression on the Court's calculus. This would be the case even when voting behavior showed that nothing short of four majority-minority districts would preserve the status quo as of 2000.

The Court's final effort to demonstrate that Georgia's plan is nonretrogressive focuses on statistics about Georgia Democrats. *Ante*, at 489. The Court explains that almost all the districts in the proposed plan with a BVAP above 20% have a likely overall Democratic performance above 50%, and from this the Court concludes that "[t]hese statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc." *Ibid.* But this is not so. The degree to which the statistics could support any judgment about the effect of black voting in State Senate elections is doubtful, and even on the Court's assumptions the statistics show no clear error by the District Court.

As for doubt about what the numbers have to do with State Senate elections, it is enough to know that the majority's figures are taken from a table describing Democratic voting in statewide, not local, elections. The Court offers no basis for assuming that voting for Democratic candidates in statewide elections correlates with voting behavior in local elections,[7] and in fact, the record points to different, not identical, voting patterns. The District Court specifically noted that the United States's expert testified that "African American candidates consistently received less crossover voting in local election[s] than in statewide elections," 195 F. Supp. 2d, at 71, and the court concluded that there is "compelling evidence that racial voting patterns in State Senate races can be expected to differ from racial voting patterns in statewide races," *id.*, at 85–86.

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[7] Even if the majority wanted to rely on these figures to make a claim about Democratic voting in statewide elections, the predictors' significance is utterly unclear. The majority pulls its figures from an exhibit titled, "Political Data Report," and a column labeled, "%OVER DEMVOTES," Pl. Exh. 2D. See *ante*, at 489. The document provides no information regarding whether the numbers in the column reflect an average of past performance, a prediction for future performance, or something else altogether.

But even if we assume the data on Democratic voting statewide can tell us something useful about Democratic voting in State Senate districts, the Court's argument does not hold up. It proceeds from the faulty premise that even with a low BVAP, if enough of the district is Democratic, the minority Democrats will necessarily have an effect on which candidates are elected. But if the proportion of nonminority Democrats is high enough, the minority group may well have no impact whatever on which Democratic candidate is selected to run and ultimately elected. In districts, say, with 20% minority voters (all of them Democrats) and 51% nonminority Democrats, the Democratic candidate has no obvious need to take the interests of the minority group into account; if everybody votes (or the proportion of stay-at-homes is constant throughout the electorate) the Democrat can win the general election without minority support. Even in a situation where a Democratic candidate needs a substantial fraction of minority voters to win (say the population is 25% minority and 30% nonminority Democrats), the Democratic candidate may still be able to ignore minority interests if there is such ideological polarization as between the major parties that the Republican candidate is entirely unresponsive to minority interests. In that situation, a minority bloc would presumably still prefer the Democrat, who would not need to adjust any political positions to get the minority vote.

All of this reasoning, of course, carries a whiff of the lamp. I do not know how Georgia's voters will actually behave if the percentage of something is x, or maybe y, any more than the Court does. We are arguing about numerical abstractions, and my sole point is that the Court's abstract arguments do not hold up. Much less do they prove the District Court wrong.

IV

Section 5, after all, was not enacted to address abstractions. It was enacted "to shift the advantage of time and

inertia from the perpetrators of the evil to its victim," *Beer*, 425 U. S., at 140 (internal quotation marks omitted) (quoting H. R. Rep. No. 94–196, pp. 57–58 (1970)), and the State of Georgia was made subject to the requirement of preclearance because Congress "had reason to suppose" it might "try . . . to evade the remedies for voting discrimination" and thus justifies §5's "uncommon exercise of congressional power." *South Carolina* v. *Katzenbach*, 383 U. S., at 334–335. Section 5 can only be addressed, and the burden to prove no retrogression can only be carried, with evidence of how particular populations of voters will probably act in the circumstances in which they live. The State has the burden to convince on the basis of such evidence. The District Court considered such evidence: it received testimony, decided what it was worth, and concluded as the trier of fact that the State had failed to carry its burden. There was no error, and I respectfully dissent.

Syllabus

WIGGINS *v.* SMITH, WARDEN, ET AL.

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

No. 02–311. Argued March 24, 2003—Decided June 26, 2003

In 1989, petitioner Wiggins was convicted of capital murder by a Maryland judge and subsequently elected to be sentenced by a jury. His public defenders, Schlaich and Nethercott, moved to bifurcate the sentencing, representing that they planned to prove that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The court denied the motion. At sentencing, Nethercott told the jury in her opening statement that they would hear, among other things, about Wiggins' difficult life, but such evidence was never introduced. Before closing arguments and outside the presence of the jury, Schlaich made a proffer to the court to preserve the bifurcation issue for appeal, detailing the mitigation case counsel would have presented. Schlaich never mentioned Wiggins' life history or family background. The jury sentenced Wiggins to death, and the Maryland Court of Appeals affirmed. Represented by new counsel, Wiggins sought postconviction relief, arguing that his trial counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. He presented expert testimony by a forensic social worker about the severe physical and sexual abuse he had suffered at the hands of his mother and while under the care of a series of foster parents. Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history before sentencing, even though state funds were available for that purpose, and explained that he and Nethercott had decided to focus on retrying the factual case and disputing Wiggins' direct responsibility for the murder. The trial court denied the petition, and the State Court of Appeals affirmed, concluding that trial counsel had made a reasoned choice to proceed with what they considered their best defense. Subsequently, the Federal District Court granted Wiggins relief on his federal habeas petition, holding that the Maryland courts' rejection of his ineffective assistance claim involved an unreasonable application of clearly established federal law. In reversing, the Fourth Circuit found trial counsel's strategic decision to focus on Wiggins' direct responsibility to be reasonable.

Held: The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel. Pp. 519–538.

Syllabus

(a) A federal writ can be granted only if a state court decision "was contrary to, or involved an unreasonable application of, clearly established" precedents of this Court. 28 U. S. C. § 2254(d)(1). This "unreasonable application" prong permits the writ to be granted when a state court identifies the correct governing legal principle but unreasonably applies it to the facts of a petitioner's case. *Williams* v. *Taylor*, 529 U. S. 362, 413. For this standard to be satisfied, the state court decision must have been "objectively unreasonable," *id.*, at 409, not just incorrect or erroneous. An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland* v. *Washington*, 466 U. S. 668, 687. Performance is deficient if it falls below an objective standard of reasonableness, which is defined in terms of prevailing professional norms. *Id.*, at 688. Here, as in *Strickland*, counsel claim that their limited investigation into petitioner's background reflected a tactical judgment not to present mitigating evidence and to pursue an alternative strategy instead. In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable*. The Court thus conducts an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct. *Id.*, at 688, 689. Pp. 519–523.

(b) Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigating when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case

from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. The record of the sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly stemmed from inattention, not strategic judgment. Until the trial court denied their bifurcation motion, they had had every reason to develop the most powerful mitigation case possible. During the sentencing process itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder; rather they put on a halfhearted mitigation case instead. The Maryland Court of Appeals' assumption that counsel's investigation was adequate reflected an unreasonable application of *Strickland.* In deferring to counsel's decision not to present every conceivable mitigation defense despite the fact that counsel based their alleged choice on an inadequate investigation, the Maryland Court of Appeals further unreasonably applied *Strickland.* And the court's conclusion that the social services records revealed incidences of sexual abuse, when they in fact did not, reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U. S. C. § 2254(d)(2). Contrary to the State's and the United States' contention, the record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one this Court describes. Ultimately, this Court's conclusion that counsel's investigation was inadequate does not mean that *Strickland* requires counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require counsel to present such evidence at sentencing in every case. Rather, the conclusion is based on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Strickland*, *supra,* at 690–691. Pp. 523–534.

(c) Counsel's failures prejudiced Wiggins' defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Strickland*, *supra,* at 694. This Court assesses prejudice by reweighing the aggravating evidence against the totality of the mitigating evidence adduced both at trial and in the habeas proceedings. *Williams* v. *Taylor*, *supra,* at 397–398. The mitigating evidence counsel failed to discover and present here is powerful. Wiggins experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless and his diminished mental capacities further augment his mitigation case. He

Syllabus

thus has the kind of troubled history relevant to assessing a defendant's moral culpability. *Penry* v. *Lynaugh*, 492 U. S. 302, 319. Given the nature and extent of the abuse, there is a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different sentence. The only significant mitigating factor the jury heard was that Wiggins had no prior convictions. Had it been able to place his excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Wiggins had no record of violent conduct that the State could have introduced to offset this powerful mitigating narrative. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of his moral culpability. Pp. 534–538.

288 F. 3d 629, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, *post,* p. 538.

Donald B. Verrilli, Jr., argued the cause for petitioner. With him on the briefs were *Ian Heath Gershengorn* and *Lara M. Flint.*

Gary E. Bair, Solicitor General of Maryland, argued the cause for respondents. With him on the brief were *J. Joseph Curran, Jr.*, Attorney General, and *Kathryn Grill Graeff* and *Ann N. Bosse*, Assistant Attorneys General.

Dan Himmelfarb argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson, Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben*, and *Robert J. Erickson.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Alfred P. Carlton, Lawrence J. Fox, David J. Kessler*, and *Robin M. Maher;* for the Constitution Project by *Virginia E. Sloan* and *Stephen F. Hanlon;* for the National Association of Criminal Defense Lawyers et al. by *David A. Reiser, Eleanor H. Smith*, and *Lisa B. Kemler;* for the National Association of Social Workers et al. by *Thomas C. Gold-*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, Kevin Wiggins, argues that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel. In this case, we consider whether the United States Court of Appeals for the Fourth Circuit erred in upholding the Maryland Court of Appeals' rejection of this claim.

I

A

On September 17, 1988, police discovered 77-year-old Florence Lacs drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland. *Wiggins* v. *State*, 352 Md. 580, 585, 724 A. 2d 1, 5 (1999). The State indicted petitioner for the crime on October 20, 1988, and later filed a notice of intention to seek the death penalty. Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, assumed responsibility for Wiggins' case. In July 1989, petitioner elected to be tried before a judge in Baltimore County

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stein and *Amy Howe;* and for Janet F. Reno et al. by *Robert S. Litt*, *Kathleen A. Behan*, and *John A. Freedman.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, and *Kristofer Jorstad*, *A. Scott Hayward*, and *Donald E. De Nicola*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Terry Goddard* of Arizona, *Ken Salazar* of Colorado, *Thurbert E. Baker* of Georgia, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Richard P. Ieyoub* of Louisiana, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Christine O. Gregoire* of Washington; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Circuit Court. *Ibid.* On August 4, after a 4-day trial, the court found petitioner guilty of first-degree murder, robbery, and two counts of theft. App. 32.

After his conviction, Wiggins elected to be sentenced by a jury, and the trial court scheduled the proceedings to begin on October 11, 1989. On September 11, counsel filed a motion for bifurcation of sentencing in hopes of presenting Wiggins' case in two phases. *Id.*, at 34. Counsel intended first to prove that Wiggins did not act as a "principal in the first degree," *ibid.*—*i. e.*, that he did not kill the victim by his own hand. See Md. Ann. Code, Art. 27, § 413 (1996) (requiring proof of direct responsibility for death eligibility). Counsel then intended, if necessary, to present a mitigation case. In the memorandum in support of their motion, counsel argued that bifurcation would enable them to present each case in its best light; separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder. App. 36–42, 37.

On October 12, the court denied the bifurcation motion, and sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed Lacs. *Id.*, at 70–71. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "'You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period. . . . I think that's an important thing for you to consider.'" *Id.*, at 72. During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.

Before closing arguments, Schlaich made a proffer to the court, outside the presence of the jury, to preserve bifurca-

tion as an issue for appeal. He detailed the mitigation case counsel would have presented had the court granted their bifurcation motion. He explained that they would have introduced psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other. See *id.*, at 349–351. At no point did Schlaich proffer any evidence of petitioner's life history or family background. On October 18, the court instructed the jury on the sentencing task before it, and later that afternoon, the jury returned with a sentence of death. *Id.*, at 409–410. A divided Maryland Court of Appeals affirmed. *Wiggins* v. *State*, 324 Md. 551, 597 A. 2d 1359 (1991), cert. denied, 503 U. S. 1007 (1992).

B

In 1993, Wiggins sought postconviction relief in Baltimore County Circuit Court. With new counsel, he challenged the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. App. to Pet. for Cert. 132a. To support his claim, petitioner presented testimony by Hans Selvog, a licensed social worker certified as an expert by the court. App. 419. Selvog testified concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, Selvog chronicled petitioner's bleak life history. App. to Pet. for Cert. 163a.

According to Selvog's report, petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone

for days, forcing them to beg for food and to eat paint chips and garbage. *Id.*, at 166a–167a. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. *Id.*, at 167a–171a. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, *id.*, at 175a–176a, and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. *Id.*, at 176a–179a. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. *Id.*, at 190a. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor. *Id.*, at 192a.

During the postconviction proceedings, Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history, even though the State made funds available for that purpose. App. 487–488. He explained that he and Nethercott, well in advance of trial, decided to focus their efforts on "'retry[ing] the factual case'" and disputing Wiggins' direct responsibility for the murder. *Id.*, at 485–486. In April 1994, at the close of the proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, "'[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just—I would be flabbergasted if the Court of Appeals said anything else.'" *Id.*, at 605. In October 1997, however, the trial court denied Wiggins' petition for postconviction relief. The court concluded that "when the decision not to investigate . . . is a matter of trial tactics, there is no

ineffective assistance of counsel." App. to Pet. for Cert. 155a–156a.

The Maryland Court of Appeals affirmed the denial of relief, concluding that trial counsel had made "a deliberate, tactical decision to concentrate their effort at convincing the jury" that appellant was not directly responsible for the murder. *Wiggins* v. *State*, 352 Md., at 608, 724 A. 2d, at 15. The court observed that counsel knew of Wiggins' unfortunate childhood. They had available to them both the presentence investigation (PSI) report prepared by the Division of Parole and Probation, as required by Maryland law, Md. Ann. Code, Art. 41, § 4–609(d) (1988), as well as "more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." 352 Md., at 608–609, 724 A. 2d, at 15. The court acknowledged that this evidence was neither as detailed nor as graphic as the history elaborated in the Selvog report but emphasized that "counsel *did* investigate and *were* aware of appellant's background." *Id.*, at 610, 724 A. 2d, at 16 (emphasis in original). Counsel knew that at least one uncontested mitigating factor—Wiggins' lack of prior convictions—would be before the jury should their attempt to disprove Wiggins' direct responsibility for the murder fail. As a result, the court concluded, Schlaich and Nethercott "made a reasoned choice to proceed with what they thought was their best defense." *Id.*, at 611–612, 724 A. 2d, at 17.

C

In September 2001, Wiggins filed a petition for writ of habeas corpus in Federal District Court. The trial court granted him relief, holding that the Maryland courts' rejection of his ineffective assistance claim "involved an unreasonable application of clearly established federal law." *Wiggins* v. *Corcoran*, 164 F. Supp. 2d 538, 557 (2001) (citing *Williams* v. *Taylor*, 529 U. S. 362 (2000)). The court rejected the State's defense of counsel's "tactical" decision to "'retry

guilt,'" concluding that for a strategic decision to be reasonable, it must be "based upon information the attorney has made after conducting a reasonable investigation." 164 F. Supp. 2d, at 558. The court found that though counsel were aware of some aspects of Wiggins' background, that knowledge did not excuse them from their duty to make a "fully informed and deliberate decision" about whether to present a mitigation case. In fact, the court concluded, their knowledge triggered an obligation to look further. *Id.*, at 559.

Reviewing the District Court's decision *de novo*, the Fourth Circuit reversed, holding that counsel had made a reasonable strategic decision to focus on petitioner's direct responsibility. *Wiggins* v. *Corcoran*, 288 F. 3d 629, 639–640 (2002). The court contrasted counsel's complete failure to investigate potential mitigating evidence in *Williams*, 288 F. 3d, at 640, with the fact that Schlaich and Nethercott knew at least some details of Wiggins' childhood from the PSI and social services records, *id.*, at 641. The court acknowledged that counsel likely knew further investigation "would have resulted in more sordid details surfacing," but agreed with the Maryland Court of Appeals that counsel's knowledge of the avenues of mitigation available to them "was sufficient to make an informed strategic choice" to challenge petitioner's direct responsibility for the murder. *Id.*, at 641–642. The court emphasized that conflicting medical testimony with respect to the time of death, the absence of direct evidence against Wiggins, and unexplained forensic evidence at the crime scene supported counsel's strategy. *Id.*, at 641.

We granted certiorari, 537 U. S. 1027 (2002), and now reverse.

II

A

Petitioner renews his contention that his attorneys' performance at sentencing violated his Sixth Amendment right

to effective assistance of counsel. The amendments to 28 U. S. C. § 2254, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was "clearly established" by our precedents at the time of the state court's decision. Section 2254 provides:

> "(d) An 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—
>
> "(1) 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; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

We have made clear that the "unreasonable application" prong of § 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts" of petitioner's case. *Williams* v. *Taylor*, *supra*, at 413; see also *Bell* v. *Cone*, 535 U. S. 685, 694 (2002). In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003) (citing *Williams* v. *Taylor*, *supra*, at 407). In order for a federal court to find a state court's application of our precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. See *Lockyer*, *supra*, at 75. The state court's appli-

cation must have been "objectively unreasonable." See *Williams* v. *Taylor*, 529 U. S., at 409.

We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland* v. *Washington*, 466 U. S. 668 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

In this case, as in *Strickland*, petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. *Id.*, at 673. Here, as in *Strickland*, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead. In rejecting the respondent's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circum-

stances, applying a heavy measure of deference to counsel's judgments." *Id.*, at 690–691.

Our opinion in *Williams* v. *Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U. S., at 396 (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. *post*, at 542 (SCALIA, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *post*, at 543, we therefore made no new law in resolving Williams' ineffectiveness claim. See *Williams*, 529 U. S., at 390 (noting that the merits of Williams' claim "are squarely governed by our holding in *Strickland*"); see also *id.*, at 395 (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. 466 U. S., at 690–691 (establishing that "thorough investigation[s]" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also *id.*, at 688–689 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable

professional judgmen[t]," *id.*, at 691, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*. *Ibid.* Cf. *Williams* v. *Taylor*, *supra*, at 415 (O'CONNOR, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland*, 466 U. S., at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.*, at 689 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

B

1

The record demonstrates that counsel's investigation drew from three sources. App. 490–491. Counsel arranged for William Stejskal, a psychologist, to conduct a number of tests on petitioner. Stejskal concluded that petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.*, at 44–45, 349–351. These reports revealed nothing, however, of petitioner's life history. Tr. of Oral Arg. 24–25.

With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as "'disgusting,'" and observing that he spent most of his life in foster care. App. 20–21. Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. *Id.*, at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's

life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information. See 288 F. 3d, at 640–641; *Wiggins* v. *State*, 352 Md., at 608–609, 724 A. 2d, at 15.

Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. *Id.*, at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." *Strickland*, *supra*, at 688; *Williams* v. *Taylor*, *supra*, at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and

to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").

The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. See Lodging of Petitioner 54–95, 126, 131–136, 140, 147, 159–176. As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F. Supp. 2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. See, *e. g.*, *Strickland*, *supra*, at 699 (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden* v. *Wainwright*, 477 U. S. 168, 186 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings.

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. See *supra*, at 515. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.

What is more, during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder. After introducing that issue in her opening statement, *id.*, at 70–71, Nethercott entreated the jury to consider not just what Wiggins "is found to have done," but also "who [he] is." *Id.*, at 70. Though she told the jury it would "hear that Kevin Wiggins has had a difficult life," *id.*, at 72, counsel never followed up on that suggestion with details of Wiggins' history. At the same time, counsel called a criminologist to testify that inmates serving life sentences tend to adjust well and refrain from further violence in prison—testimony with no bearing on whether petitioner committed the murder by his own hand. *Id.*, at 311–312. Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely the type of "'shotgun'" approach the Maryland Court of Appeals concluded counsel sought to avoid. *Wiggins* v. *State*, 352 Md., at 609, 724 A. 2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationaliza-

tion of counsel's conduct than an accurate description of their deliberations prior to sentencing.

In rejecting petitioner's ineffective assistance claim, the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the PSI and the DSS records—they were in a position to make a tactical choice not to present a mitigation defense. *Id.*, at 611–612, 724 A. 2d, at 17 (citing federal and state precedents finding ineffective assistance in cases in which counsel failed to conduct an investigation of any kind). In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming Schlaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. 466 U. S., at 691.

The Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable. Though the state court acknowledged petitioner's claim that counsel's failure to prepare a social history "did not meet the minimum standards of the profession," the court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the PSI and the DSS records actually demonstrated reasonable professional judgment. *Wiggins* v. *State*, 352 Md., at 609, 724 A. 2d, at 16. The state court merely assumed that the investigation was adequate. In light of what the PSI and the DSS records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy

impossible. The Court of Appeals' assumption that the investigation was adequate, *ibid.*, thus reflected an unreasonable application of *Strickland.* 28 U. S. C. § 2254(d)(1). As a result, the court's subsequent deference to counsel's strategic decision not "to present every conceivable mitigation defense," 352 Md., at 610, 724 A. 2d, at 16, despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable. As we established in *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U. S., at 690–691.

Additionally, the court based its conclusion, in part, on a clear factual error—that the "social service records . . . recorded incidences of . . . sexual abuse." 352 Md., at 608–609, 724 A. 2d, at 15. As the State and the United States now concede, the records contain no mention of sexual abuse, much less of the repeated molestations and rapes of petitioner detailed in the Selvog report. Brief for Respondents 22; Brief for United States as *Amicus Curiae* 26; App. to Pet. for Cert. 175a–179a, 190a. The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by "clear and convincing evidence," 28 U. S. C. § 2254(e)(1), and reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision.

The dissent insists that this Court's hands are tied, under § 2254(d), "by the state court's factual determinations that Wiggins' trial counsel '*did* investigate and *were* aware of [Wiggins'] background,'" *post*, at 550. But as we have made clear, the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation into petitioner's background met the legal standards set in *Strickland* repre-

sented an objectively unreasonable application of our precedent. § 2254(d)(1). Moreover, the court's assumption that counsel learned of a major aspect of Wiggins' background, *i. e.*, the sexual abuse, from the DSS records was clearly erroneous. The requirements of § 2254(d) thus pose no bar to granting petitioner habeas relief.

2

In their briefs to this Court, the State and the United States contend that counsel, in fact, conducted a more thorough investigation than the one we have just described. This conclusion, they explain, follows from Schlaich's postconviction testimony that he knew of the sexual abuse Wiggins suffered, as well as of the hand-burning incident. According to the State and its *amicus*, the fact that counsel claimed to be aware of this evidence, which was not in the social services records, coupled with Schlaich's statement that he knew what was in "other people's reports," App. 490–491, suggests that counsel's investigation must have extended beyond the social services records. Tr. of Oral Arg. 31–36; Brief for United States as *Amicus Curiae* 26–27, n. 4; Brief for Respondents 35. Schlaich simply "was not asked to and did not reveal the source of his knowledge" of the abuse. Brief for United States as *Amicus Curiae* 27, n. 4.

In considering this reading of the state postconviction record, we note preliminarily that the Maryland Court of Appeals clearly assumed both that counsel's investigation began and ended with the PSI and the DSS records and that this investigation was sufficient in scope to satisfy *Strickland*'s reasonableness requirement. See *Wiggins* v. *State*, 352 Md., at 608, 724 A. 2d, at 15. The court also assumed, erroneously, that the social services records cited incidences of sexual abuse. See *id.*, at 608–609, 724 A. 2d, at 15. Respondents' interpretation of Schlaich's postconviction testimony therefore has no bearing on whether the Maryland Court of

Appeals' decision reflected an objectively unreasonable application of *Strickland.*

In its assessment of the Maryland Court of Appeals' opinion, the dissent apparently does not dispute that if counsel's investigation in this case had consisted exclusively of the PSI and the DSS records, the court's decision would have constituted an unreasonable application of *Strickland.* See *post,* at 543–544. Of necessity, then, the dissent's primary contention is that the Maryland Court of Appeals *did* decide that Wiggins' counsel looked beyond the PSI and the DSS records and that we must therefore defer to that finding under § 2254(e)(1). See *post,* at 544–551. *Had* the court found that counsel's investigation extended beyond the PSI and the DSS records, the dissent, of course, would be correct that § 2254(e) would require that we defer to that finding. But the state court made no such finding.

The dissent bases its conclusion on the Maryland Court of Appeals' statements that "'[c]ounsel were aware that appellant had a most unfortunate childhood,'" and that "'counsel *did* investigate and *were* aware of appellant's background.'" See *post,* at 540, 545 (quoting *Wiggins* v. *State, supra,* at 608, 610, 724 A. 2d, at 15, 16). But the state court's description of how counsel learned of petitioner's childhood speaks for itself. The court explained: "Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report . . . but also more detailed social service records." See 352 Md., at 608–609, 724 A. 2d, at 15. This construction reflects the state court's understanding that the investigation consisted of the two sources the court mentions. Indeed, when describing counsel's investigation into petitioner's background, the court never so much as implies that counsel uncovered any source other than the PSI and the DSS records. The court's conclusion that counsel were aware of "incidences of . . . sexual abuse" does not suggest otherwise, cf. *supra,* at 518, because the court assumed that counsel

learned of such incidents from the social services records. *Wiggins* v. *State*, 352 Md., at 608–609, 724 A. 2d, at 15.

The court's subsequent statement that, "as noted, counsel *did* investigate and *were* aware of appellant's background," underscores our conclusion that the Maryland Court of Appeals assumed counsel's investigation into Wiggins' childhood consisted of the PSI and the DSS records. The court's use of the phrase "as noted," which the dissent ignores, further confirms that counsel's investigation consisted of the sources previously described, *i. e.*, the PSI and the DSS records. It is the dissent, therefore, that "rests upon a fundamental fallacy," *post*, at 544—that the Maryland Court of Appeals determined that Schlaich's investigation extended beyond the PSI and the DSS records.

We therefore must determine, *de novo*, whether counsel reached beyond the PSI and the DSS records in their investigation of petitioner's background. The record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one we have described. The dissent, like the State and the United States, relies primarily on Schlaich's postconviction testimony to establish that counsel investigated more extensively. But the questions put to Schlaich during his postconviction testimony all referred to what he knew from the social services records; the line of questioning, after all, first directed him to his discovery of those documents. His subsequent reference to "other people's reports," made in direct response to a question concerning petitioner's mental retardation, appears to be an acknowledgment of the psychologist's reports we know counsel commissioned—reports that also revealed nothing of the sexual abuse Wiggins experienced. App. 349. As the state trial judge who heard this testimony concluded at the close of the proceedings, there is "*no reason to believe* that [counsel] did have all of this information." *Id.*, at 606 (emphasis added).

The State maintained at oral argument that Schlaich's reference to "other people's reports" indicated that counsel learned of the sexual abuse from sources other than the PSI and the DSS records. Tr. of Oral Arg. 31, 33, 35. But when pressed repeatedly to identify the sources counsel might have consulted, the State acknowledged that no written reports documented the sexual abuse and speculated that counsel must have learned of it through "[o]ral reports" from Wiggins himself. *Id.*, at 36. Not only would the phrase "other people's reports" have been an unusual way for counsel to refer to conversations with his client, but the record contains no evidence that counsel ever pursued this line of questioning with Wiggins. See *id.*, at 24–25. For its part, the United States emphasized counsel's retention of the psychologist. *Id.*, at 51; Brief for United States as *Amicus Curiae* 27. But again, counsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background. Though Stejskal based his conclusions on clinical interviews with Wiggins, as well as meetings with Wiggins' family members, Lodging of Petitioner, his final report discussed only petitioner's mental capacities and attributed nothing of what he learned to Wiggins' social history.

To further underscore that counsel did not know, prior to sentencing, of the sexual abuse, as well as of the other incidents not recorded in the DSS records, petitioner directs us to the content of counsel's October 17, 1989, proffer. Before closing statements and outside the presence of the jury, Schlaich proffered to the court the mitigation case counsel would have introduced had the court granted their motion to bifurcate. App. 349–351. In his statement, Schlaich referred only to the results of the psychologist's test and mentioned nothing of Wiggins' troubled background. Given that the purpose of the proffer was to preserve their pursuit of bifurcation as an issue for appeal, they had every incentive to make their mitigation case seem as strong as possible.

Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is therefore explicable only if we assume that counsel had no knowledge of the abuse.

Contrary to the dissent's claim, see *post*, at 547, we are not accusing Schlaich of lying. His statements at the postconviction proceedings that he knew of this abuse, as well as of the hand-burning incident, may simply reflect a mistaken memory shaped by the passage of time. After all, the state postconviction proceedings took place over four years after Wiggins' sentencing. Ultimately, given counsel's likely ignorance of the history of sexual abuse at the time of sentencing, we cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and the DSS records in investigating petitioner's background. Indeed, the record contains no mention of sources other than those it is undisputed counsel possessed, see *supra*, at 523–524. We therefore conclude that counsel's investigation of petitioner's background was limited to the PSI and the DSS records.

3

In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U. S., at 689. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690–691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland.* Furthermore, the court partially relied on an erroneous factual assumption. The requirements for habeas relief established by 28 U. S. C. § 2254(d) are thus satisfied.

III

In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland,* 466 U. S., at 692. In *Strickland,* we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence. In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.

The mitigating evidence counsel failed to discover and present in this case is powerful. As Selvog reported based on his conversations with Wiggins and members of his fam-

ily, see Reply Brief for Petitioner 18–19, Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse'"); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982) (noting that consideration of the offender's life history is a "'part of the process of inflicting the penalty of death'"); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney might well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases. Cf. *Burger* v. *Kemp*, 483 U. S. 776 (1987); *Darden* v. *Wainwright*, 477 U. S. 168 (1986).

The dissent nevertheless maintains that Wiggins' counsel would not have altered their chosen strategy of focusing exclusively on Wiggins' direct responsibility for the murder. See *post*, at 553–554. But as we have made clear, counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable. See *supra*, at 524–527. Moreover, as we have noted, see *supra*, at 526, Wiggins' counsel did *not* focus solely on Wiggins' direct responsibility. Counsel told the sentencing jury "[y]ou're going to hear that Kevin Wiggins has had a difficult life," App. 72, but never followed up on this suggestion.

We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. In reaching this conclusion, we need not, as the dissent suggests, *post*, at 554–556, make the state-law evidentiary findings that would have been at issue at sentencing. Rather, we evaluate the totality of the evidence—"both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*." *Williams* v. *Taylor*, 529 U. S., at 397–398 (emphasis added).

In any event, contrary to the dissent's assertion, it appears that Selvog's report may have been admissible under Maryland law. In *Whittlesey* v. *State*, 340 Md. 30, 665 A. 2d 223 (1995), the Maryland Court of Appeals vacated a trial court decision excluding, on hearsay grounds, testimony by Selvog himself. The court instructed the trial judge to exercise its discretion to admit "any relevant and reliable mitigating evidence, including hearsay evidence that might not be admissible in the guilt-or-innocence phase of the trial." *Id.*, at 73, 665 A. 2d, at 244. This "relaxed standard," the court observed, would provide the factfinder with "the opportunity to consider 'any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less

than death.'" *Ibid.* See also *Ball* v. *State*, 347 Md. 156, 172–173, 699 A. 2d 1170, 1177 (1997) (noting that the trial judge had admitted Selvog's social history report on the defendant). While the dissent dismisses the contents of the social history report, calling Wiggins a "liar" and his claims of sexual abuse "uncorroborated gossip," *post*, at 554, 555, Maryland appears to consider this type of evidence relevant at sentencing, see *Whittlesey*, *supra*, at 71, 665 A. 2d, at 243 ("The reasons for relaxing the rules of evidence apply with particular force in the death penalty context"). Not even the State contests that Wiggins suffered from the various types of abuse and neglect detailed in the PSI, the DSS records, and Selvog's social history report.

Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Cf. *Borchardt* v. *State*, 367 Md. 91, 139–140, 786 A. 2d 631, 660 (2001) (noting that as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed); App. 369 (instructing the jury: "If you unanimously find that the State has proven by a preponderance of the evidence that the aggravating circumstance does outweigh the mitigating circumstances, then consider whether death is the appropriate sentence").

Moreover, in contrast to the petitioner in *Williams* v. *Taylor*, *supra*, Wiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative. Cf. *id.*, at 418 (REHNQUIST, C. J., dissenting) (noting that Williams had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw). As the Federal District Court found, the mitigating evidence in this case is

stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence. *Id.*, at 399. We thus conclude that the available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of Wiggins' moral culpability. *Id.*, at 398. Accordingly, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today vacates Kevin Wiggins' death sentence on the ground that his trial counsel's investigation of potential mitigating evidence was "incomplete." *Ante*, at 534. Wiggins' trial counsel testified under oath, however, that he was aware of the basic features of Wiggins' troubled childhood that the Court claims he overlooked. App. 490–491. The Court chooses to disbelieve this testimony for reasons that do not withstand analysis. Moreover, even if this disbelief could plausibly be entertained, that would certainly not establish (as 28 U. S. C. § 2254(d) requires) that the Maryland Court of Appeals was *unreasonable* in believing it, and in therefore concluding that counsel adequately investigated Wiggins' background. The Court also fails to observe § 2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations not rebutted by "clear and convincing evidence." The decision sets at naught the statutory scheme we once described as a "highly deferential standard for evaluating state-court rulings," *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997). I respectfully dissent.

I

Wiggins claims that his death sentence violates *Strickland* v. *Washington*, 466 U. S. 668 (1984), because his trial attor-

neys, had they further investigated his background, would have learned—and could have presented to the jury—the following evidence: (1) According to family members, Wiggins' mother was an alcoholic who neglected her children and failed to feed them properly, App. to Pet. for Cert. 165a–169a; (2) according to Wiggins and his sister India, Wiggins' mother intentionally burned 5-year-old Wiggins' hands on a kitchen stove as punishment for playing with matches, *id.*, at 169a–171a; (3) Wiggins was placed in foster care at age six because of his mother's neglect, and was moved in and out of various foster families, *id.*, at 173a–192a; (4) according to Wiggins, one of his foster parents sexually abused him "'two or three times a week, sometimes everyday,'" when he was eight years old, *id.*, at 177a–179a; (5) according to Wiggins, at age 16 he was knocked unconscious and raped by two of his foster mother's teenage children, *id.*, at 190a; (6) according to Wiggins, when he joined the Job Corps at age 18 a Job Corps administrator "made sexual advances . . . and they became sexually involved," *id.*, at 192a–193a (later, according to Wiggins, the Job Corps supervisor drugged him and when Wiggins woke up, he "knew he had been anally penetrated," *id.*, at 193a); and (7) Wiggins is "'borderline'" mentally retarded, *id.*, at 193a–194a. All this information is contained in a "social history" report prepared by social worker Hans Selvog for use in the state postconviction proceedings.

In those proceedings, Carl Schlaich (one of Wiggins' two trial attorneys) testified that, although he did not retain a social worker to assemble a "social history" report, he nevertheless had detailed knowledge of Wiggins' background:

> "'Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?
>
> "'A I believe that we tracked all of that down.

"'Q You got the Social Service records?

"'A That is what I recall.

"'Q That was in the Social Service records?

"'A Yes.

"'Q So you knew that?

"'A Yes.

"'Q You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?

"'A Yes.

"'Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?

"'A Yes.

"'Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?

"'A Yes.

"'Q And you also knew that he was borderline mentally retarded?

"'A Yes.

"'Q You knew all—

"'A At least I knew that as it was reported in other people's reports, yes.

"'Q But you knew it?

"'A Yes.'" App. 490–491.

In light of this testimony, the Maryland Court of Appeals found that "counsel *did* investigate and *were* aware of [Wiggins'] background," *Wiggins* v. *State*, 352 Md. 580, 610, 724 A. 2d, 1, 16 (1999) (emphasis in original), and, specifically, that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.*, at 608, 724 A. 2d, at 15. These state-court determinations of factual issues are binding on federal habeas courts, including this Court, unless rebutted by clear

and convincing evidence.[1] Relying on these factual findings, the Maryland Court of Appeals rejected Wiggins' claim that his trial attorneys failed adequately to investigate potential mitigating evidence. Wiggins' trial counsel, it said, "did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State*, 331 Md. 651, 680–82, 629 A. 2d 685, 700–02 (1993), *cert. denied*, 510 U. S. 1077 . . . (1994); *Burger v. Kemp*, 483 U. S. 776, 788–96 . . . (1987)." *Id.*, at 610, 724 A. 2d, at 16.

The state court having adjudicated Wiggins' Sixth Amendment claim on the merits, 28 U. S. C. § 2254(d) bars habeas relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). The Court concludes without foundation that the Maryland Court of Appeals' decision failed both these tests. I shall discuss each in turn.

A

In concluding that the Maryland Court of Appeals *unreasonably* applied our clearly established precedents, the Court disregards § 2254(d)(1)'s command that only "clearly established Federal law, as determined by the Supreme Court of the United States," be used in assessing the reasonableness of state-court decisions. Further, the Court misdescribes the state court's opinion while ignoring § 2254(e)(1)'s

[1] Title 28 U. S. C. § 2254(e)(1) provides:

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

requirement that federal habeas courts respect state-court factual determinations.

1

We have defined "clearly established Federal law, as determined by the Supreme Court of the United States," to encompass "the holdings . . . of this Court's decisions *as of the time of the relevant state-court decision.*" *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (emphasis added). Yet in discussing what our precedents have "clearly established" with respect to ineffectiveness claims, the Court relies upon a case—*Williams* v. *Taylor*, *supra*—that *postdates* the Maryland court's decision rejecting Wiggins' Sixth Amendment claim. See *ante*, at 522. The Court concedes that *Williams* was not "clearly established Federal law" at the time of the Maryland Court of Appeals' decision, *ante*, at 522, yet believes that it may ignore § 2254(d)'s strictures on the ground that "Williams' case was before us on habeas review[, and] we therefore made no new law in resolving [his] ineffectiveness claim," *ibid.* The Court is wrong—in both its premise and its conclusion.

Although *Williams* was a habeas case, we reviewed the *first* prong of the habeas petitioner's *Strickland* claim—the inadequate-performance question—*de novo.* Williams had surmounted § 2254(d)'s bar to habeas relief because we held that the Virginia Supreme Court's analysis with respect to *Strickland*'s second prong—the *prejudice* prong—was both "contrary to," and "an unreasonable application of," our clearly established precedents. See *Williams*, *supra*, at 393–394, 397. That left us free to provide habeas relief—and since the State had not raised a *Teague* defense, see *Teague* v. *Lane*, 489 U. S. 288 (1989), we proceeded to analyze the inadequate-performance contention *de novo*, rather than under "clearly established" law. That is clear from the fact that we cited no cases in our discussion of the inadequate-performance question, see 529 U. S., at 395–396. The Court is mistaken to assert that this discussion "made no new law,"

ante, at 522. There was nothing in *Strickland*, or in any of our "clearly established" precedents at the time of the Virginia Supreme Court's decision, to support *Williams*' statement that trial counsel had an "obligation to conduct a thorough investigation of the defendant's background," 529 U. S., at 396. That is why the citation supporting the statement is not one of our opinions, but rather standards promulgated by the American Bar Association, *ibid.* (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)). Insofar as this Court's cases were concerned, *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), had *rejected* an ineffective-assistance claim even though acknowledging that trial counsel "could well have made a more thorough investigation than he did." And *Strickland* had eschewed the imposition of such "rules" on counsel, 466 U. S., at 688–689, specifically stating that the very ABA standards upon which *Williams* later relied "are guides to determining what is reasonable, *but they are only guides.*" 466 U. S., at 688 (emphasis added). *Williams did* make new law—law that was *not* "clearly established" at the time of the Maryland Court of Appeals' decision.

But even if the Court were correct in its characterization of *Williams*, that *still* cannot justify its decision to ignore an Act of Congress. Whether *Williams* "made new law" or not, what *Williams* held was not clearly established Supreme Court precedent *as of the time of the state court's decision*, and cannot be used to find fault in the state-court opinion. Section 2254(d)(1) means what it says, and the Court simply defies the congressionally imposed limits on federal habeas review.

2

The Court concludes that *Strickland* was applied unreasonably (and § 2254(d)(1) thereby satisfied) because the Maryland Court of Appeals' conclusion that trial counsel adequately investigated Wiggins' background, see *Wiggins*, 352 Md., at 610, 724 A. 2d, at 16, was unreasonable. That assess-

ment cannot possibly be sustained, particularly in light of the state court's factual determinations that bind this Court under § 2254(e)(1). The Court's analysis of this point rests upon a fundamental fallacy: that the state court "clearly assumed that counsel's investigation began and ended with the PSI and the DSS records," *ante,* at 529. That is demonstrably not so. The state court did observe that Wiggins' trial attorneys "had available" the presentence investigation (PSI) report and the Maryland Department of Social Services (DSS) reports, *Wiggins, supra,* at 608–609, 724 A. 2d, at 15–16, but there is absolutely nothing in the state-court opinion that says (or assumes) that these were the *only* sources on which counsel relied. It is rather *this* Court that makes such an assumption—or rather, such a bald assertion, see *ante,* at 527 (asserting that counsel "cease[d] all investigation" upon receipt of the PSI and DSS reports); *ante,* at 524 (referring to "[c]ounsel's decision not to expand their investigation beyond the PSI and DSS records").

Nor *could* the Maryland Court of Appeals have "assumed" that Wiggins' trial counsel looked no further than the PSI and DSS reports, because the state-court record is clear that Wiggins' trial attorneys had investigated well beyond these sources. Public-defender investigators interviewed Wiggins' family members, see Defendant's Supplemental Answer to State's Discovery Request filed in No. 88–CR–5464 (Cir. Ct. Baltimore Cty., Md., Sept. 18, 1989), Lodging of Respondents, and Wiggins' trial attorneys hired a psychologist, Dr. William Stejskal (who reviewed the DSS records, conducted clinical interviews, and performed six different psychological tests of Wiggins, *ibid.;* App. 349–351), and a criminologist, Dr. Robert Johnson (who interviewed Wiggins and testified that Wiggins would adjust adequately to life in prison, *id.,* at 319–321). Schlaich also testified in the state postconviction proceedings that he knew information about Wiggins' background that was not contained in the DSS or PSI reports—such as the allegation that Wiggins' mother

burned his hands as a child, *id.*, at 490—so Schlaich *must* have investigated sources beyond these reports.

As the Court notes, *ante*, at 529–530, the Maryland Court of Appeals did not expressly state that counsel's investigation extended beyond the PSI and DSS records. There was no reason whatever to do so, since it had found that "counsel *did* investigate and *were* aware of appellant's background," *Wiggins*, *supra*, at 610, 724 A. 2d, at 16, and since that finding was based on a state-court record that clearly demonstrates investigation beyond the PSI and DSS reports. The court's failure to recite what is obvious from the record surely provides no basis for believing that it stupidly "assumed" the opposite of what is obvious from the record.

Once one eliminates the Court's mischaracterization of the state-court opinion—which did not and could not have "assumed" that Wiggins' counsel knew only what was contained in the DSS and PSI reports—there is no basis for finding it "unreasonable" to believe that counsel's investigation was adequate. As noted earlier, Schlaich testified in the state postconviction proceedings that he was aware of the essential items contained in the later-prepared "social history" report. He knew that Wiggins was subjected to neglect and abuse from his mother, App. 490, that there were reports of sexual abuse at one of his foster homes, *ibid.*, that his mother had burned his hands as a child, *ibid.*, that a Job Corps supervisor had made homosexual overtures toward him, *id.*, at 490–491, and that Wiggins was "'borderline'" mentally retarded, *id.*, at 491.[2] Schlaich explained that, although he

[2] The only incident contained in the "social history" report about which Schlaich did not confirm knowledge was the occurrence of sexual abuse in *more than one* of Wiggins' foster homes. And *that* knowledge remained unconfirmed only because the question posed asked him whether he knew of reports of abuse at "'one'" of the foster homes. App. 490. The record does not show that Schlaich knew of all these incidents in the degree of detail contained in the "social history" report—but it does not show that he did *not*, either. In short, given Schlaich's testimony, there is *no basis*

was aware of all this potential mitigating evidence, he chose not to present it to the jury for a strategic reason—namely, that it would conflict with his efforts to persuade the jury that Wiggins was not a "'principal'" in Mrs. Lacs's murder (*i. e.*, that he did not kill Lacs by his own hand). *Id.*, at 504–505.

There are only two possible responses to this testimony that might salvage Wiggins' ineffective-assistance claim. The first would be to declare that Schlaich had an inescapable *duty* to hire a social worker to construct a so-called "social history" report, *regardless* of Schlaich's pre-existing knowledge of Wiggins' background. Petitioner makes this suggestion, see Brief for Petitioner 32, n. 8 (asserting that it was "'a normative standard'" at the time of Wiggins' case for capital defense lawyers in Maryland to obtain a social history); and the Court flirts with accepting it, see *ante,* at 524 ("[P]rofessional standards that prevailed in Maryland . . . at the time of Wiggins' trial" included, for defense of capital cases, "the preparation of a social history report"); *ibid.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (hereinafter ABA Guidelines), which says that counsel should make efforts "'to discover *all reasonably available* mitigating evidence'" (emphasis added by the Court)). To think that the requirement of a "social history" was part of "clearly established Federal law" (which is what § 2254(d) requires) when the events here occurred would be absurd. Nothing in our clearly established precedents requires counsel to retain a social worker when he is already largely aware of his client's background. To the contrary, *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," 466 U. S., at 689, and further states that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are

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for finding that he was without knowledge of *anything* in the "social history" report.

guides to determining what is reasonable, *but they are only guides*," *id.*, at 688. Cf. *ante*, at 524 (treating the ABA Guidelines as "well-defined norms"). It is inconceivable that Schlaich, assuming he testified truthfully regarding his detailed knowledge of Wiggins' troubled childhood, App. 490–491, would need to hire a social worker to comport with *Strickland*'s competence standards. And it certainly would not have been *unreasonable* for the Maryland Court of Appeals to conclude otherwise.

The second possible response to Schlaich's testimony about his extensive awareness of Wiggins' background is to assert that Schlaich lied. The Court assumes *sub silentio* throughout its opinion that Schlaich was not telling the truth when he testified that he knew of reports of sexual abuse in one of Wiggins' foster homes, see, *e. g.*, *ante*, at 525 ("Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings"), and eventually declares straight-out that it disbelieves Schlaich, *ante*, at 531–533. This conclusion rests upon a blatant mischaracterization of the record, and an improper shifting of the burden of proof to the State to demonstrate Schlaich's awareness of Wiggins' background, rather than requiring Wiggins to prove Schlaich's ignorance of it. But, more importantly, it is simply not enough for the Court to conclude, *ante*, at 533, that it "cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and DSS reports in investigating petitioner's background." If it is at least *reasonable* to believe Schlaich told the truth, then it could not have been *unreasonable* for the Maryland Court of Appeals to conclude that Wiggins' trial attorneys conducted an adequate investigation into his background. See 28 U. S. C. § 2254(d)(1).

Schlaich's testimony must have been false, the Court insists, because the social services records do not contain any evidence of sexual abuse, and "the questions put to Schlaich during his postconviction testimony all referred to what he

knew from the social services records." *Ante,* at 531. That is not true. Schlaich was *never* asked "what he knew from the social services records." With regard to the alleged sexual abuse in particular, Schlaich answered "'[y]es'" to the following question: "'You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?'" This question did not "refe[r] to what [Schlaich] knew from the social services records," as the Court declares; and neither, by the way, did *any* of the other questions put to Schlaich regarding his knowledge of Wiggins' background. See App. 490–491. Wiggins' postconviction counsel simply never asked Schlaich to reveal the source of his knowledge.

Schlaich's most likely source of knowledge of the alleged sexual abuse was Wiggins himself; even Hans Selvog's extensive "social history" report unearthed no documentation or corroborating witnesses with respect to that claim. *Id.*, at 464; see App. to Pet. for Cert. 177a, 193a. The Court, however, dismisses this possibility for two reasons. First, because "the record contains no evidence that counsel ever pursued this line of questioning with Wiggins." *Ante,* at 532. This statement calls for a timeout to get our bearings: The burden of proof here is on *Wiggins* to show that counsel made their decision without adequate knowledge. See *Strickland,* 466 U. S., at 687. And when counsel has testified, under oath, that he *did* have particular knowledge, the burden is not on counsel to show how he obtained it, but on *Wiggins* (if he wishes to impeach that testimony) to show that counsel could not have obtained it. Thus, the absence of evidence in the record as to whether or not Schlaich pursued this line of questioning with Wiggins dooms, rather than fortifies, Wiggins' ineffective-assistance claim. Wiggins has produced no evidence that *anything* in Hans Selvog's "social history" report was unknown to Schlaich, and no evidence that any source on which Selvog relied was not used by Schlaich.

The Court's second reason for rejecting the possibility that Schlaich learned of the alleged sexual abuse from Wiggins is even more incomprehensible. The Court claims that "the phrase 'other people's reports' [would] have been an unusual way for counsel to refer to conversations with his client." *Ante*, at 532. But Schlaich never used the phrase "other people's reports" in describing how he learned of the alleged sexual abuse in Wiggins' foster homes. Schlaich testified only that he learned of Wiggins' *borderline mental retardation* as it was reported in "'other people's reports'":

> "'Q And you also knew that he was borderline mentally retarded?
>
> "'A Yes.
>
> "'Q You knew all—
>
> "'A At least I knew *that* as it was reported *in other people's reports*, yes.
>
> "'Q But you knew it?
>
> "'A Yes.'" App. 490–491 (emphasis added).

It is clear that when Schlaich said, "'At least I knew *that* as it was reported in other people's reports,'" *id.*, at 491 (emphasis added), the "'that'" to which he referred was the fact that Wiggins was borderline mentally retarded—not the other details of Wiggins' background which Schlaich had previously testified he knew.

The Court's final reason for disbelieving Schlaich's sworn testimony is his failure to mention the alleged sexual abuse in the proffer of mitigating evidence he would introduce if the trial court granted his motion to bifurcate. "Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is . . . explicable only if we assume that counsel had no knowledge of the abuse." *Ante*, at 533. But because the *only* evidence of sexual abuse consisted of Wiggins' own assertions, see App. 464; App. to Pet. for Cert. 177a, 193a (evidence not exactly worthy of the Court's flattering description as "powerful"), *there was nothing to prof-*

fer unless Schlaich declared an intent to put Wiggins on the stand. Given counsel's chosen trial strategy to prevent Wiggins from testifying during the sentencing proceedings, the decision not to mention sexual abuse in the proffer is perfectly consistent with counsel's claimed knowledge of the alleged abuse.

Of course these reasons the Court offers—which range from the incredible up to the feeble—are used only in support of the Court's conclusion that, *in its independent judgment*, Schlaich was lying. The Court does not even attempt to establish (as it must) that it was *objectively unreasonable* for the state court to believe Schlaich's testimony and therefore conclude that he conducted an adequate investigation of Wiggins' background. It could not possibly make this showing. Wiggins has not produced any direct evidence that his attorneys were uninformed with respect to *anything* in his background, and the Court can muster no circumstantial evidence beyond the powerfully unconvincing fact that Schlaich failed to mention the allegations of sexual abuse in his proffer. To make things worse, the Court is *still* bound (though one would not know it from the opinion) by the state court's factual determinations that Wiggins' trial counsel "*did* investigate and *were* aware of [Wiggins'] background," *Wiggins*, 352 Md., at 610, 724 A. 2d, at 16 (emphasis in original), and that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.*, at 608, 724 A. 2d, at 15. See 28 U. S. C. § 2254(e)(1).[3] Because it is at least reasonable to be-

[3] The Court defends its refusal to adhere to these state-court factual determinations on the ground that "the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation . . . met the legal standards set forth in *Strickland* represented an objectively unreasonable application of our precedent." *Ante*, at 528–529. That is an inadequate response, for several reasons. First, because in the very course of determining *what was* the scope of counsel's investigation, the Court was bound to accept (as it did not) the Maryland Court of Appeals' factual findings that counsel knew of Wiggins' background, including his "most unfortunate childhood." And it is an inadequate response, secondly, because even

lieve Schlaich's testimony, and because § 2254(e)(1) requires us to respect the state court's factual determination that Wiggins' trial attorneys were aware of Wiggins' background, the Maryland Court of Appeals' legal conclusion—that trial counsel "did not have as detailed or graphic a history as was prepared by Mr. Selvog, *but that is not a Constitutional deficiency*," *Wiggins*, *supra*, at 610, 724 A. 2d, at 16 (emphasis added)—is unassailable under § 2254(d)(1).

B

The Court holds in the alternative that Wiggins has satisfied § 2254(d)(2), which allows a habeas petitioner to escape § 2254(d)'s bar to relief when the state court's adjudication of his claim "resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding." (Emphasis added.) This is so, the Court says, because the Maryland Court of Appeals wrongly claimed that Wiggins' social services records "recorded incidences of . . . sexual abuse." 352 Md., at 608–609, 724 A. 2d, at 15.

That it made that claim is true enough. And I will concede that Wiggins has rebutted the presumption of correctness by the "clear and convincing evidence" that § 2254(e)(1) requires. It is both clear and convincing from reading the DSS records that they contain no evidence of sexual abuse. I will also assume, *arguendo*, that the state court's error was "unreasonable" in light of the evidence presented in the state-court proceeding.

Given all that, the Court's conclusion that a § 2254(d)(2) case has been made out still suffers from the irreparable de-

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after the Court concludes that the petitioner has avoided § 2254(d)'s bar to relief because of that misapplication of *Strickland* (or because of the alleged mistaken factual assumption "that counsel learned of . . . sexual abuse . . . from the DSS records," *ante*, at 529), it *still* must observe § 2254(e)(1)'s presumption of correctness in deciding the merits of the habeas question. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 341, 348 (2003).

fect that the Maryland Court of Appeals' decision was not "based on" this mistaken factual determination. What difference did it make whether the social services records contained evidence of sexual abuse? Even if they did not, the court's decision would have been the same in light of Schlaich's sworn testimony that he was aware of the alleged sexual abuse. The *source* of Schlaich's knowledge—whether he obtained it from the DSS reports or from Wiggins himself—was of no consequence. The only thing that mattered was that Schlaich *knew*, and testified under oath that he knew, enough about Wiggins' background to make it reasonable to proceed without a report by a social worker. The Court's opinion does not even discuss this requirement of § 2254(d)(2), that the unreasonable determination of facts be one on which the state-court decision was *based*.

II

The Court's indefensible holding that Wiggins has avoided § 2254(d)'s bar to relief is not alone enough to entitle Wiggins to habeas relief on his Sixth Amendment claim. Wiggins *still* must establish that he was "prejudiced" by his counsel's alleged "error." *Strickland*, 466 U. S., at 691–696. Specifically, Wiggins must demonstrate that, if his trial attorneys had retained a licensed social worker to assemble a "social history" of their client, there is a "reasonable probability" that (1) his attorneys would have chosen to present the social history evidence to the jury, *and* (2) upon hearing that evidence, the jury would have spared his life. The Court's analysis on these points continues its disregard for the record in a determined procession toward a seemingly preordained result.

There is no "reasonable probability" that a social-history investigation would have altered the chosen strategy of Wiggins' trial counsel. As noted earlier, Schlaich was well aware—without the benefit of a "social history" report—that Wiggins had a troubled childhood and background. And the

Court remains bound, *even after* concluding that Wiggins has satisfied the standards of §§ 2254(d)(1) and (d)(2), by the state court's factual determination that Wiggins' trial attorneys "*were* aware of [Wiggins'] background," *Wiggins*, 352 Md., at 610, 724 A. 2d, at 16 (emphasis in original), and "were aware that [Wiggins] had a most unfortunate childhood," *id.*, at 608, 724 A. 2d, at 15. See 28 U. S. C. § 2254(e)(1). Wiggins' trial attorneys chose, however, not to present evidence of Wiggins' background to the jury because of their "deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs." *Wiggins*, *supra*, at 608, 724 A. 2d, at 15.

Wiggins has not shown that the incremental information in Hans Selvog's social-history report would have induced counsel to change this course. Schlaich testified under oath that presenting the type of evidence in Selvog's report would have conflicted with his chosen defense strategy to raise doubts as to Wiggins' role as a principal, and that he wanted to avoid a "shotgun approach" with the jury. App. 504–505.[4] (This testimony is entirely unrefuted by the Court's statement that *at the time of trial* counsel "were not in a position to make a reasonable strategic choice," because of their alleged inadequate investigation, *ante*, at 536. Schlaich presented this testimony in state postconviction proceedings, when *there was no doubt* he was fully aware of the details of Wiggins' background. See App. 490–491.) It is irrelevant whether a hypothetical "reasonable attorney" might have introduced evidence of alleged sexual abuse, *ante*, at 535–536; *Wiggins'* attorneys would *not* have done so, and therefore

[4] Introducing evidence that Wiggins suffered semiweekly (or perhaps daily) sexual abuse as a child, for example, could have led the jury to conclude that this horrible experience made Wiggins precisely the type of person who could perpetrate this bizarre crime—in which a 77-year-old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer.

Wiggins was not prejudiced by their allegedly inadequate investigation. There is simply *nothing* to show (and the Court does not even dare to *assert*) that there is a "reasonable probability" this evidence would have been introduced *in this case*. *Ante*, at 535–536.

What is more, almost all of Selvog's social-history evidence was *inadmissible* at the time of Wiggins' trial. Maryland law provides that evidence in a capital sentencing proceeding must be "reliable" to be admissible, see *Whittlesey* v. *State*, 340 Md. 30, 70, 665 A. 2d 223, 243 (1995), and many of the anecdotes regarding Wiggins' childhood consist of the baldest hearsay—statements that have been neither taken in court, nor given under oath, nor subjected to cross-examination, nor even submitted in the form of a signed affidavit. Consider, for example, the allegation that Wiggins' foster father sexually abused him "'two or three times a week, sometimes everyday,'" App. to Pet. for Cert. 177a. The *only* source of that information was Wiggins himself, in his unsworn and un-cross-examined interview with Hans Selvog. There is absolutely no documentation or corroboration of the claim, App. 464, and the allegedly abusive foster parent is apparently deceased, *id.*, at 470. Wiggins was, however, examined by a pediatrician during the time that this supposed biweekly or daily sexual abuse occurred, and the pediatrician's report mentioned no signs of sexual abuse. App. to Pet. for Cert. 181a; App. 464.

Much of the other "evidence" in Selvog's report (including Wiggins' claim that he was drugged by his Job Corps supervisor and raped while unconscious, and that he was raped by the teenage sons at his fourth foster home) was also undocumented and based entirely on Wiggins' say-so. The Court treats all this uncorroborated gossip as established fact,[5]

[5] Wiggins' postconviction lawyers could have increased the credibility of these anecdotes, and assisted this Court's prejudice determination, by at least having Wiggins testify under oath in the state postconviction proceedings as to his allegedly abusive childhood. They did not do that—

ante, at 534–535—indeed, even refers to it as "powerful" evidence, *ante*, at 534—and assumes that Wiggins' lawyers could have simply handed Hans Selvog's report to the jury. Nothing could be further from the truth. As the State Circuit Court explained in rejecting Wiggins' Sixth Amendment claim, "Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature." App. to Pet. for Cert. 156a.

The Court contends that Selvog's report "may have been admissible," *ante*, at 536—relying for that contention upon *Whittlesey* v. *State*, *supra*. *Whittlesey*, however, merely *vacated* the trial judge's decision that a social-history report assembled by Selvog was *per se* inadmissible on hearsay grounds and remanded for a determination whether the hearsay evidence was "reliable." *Id.*, at 71–72, 665 A. 2d, at 243. Thus, unless the Court is prepared to make the implausible contention that Wiggins' hearsay statements in Selvog's report are "reliable" under Maryland law, there is no basis for its conclusion that Maryland "consider[s] this type of evidence relevant at sentencing," *ante*, at 537. The State Circuit Court in the present case, in its decision that postdated *Whittlesey*, certainly did not think Selvog's report met the standard of reliability, App. to Pet. for Cert. 156a, and that court's assessment was undoubtedly correct. Wiggins' accounts of his background, as reported by Selvog, are the hearsay statements of a convicted murderer and, as the trial testimony in this case demonstrates, a serial liar. Wiggins lied to Geraldine Armstrong when he told her that Mrs. Lacs's car belongs to "'a buddy of min[e],'" App. 179. He lied when he told the police that he had obtained

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perhaps anticipating, correctly alas, that they could succeed in getting this Court to vacate a jury verdict of death on the basis of rumor and innuendo in a "social history" report that would never be admissible in a court of law.

Mrs. Lacs's car and credit cards on Friday in the afternoon, rather than Thursday, *id.*, at 180. He lied to Armstrong about how he obtained Mrs. Lacs's ring, *ibid.* And, knowing that the information he provided to Selvog would be used to attack his death sentence, Wiggins had every incentive to lie again about the supposed abuse he suffered. The hearsay statements in Selvog's report pertaining to the alleged sexual abuse were of especially dubious reliability; Maryland courts have consistently refused to allow hearsay evidence regarding alleged sexual abuse, except for statements provided by the victim to a treating physician. See *Bohnert* v. *State*, 312 Md. 266, 276, 539 A. 2d 657, 662 (1988) (refusing to admit into evidence a social worker's opinion, based on a child's "unsubstantiated averments," that the child had been sexually abused); *Nixon* v. *State*, 140 Md. App. 170, 178–188, 780 A. 2d 344, 349–354 (2001) (child protective services agent's testimony that retarded teenager told agent she had been sexually abused was inadmissible hearsay); *Low* v. *State*, 119 Md. App. 413, 424–426, 705 A. 2d 67, 73–74 (1998) (refusing to admit into evidence examining physician's testimony regarding a child's statements of sexual abuse).

Given that the anecdotes in Selvog's report were unreliable, and therefore inadmissible, the only way Wiggins' trial attorneys could have presented these allegations to the jury would have been to place Wiggins on the witness stand. Wiggins has not established (and the Court does not assert) any "reasonable probability" that they would have done this, given the dangers they saw in exposing their client to cross-examination over a wide range of issues. See App. 353 (Wiggins' trial attorneys advising him in open court: "'Kevin, if you do take the witness stand, you must answer any question that's asked of you. If it is a question the judge rules is a permissible question, you would have to answer'"). Their perception of those dangers must surely have been heightened by their observation of Wiggins' volatile and obnoxious behavior throughout the trial. See, *e. g.*,

id., at 32 (Wiggins interrupting the judge's statement of the verdict to say: "'He can't tell me I did it. I'm going to go out. . . . I didn't do it. He can't tell me I did it'"); *id.*, at 56 (Wiggins interrupting the prosecutor's opening argument to say: "'I'm not going to take that because I didn't kill that lady. I'm not going to sit there and take that'").

But even indulging, for the sake of argument, the Court's belief that Selvog's report "may" have been admissible, *ante*, at 536, the Court's prejudice discussion simply assumes without analysis that the sentencing jury would have believed the report's hearsay accounts of Wiggins' statements. *Ante*, at 536–537. Yet that same jury would have learned during the guilt phase of the trial that Wiggins is a proven liar, see App. 179–180, and Wiggins would not have aided his credibility with the jury by avoiding the witness stand and funneling his story through a social worker. I doubt very much that Wiggins' jury would have shared the Court's uncritical and wholesale acceptance of these hearsay claims.

* * *

Today's decision is extraordinary—even for our "'death-is-different'" jurisprudence. See *Simmons* v. *South Carolina*, 512 U. S. 154, 185 (1994) (SCALIA, J., dissenting). It fails to give effect to §2254(e)(1)'s requirement that state-court factual determinations be presumed correct, and disbelieves the sworn testimony of a member of the bar while treating hearsay accounts of statements of a convicted murderer as established fact. I dissent.

Syllabus

LAWRENCE ET AL. *v.* TEXAS

CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

No. 02–102. Argued March 26, 2003—Decided June 26, 2003

Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held, *inter alia*, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The court considered *Bowers* v. *Hardwick*, 478 U. S. 186, controlling on that point.

Held: The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause. Pp. 564–579.

(a) Resolution of this case depends on whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. For this inquiry the Court deems it necessary to reconsider its *Bowers* holding. The *Bowers* Court's initial substantive statement—"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ," 478 U. S., at 190—discloses the Court's failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse. Although the laws involved in *Bowers* and here purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. Pp. 564–567.

Syllabus

(b) Having misapprehended the liberty claim presented to it, the *Bowers* Court stated that proscriptions against sodomy have ancient roots. 478 U. S., at 192. It should be noted, however, that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally, whether between men and women or men and men. Moreover, early sodomy laws seem not to have been enforced against consenting adults acting in private. Instead, sodomy prosecutions often involved predatory acts against those who could not or did not consent: relations between men and minor girls or boys, between adults involving force, between adults implicating disparity in status, or between men and animals. The longstanding criminal prohibition of homosexual sodomy upon which *Bowers* placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. Far from possessing "ancient roots," *ibid.*, American laws targeting same-sex couples did not develop until the last third of the 20th century. Even now, only nine States have singled out same-sex relations for criminal prosecution. Thus, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated. The *Bowers* Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 850. The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 857. Pp. 567–573.

(c) *Bowers*' deficiencies became even more apparent in the years following its announcement. The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States, including Texas, that still proscribe sodomy (whether for same-sex or heterosexual conduct), there is a pattern of nonenforcement with respect to consenting adults acting in private. *Casey*, *supra*, at 851—which confirmed that the Due Process Clause protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education—and *Romer* v. *Evans*, 517 U. S. 620, 624—which struck down class-based legislation directed at homosexuals—cast *Bow-*

ers' holding into even more doubt. The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law. Where a case's foundations have sustained serious erosion, criticism from other sources is of greater significance. In the United States, criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. And, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. *Stare decisis* is not an inexorable command. *Payne* v. *Tennessee*, 501 U. S. 808, 828. *Bowers*' holding has not induced detrimental reliance of the sort that could counsel against overturning it once there are compelling reasons to do so. *Casey*, *supra*, at 855–856. *Bowers* causes uncertainty, for the precedents before and after it contradict its central holding. Pp. 573–577.

(d) *Bowers'* rationale does not withstand careful analysis. In his dissenting opinion in *Bowers* JUSTICE STEVENS concluded that (1) the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process. That analysis should have controlled *Bowers*, and it controls here. *Bowers* was not correct when it was decided, is not correct today, and is hereby overruled. This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention. *Casey*, *supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life. Pp. 577–579.

41 S. W. 3d 349, reversed and remanded.

Syllabus

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 579. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 586. THOMAS, J., filed a dissenting opinion, *post*, p. 605.

Paul M. Smith argued the cause for petitioners. With him on the briefs were *William M. Hohengarten*, *Daniel Mach*, *Mitchell Katine*, *Ruth E. Harlow*, *Patricia M. Logue*, and *Susan L. Sommer*.

Charles A. Rosenthal, Jr., argued the cause for respondent. With him on the brief were *William J. Delmore III* and *Scott A. Durfee*.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of Baptists et al. by *Robert A. Long, Jr.*, and *Thomas L. Cubbage III;* for the American Psychological Association et al. by *David W. Ogden*, *Paul R. Q. Wolfson*, *Richard G. Taranto*, *Nathalie F. P. Gilfoyle*, and *Carolyn I. Polowy;* for the American Public Health Association et al. by *Jeffrey S. Trachtman* and *Norman C. Simon;* for the Cato Institute by *Robert A. Levy;* for Constitutional Law Professors by *Pamela S. Karlan* and *William B. Rubenstein;* for the Human Rights Campaign et al. by *Walter Dellinger*, *Pamela Harris*, and *Jonathan D. Hacker;* for the Log Cabin Republicans et al. by *C. Martin Meekins;* for the NOW Legal Defense and Education Fund by *David C. Codell*, *Laura W. Brill*, and *Wendy R. Weiser;* for Professors of History by *Roy T. Englert, Jr.*, *Alan Untereiner*, and *Sherri Lynn Wolson;* for the Republican Unity Coalition et al. by *Erik S. Jaffe;* and for Mary Robinson et al. by *Harold Hongju Koh* and *Joseph F. Tringali*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *William H. Pryor, Jr.*, Attorney General of Alabama, *Nathan A. Forrester*, Solicitor General, and *George M. Weaver*, and by the Attorneys General for their respective States as follows: *Henry D. McMaster* of South Carolina and *Mark L. Shurtleff* of Utah; for Agudath Israel of America by *David Zwiebel;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson, Sr.*, *Joel H. Thornton*, and *Walter M. Weber;* for the American Family Association, Inc., et al. by *Stephen M. Crampton*, *Brian Fahling*, and *Michael J. DePrimo;* for the Center for Arizona Policy et al. by *Len L. Munsil;* for the Center for Law and Justice International by *Thomas Patrick Monaghan* and *John P. Tuskey;* for the Center for Marriage Law by *Vincent P. McCarthy* and *Lynn D. Wardle;* for the Center

JUSTICE KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence,

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for the Original Intent of the Constitution by *Michael P. Farris* and *Jordan W. Lorence;* for Concerned Women for America by *Janet M. LaRue;* for the Family Research Council, Inc., by *Robert P. George;* for First Principles, Inc., by *Ronald D. Ray;* for Liberty Counsel by *Mathew D. Staver* and *Rena M. Lindevaldsen;* for the Pro Family Law Center et al. by *Richard D. Ackerman* and *Gary G. Kreep;* for Public Advocate of the United States et al. by *Herbert W. Titus* and *William J. Olson;* for the Texas Eagle Forum et al. by *Teresa Stanton Collett;* for Texas Legislator Warren Chisum et al. by *Kelly Shackelford* and *Scott Roberts;* for the Texas Physicians Resource Council et al. by *Glen Lavy;* and for United Families International by *Paul Benjamin Linton.*

Briefs of *amici curiae* were filed for the American Bar Association by *Alfred P. Carlton, Jr.*, *Ruth N. Borenstein*, and *Beth S. Brinkmann;* for the American Civil Liberties Union et al. by *Laurence H. Tribe*, *James D. Esseks*, *Steven R. Shapiro*, and *Matthew A. Coles;* for the Institute for Justice by *William H. Mellor*, *Clint Bolick*, *Dana Berliner*, and *Randy E. Barnett;* and for the National Lesbian and Gay Law Association et al. by *Chai R. Feldblum*, *J. Paul Oetken*, and *Scott Ruskay-Kidd.*

resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
>
> "(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, § 3a. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a–110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S. W. 3d 349 (2001). The majority opinion indicates that the Court of Appeals considered our decision in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari, 537 U. S. 1044 (2002), to consider three questions:

> 1. Whether petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.
>
> 2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
>
> 3. Whether *Bowers* v. *Hardwick*, *supra*, should be overruled? See Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); but the most pertinent beginning point is our decision in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and

placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.*, at 485.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.*, at 454; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*, at 453.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers* v. *Hardwick*.

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U. S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); *id.*, at 214 (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so

for a very long time." *Id.*, at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.*, at 192. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opin-

ions in *Bowers*. Brief for Cato Institute as *Amicus Curiae* 16–17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15–21; Brief for Professors of History et al. as *Amici Curiae* 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e. g.*, *King* v. *Wiseman*, 92 Eng. Rep. 774, 775 (K. B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e. g.*, 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47–50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, *e. g.*, J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of

homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra*, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e. g.*, F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic

punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," *Bowers*, 478 U. S., at 192, American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14–15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post* v. *State*, 715 P. 2d 1105 (Okla. Crim. App. 1986) (sodomy law invalidated as applied to different-sex couples). Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e. g.*, *Jegley* v. *Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Gryczan* v. *State*, 283 Mont. 433, 942 P. 2d 112 (1997); *Campbell* v. *Sundquist*, 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth* v. *Wasson*,

842 S. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. § 201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 850 (1992).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." 478 U. S., at 196. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e. g.*, Eskridge, Hardwick and Historiography, 1999 U. Ill. L. Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of

most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento* v. *Lewis,* 523 U. S. 833, 857 (1998) (KENNEDY, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277–280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15–16.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U. S., at 192–193. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. *Id.*, at 197–198, n. 2 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws

punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v. *United Kingdom*, 45 Eur. Ct. H. R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State* v. *Morales*, 869 S. W. 2d 941, 943.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed

that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer* v. *Evans*, 517 U. S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id.*, at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.*, at 634.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we con-

clude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith* v. *Doe*, 538 U. S. 84 (2003); *Connecticut Dept. of Public Safety* v. *Doe*, 538 U. S. 1 (2003). We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing Idaho Code §§ 18–8301 to 18–8326 (Cum. Supp. 2002); La. Code Crim. Proc. Ann. §§ 15:540–15:549

(West 2003); Miss. Code Ann. §§ 45–33–21 to 45–33–57 (Lexis 2003); S. C. Code Ann. §§ 23–3–400 to 23–3–490 (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e. g.*, C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley* v. *Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Powell* v. *State*, 270 Ga. 327, 510 S. E. 2d 18, 24 (1998); *Gryczan* v. *State*, 283 Mont. 433, 942 P. 2d 112 (1997); *Campbell* v. *Sundquist*, 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth* v. *Wasson*, 842 S. W. 2d 487 (Ky. 1992).

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v. *United Kingdom*. See *P. G. & J. H.* v. *United Kingdom*, App. No. 00044787/98, ¶ 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v. *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v. *Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary

Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'" (quoting *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940))). In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U. S., at 855–856; see also *id.*, at 844 ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* JUSTICE STEVENS came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from consti-

> tutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." 478 U. S., at 216 (footnotes and citations omitted).

JUSTICE STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, *supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume

to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'Connor, concurring in the judgment.

The Court today overrules *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. § 21.06 (2003). Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985); see also *Plyler* v. *Doe*, 457 U. S. 202, 216 (1982). Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne* v. *Cleburne Living Center*, *supra*, at 440; see also *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973); *Romer* v. *Evans*, 517 U. S. 620, 632–633 (1996); *Nordlinger* v. *Hahn*, 505 U. S. 1, 11–12 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the

democratic processes." *Cleburne* v. *Cleburne Living Center*, *supra*, at 440; see also *Fitzgerald* v. *Racing Assn. of Central Iowa*, *ante*, p. 103; *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). We have consistently held, however, that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. *Department of Agriculture* v. *Moreno*, *supra*, at 534. See also *Cleburne* v. *Cleburne Living Center*, *supra*, at 446–447; *Romer* v. *Evans*, *supra*, at 632. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture* v. *Moreno*, for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to "'discriminate against hippies.'" 413 U. S., at 534. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. *Id.*, at 535–538. In *Eisenstadt* v. *Baird*, 405 U. S. 438, 447–455 (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne* v. *Cleburne Living Center*, *supra*, we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer* v. *Evans*, we disallowed a state statute that "impos[ed] a broad and undifferentiated disability on a single named group"—specifically, homosexuals. 517 U. S., at 632.

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. See *State* v. *Morales*, 869 S. W. 2d 941, 943 (Tex. 1994) (noting in 1994 that § 21.06 "has not been, and in all probability will not be, enforced against private consensual conduct between adults"). This case shows, however, that prosecutions under § 21.06 *do* occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, *e. g.*, Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. See, *e. g.*, Idaho Code § 18–8304 (Cum. Supp. 2002); La. Stat. Ann. § 15:542 (West Cum. Supp. 2003); Miss. Code Ann. § 45–33–25 (West 2003); S. C. Code Ann. § 23–3–430 (West Cum. Supp. 2002); cf. *ante*, at 575–576.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas

itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." *State* v. *Morales*, 826 S. W. 2d 201, 203 (Tex. App. 1992).

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers*, we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. 478 U. S., at 196. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Id.*, at 188, n. 2. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers:* whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, *e. g.*, *Department of Agriculture* v. *Moreno*, 413 U. S., at 534; *Romer* v. *Evans*, 517 U. S., at 634–635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.*, at 633. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." *Id.*, at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.*, at 634.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.*, at 641 (Scalia, J., dissenting) (internal quotation marks omitted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante*, at 575.

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "ho-

mosexual" "impute[s] the commission of a crime." *Plumley* v. *Landmark Chevrolet, Inc.*, 122 F. 3d 308, 310 (CA5 1997) (applying Texas law); see also *Head* v. *Newton*, 596 S. W. 2d 209, 210 (Tex. App. 1980). The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State* v. *Morales*, 826 S. W. 2d, at 202–203 ("[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer* v. *Evans*, we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U. S., at 633. The same is true here. The Equal Protection Clause "'neither knows nor tolerates classes among citizens.'" *Id.*, at 623 (quoting *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting)).

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with" the Equal Protection Clause. *Plyler* v. *Doe*, 457 U. S., at 239 (Powell, J., concurring).

Whether a sodomy law that is neutral both in effect and application, see *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a

law would not long stand in our democratic society. In the words of Justice Jackson:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 112–113 (1949) (concurring opinion).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

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

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 844 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe* v. *Wade*, 410 U. S. 113 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. *Ante*, at 578 (overruling *Bowers* to the extent it sustained Georgia's antisodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," *ante*, at 565, and "fundamental decisions," *ibid.*, nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U. S., at 191. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante*, at 564.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers* v. *Hard-*

wick. I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood* v. *Casey*. There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it:

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*[,] . . . its decision has a dimension that the resolution of the normal case does not carry. . . . [T]o overrule under fire in the absence of the most compelling reason . . . would subvert the Court's legitimacy beyond any serious question." 505 U. S., at 866–867.

Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as "intensely divisive" as the issue in *Roe*, is offered as a reason in favor of *overruling* it. See *ante*, at 576–577. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven 'unworkable,'" *Casey*, *supra*, at 855.

Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if:* (1) its foundations have been "ero[ded]" by subsequent decisions, *ante*, at 576; (2) it has been subject to "substantial and continuing" criticism, *ibid.;* and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante*, at 577. The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*.

(1) A preliminary digressive observation with regard to the first factor: The Court's claim that *Planned Parenthood* v. *Casey*, *supra*, "casts some doubt" upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante*, at 571. As far as its holding is concerned, *Casey* provided a *less* expansive right to abortion than did *Roe*, *which was already on the books when Bowers was decided.* And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 574 ("'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'"): That "casts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.

I do not quarrel with the Court's claim that *Romer* v. *Evans*, 517 U. S. 620 (1996), "eroded" the "foundations" of *Bowers*' rational-basis holding. See *Romer*, *supra*, at 640–643 (SCALIA, J., dissenting). But *Roe* and *Casey* have been equally "eroded" by *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which held that *only* fundamental rights which are "'deeply rooted in this Nation's history and tradition'" qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition.

(2) *Bowers*, the Court says, has been subject to "substantial and continuing [criticism], disapproving of its reasoning in all respects, not just as to its historical assumptions." *Ante*, at 576. Exactly what those nonhistorical criticisms are, and whether the Court even agrees with them, are left

unsaid, although the Court does cite two books. See *ibid.* (citing C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992)).[1] Of course, *Roe* too (and by extension *Casey*) had been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today. See Fried, *supra*, at 75 ("Roe was a prime example of twisted judging"); Posner, *supra*, at 337 ("[The Court's] opinion in *Roe* . . . fails to measure up to professional expectations regarding judicial opinions"); Posner, Judicial Opinion Writing, 62 U. Chi. L. Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an "embarrassing performanc[e]").

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers*, only the third factor. "[T]here has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . . ." *Ante*, at 577. It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, *e. g.*, *Williams* v. *Pryor*, 240 F. 3d 944, 949 (CA11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny"); *Milner* v. *Apfel*, 148 F. 3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality . . . rather than confined

[1] This last-cited critic of *Bowers* actually writes: "*[Bowers]* is correct nevertheless that the right to engage in homosexual acts is not deeply rooted in America's history and tradition." Posner, Sex and Reason, at 343.

to preventing demonstrable harms"); *Holmes* v. *California Army National Guard*, 124 F. 3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens* v. *State*, 352 Md. 663, 683, 724 A. 2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman* v. *Henry*, 928 S. W. 2d 464, 469–473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 569 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.* (plurality opinion); see also *id.*, at 575 (SCALIA, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 572 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U. S., at 196.[2]

[2] While the Court does not overrule *Bowers*' holding that homosexual sodomy is not a "fundamental right," it is worth noting that the "societal reliance" upon that aspect of the decision has been substantial as well.

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State. *Casey*, however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U. S., at 856. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted*

See 10 U. S. C. § 654(b)(1) ("A member of the armed forces shall be separated from the armed forces . . . if . . . the member has engaged in . . . a homosexual act or acts"); *Marcum* v. *McWhorter*, 308 F. 3d 635, 640–642 (CA6 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); *Mullins* v. *Oregon*, 57 F. 3d 789, 793–794 (CA9 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interes[t]" in the adoption of her grandchildren); *Doe* v. *Wigginton*, 21 F. 3d 733, 739–740 (CA6 1994) (relying on *Bowers* in rejecting a prisoner's claimed "fundamental right" to on-demand HIV testing); *Schowengerdt* v. *United States*, 944 F. 2d 483, 490 (CA9 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); *Charles* v. *Baesler*, 910 F. 2d 1349, 1353 (CA6 1990) (relying on *Bowers* in rejecting fire department captain's claimed "fundamental" interest in a promotion); *Henne* v. *Wright*, 904 F. 2d 1208, 1214–1215 (CA8 1990) (relying on *Bowers* in rejecting a claim that state law restricting surnames that could be given to children at birth implicates a "fundamental right"); *Walls* v. *Petersburg*, 895 F. 2d 188, 193 (CA4 1990) (relying on *Bowers* in rejecting substantive-due-process challenge to a police department questionnaire that asked prospective employees about homosexual activity); *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 895 F. 2d 563, 570–571 (CA9 1988) (relying on *Bowers*' holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department's policy of conducting expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearances).

the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.

II

Having decided that it need not adhere to *stare decisis*, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. §21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante*, at 567 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante*, at 574 (" 'These matters . . . are central to the liberty protected by the Fourteenth Amendment' "); *ante*, at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," *so long as "due process of law" is provided:*

> "No state shall . . . deprive any person of life, liberty, or property, *without due process of law.*" Amdt. 14 (emphasis added).

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington* v. *Glucksberg*, 521 U. S., at 721. We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "'deeply rooted in this Nation's history and tradition,'" *ibid.* See *Reno* v. *Flores*, 507 U. S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States* v. *Salerno*, 481 U. S. 739, 751 (1987) (same). See also *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society"); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923) (Fourteenth Amendment protects "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men" (emphasis added)).[3] All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

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[3] The Court is quite right that "'[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,'" *ante*, at 572. An asserted "fundamental liberty interest" must not only be "'deeply rooted in this Nation's history and tradition,'" *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), but it must *also* be "'implicit in the concept of ordered liberty,'" so that "'neither liberty nor justice would exist if [it] were sacrificed,'" *ibid.* Moreover, liberty interests unsupported by history and tradition, though not deserving of "heightened scrutiny," are *still* protected from state laws that are not rationally related to any legitimate state interest. *Id.*, at 722. As I proceed to discuss, it is this latter principle that the Court applies in the present case.

Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right" under the Due Process Clause, 478 U. S., at 191–194. Noting that "[p]roscriptions against that conduct have ancient roots," *id.*, at 192, that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," *ibid.*, and that many States had retained their bans on sodomy, *id.*, at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition,'" *id.*, at 192.

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary, see *id.*, at 196. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Ante*, at 578.

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers'* conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. *Ante*, at 566. The Court points to *Griswold* v. *Connecticut*, 381 U. S. 479, 481–482 (1965). But that case *expressly disclaimed* any reliance on the doctrine of "substantive due

process," and grounded the so-called "right to privacy" in penumbras of constitutional provisions *other than* the Due Process Clause. *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), likewise had nothing to do with "substantive due process"; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well-known dictum relating to the "right to privacy," but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a "substantive due process" right.

Roe v. *Wade* recognized that the right to abort an unborn child was a "fundamental right" protected by the Due Process Clause. 410 U. S., at 155. The *Roe* Court, however, made no attempt to establish that this right was "'deeply rooted in this Nation's history and tradition'"; instead, it based its conclusion that "the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" on its own normative judgment that antiabortion laws were undesirable. See *id.*, at 153. We have since rejected *Roe*'s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood* v. *Casey*, 505 U. S., at 876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *id.*, at 951–953 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part)—and thus, by logical implication, *Roe*'s holding that the right to abort an unborn child is a "fundamental right." See 505 U. S., at 843–912 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) (not once describing abortion as a "fundamental right" or a "fundamental liberty interest").

After discussing the history of antisodomy laws, *ante*, at 568–571, the Court proclaims that, "it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," *ante*,

at 568. This observation in no way casts into doubt the "definitive [historical] conclusio[n]," *ibid.*, on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples:

> "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws.* In fact, until 1961, all 50 States outlawed *sodomy,* and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U. S., at 192–194 (citations and footnotes omitted; emphasis added).

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." *Ante,* at 568. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition." The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers actually* relied.

Next the Court makes the claim, again unsupported by any citations, that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Ante*, at 569. The key qualifier here is "acting in private"—since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were "infrequen[t]," *ibid.*). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. See W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999) (hereinafter Gaylaw). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983). *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*." *Ante*, at 571–572 (emphasis

added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,'" *ante*, at 572, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." Gaylaw 159.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante*, at 576, but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition,'" 478 U. S., at 193–194 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.*, at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Foster* v. *Florida*, 537 U. S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra,* at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante,* at 578 (emphasis added). The Court embraces instead JUSTICE STEVENS' declaration in his *Bowers* dissent, that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,'" *ante,* at 577. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save JUSTICE O'CONNOR, *ante,* at 579 (opinion concurring in judgment), embraces: On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual

acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving* v. *Virginia*, 388 U. S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." *Id.*, at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington* v. *Davis*, 426 U. S. 229, 241–242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 U. S., at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

JUSTICE O'CONNOR argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

> "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than con-

> duct. It is instead directed toward gay persons as a class." *Ante*, at 583.

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law *does* deny equal protection to "homosexuals as a class," that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

JUSTICE O'CONNOR simply decrees application of "a more searching form of rational basis review" to the Texas statute. *Ante*, at 580. The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer* v. *Evans*, 517 U. S., at 635; *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448–450 (1985); *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534–538 (1973). Nor does JUSTICE O'CONNOR explain precisely what her "more searching form" of rational-basis review consists of. It must at least mean, however, that laws exhibiting "a desire to harm a politically unpopular group," *ante*, at 580, are invalid *even though* there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. JUSTICE O'CONNOR seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. *Ante*, at 585. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence JUSTICE O'CONNOR

has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

* * *

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer*, *supra*, at 653.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante*, at 575. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that

culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is *mandated* by federal statute, see 10 U. S. C. § 654(b)(1) (mandating discharge from the Armed Forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," *ante*, at 579; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made

by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern* v. *Toronto*, 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante*, at 578. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante*, at 574 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante*, at 578; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen

sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante*, at 567; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.?* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

JUSTICE THOMAS, dissenting.

I join JUSTICE SCALIA's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold* v. *Connecticut*, 381 U. S. 479, 527 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" *Id.*, at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the

Constitution a] general right of privacy," *ibid.*, or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante*, at 562.

Syllabus

STOGNER *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 01–1757. Argued March 31, 2003—Decided June 26, 2003

In 1993, California enacted a new criminal statute of limitations permitting prosecution for sex-related child abuse where the prior limitations period has expired if, *inter alia*, the prosecution is begun within one year of a victim's report to police. A subsequently added provision makes clear that this law revives causes of action barred by prior limitations statutes. In 1998, petitioner Stogner was indicted for sex-related child abuse committed between 1955 and 1973. At the time those crimes were allegedly committed, the limitations period was three years. Stogner moved to dismiss the complaint on the ground that the *Ex Post Facto* Clause forbids revival of a previously time-barred prosecution. The trial court agreed, but the California Court of Appeal reversed. The trial court denied Stogner's subsequent dismissal motion, in which he argued that his prosecution violated the *Ex Post Facto* and Due Process Clauses. The Court of Appeal affirmed.

Held: A law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution. California's law extends the time in which prosecution is allowed, authorizes prosecutions that the passage of time has previously barred, and was enacted after prior limitations periods for Stogner's alleged offenses had expired. Such features produce the kind of retroactivity that the Constitution forbids. First, the law threatens the kinds of harm that the Clause seeks to avoid, for the Clause protects liberty by preventing governments from enacting statutes with "manifestly *unjust and oppressive*" retroactive effects. *Calder* v. *Bull*, 3 Dall. 386, 391. Second, the law falls literally within the categorical descriptions of *ex post facto* laws that Justice Chase set forth more than 200 years ago in *Calder* v. *Bull*, which this Court has recognized as an authoritative account of the Clause's scope, *Collins* v. *Youngblood*, 497 U. S. 37, 46. It falls within the second category, which Justice Chase understood to include a new law that inflicts punishments where the party was not, by law, liable to any punishment. Third, numerous legislators, courts, and commentators have long believed it well settled that the Clause forbids resurrection of a time-barred prosecution. The Reconstruction Congress of 1867 rejected a bill that would have revived time-barred treason prosecutions against Jefferson Davis

Syllabus

and others, passing instead a law extending unexpired limitations periods. Roughly contemporaneous State Supreme Courts echoed the view that laws reviving time-barred prosecutions are *ex post facto*. Even courts that have upheld extensions of *unexpired* statutes of limitations have consistently distinguished situations where the periods have *expired*, often using language that suggests a presumption that reviving time-barred criminal cases is not allowed. This Court has not previously spoken decisively on this matter. Neither its recognition that the Fifth Amendment's privilege against self-incrimination does not apply after the relevant limitations period has expired, *Brown* v. *Walker*, 161 U. S. 591, 597–598, nor its holding that a Civil War statute retroactively tolling limitations periods during the war was valid as an exercise of Congress' war powers, *Stewart* v. *Kahn*, 11 Wall. 493, 503–504, dictates the outcome here. Instead, that outcome is determined by the nature of the harms that the law creates, the fact that the law falls within Justice Chase's second category, and a long line of authority. Pp. 610–633.

93 Cal. App. 4th 1229, 114 Cal. Rptr. 2d 37, reversed.

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. 633.

Roberto Nájera argued the cause for petitioner. With him on the briefs was *Elisa Stewart*.

Janet Gaard, Special Assistant Attorney General of California, argued the cause for respondent. With her on the brief were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *W. Scott Thorpe*, Special Assistant Attorney General, and *Kelly E. Lebel*, Deputy Attorney General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Deputy Solicitor General Dreeben*, and *John F. De Pue*.*

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*Briefs of *amici curiae* were filed for the American Psychological Association et al. by *Kathleen A. Behan*, *Christopher D. Man*, and *Nathalie F. P. Gilfoyle;* and for the National Association of Criminal Defense Law-

JUSTICE BREYER delivered the opinion of the Court.

California has brought a criminal prosecution after expiration of the time periods set forth in previously applicable statutes of limitations. California has done so under the authority of a new law that (1) permits resurrection of otherwise time-barred criminal prosecutions, and (2) was itself enacted *after* pre-existing limitations periods had expired. We conclude that the Constitution's *Ex Post Facto* Clause, Art. I, § 10, cl. 1, bars application of this new law to the present case.

I

In 1993, California enacted a new criminal statute of limitations governing sex-related child abuse crimes. The new statute permits prosecution for those crimes where "[t]he limitation period specified in [prior statutes of limitations] has expired"—provided that (1) a victim has reported an allegation of abuse to the police, (2) "there is independent evidence that clearly and convincingly corroborates the victim's allegation," and (3) the prosecution is begun within one year of the victim's report. 1993 Cal. Stats. ch. 390, § 1 (codified as amended at Cal. Penal Code Ann. § 803(g) (West Supp. 2003)). A related provision, added to the statute in 1996, makes clear that a prosecution satisfying these three conditions "shall revive any cause of action barred by [prior statutes of limitations]." 1996 Cal. Stats. ch. 130, § 1 (codified at Cal. Penal Code Ann. § 803(g)(3)(A) (West Supp. 2003)). The statute thus authorizes prosecution for criminal acts committed many years beforehand—and where the original limitations period has expired—as long as prosecution begins within a year of a victim's first complaint to the police.

In 1998, a California grand jury indicted Marion Stogner, the petitioner, charging him with sex-related child abuse committed decades earlier—between 1955 and 1973. With-

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yers et al. by *David M. Porter, Barry T. Simons, Martin N. Buchanan,* and *Michael B. Dashjian.*

out the new statute allowing revival of the State's cause of action, California could not have prosecuted Stogner. The statute of limitations governing prosecutions at the time the crimes were allegedly committed had set forth a 3-year limitations period. And that period had run 22 years or more before the present prosecution was brought.

Stogner moved for the complaint's dismissal. He argued that the Federal Constitution's *Ex Post Facto* Clause, Art. I, § 10, cl. 1, forbids revival of a previously time-barred prosecution. The trial court agreed that such a revival is unconstitutional. But the California Court of Appeal reversed, citing a recent, contrary decision by the California Supreme Court, *People* v. *Frazer*, 21 Cal. 4th 737, 982 P. 2d 180 (1999), cert. denied, 529 U. S. 1108 (2000). Stogner then moved to dismiss his indictment, arguing that his prosecution is unconstitutional under both the *Ex Post Facto* Clause and the Due Process Clause, Amdt. 14, § 1. The trial court denied Stogner's motion, and the Court of Appeal upheld that denial. *Stogner* v. *Superior Court*, 93 Cal. App. 4th 1229, 114 Cal. Rptr. 2d 37 (2001). We granted certiorari to consider Stogner's constitutional claims. 537 U. S. 1043 (2002).

II

The Constitution's two *Ex Post Facto* Clauses prohibit the Federal Government and the States from enacting laws with certain retroactive effects. See Art. I, § 9, cl. 3 (Federal Government); Art. I, § 10, cl. 1 (States). The law at issue here created a new criminal limitations period that extends the time in which prosecution is allowed. It authorized criminal prosecutions that the passage of time had previously barred. Moreover, it was enacted after prior limitations periods for Stogner's alleged offenses had expired. Do these features of the law, taken together, produce the kind of retroactivity that the Constitution forbids? We conclude that they do.

First, the new statute threatens the kinds of harm that, in this Court's view, the *Ex Post Facto* Clause seeks to avoid. Long ago Justice Chase pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly *unjust and oppressive*" retroactive effects. *Calder* v. *Bull*, 3 Dall. 386, 391 (1798). Judge Learned Hand later wrote that extending a limitations period after the State has assured "a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest." *Falter* v. *United States*, 23 F. 2d 420, 426 (CA2), cert. denied, 277 U. S. 590 (1928). In such a case, the government has refused "to play by its own rules," *Carmell* v. *Texas*, 529 U. S. 513, 533 (2000). It has deprived the defendant of the "fair warning," *Weaver* v. *Graham*, 450 U. S. 24, 28 (1981), that might have led him to preserve exculpatory evidence. F. Wharton, Criminal Pleading and Practice § 316, p. 210 (8th ed. 1880) ("The statute [of limitations] is . . . an amnesty, declaring that after a certain time . . . the offender shall be at liberty to return to his country . . . and . . . may cease to preserve the proofs of his innocence"). And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers, *Weaver*, *supra*, at 29, and n. 10. See *Fletcher* v. *Peck*, 6 Cranch 87, 137–138 (1810) (viewing the *Ex Post Facto* Clause as a protection against "violent acts which might grow out of the feelings of the moment").

Second, the kind of statute at issue falls literally within the categorical descriptions of *ex post facto* laws set forth by Justice Chase more than 200 years ago in *Calder* v. *Bull*, *supra*—a categorization that this Court has recognized as providing an authoritative account of the scope of the *Ex Post Facto* Clause. *Collins* v. *Youngblood*, 497 U. S. 37, 46 (1990); *Carmell*, *supra*, at 539. Drawing substantially on Richard Wooddeson's 18th-century commentary on the nature of *ex post facto* laws and past parliamentary abuses,

Chase divided *ex post facto* laws into categories that he described in two alternative ways. See 529 U. S., at 522–524, and n. 9. He wrote:

> "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. *2d. Every law that aggravates a crime, or makes it greater than it was, when committed.* 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive." *Calder, supra,* at 390–391 (emphasis altered from original).

In his alternative description, Chase traced these four categories back to Parliament's earlier abusive acts, as follows:

> Category 1: "Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed."
>
> Category 2: *"[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment."*
>
> Category 3: "[I]n other cases, they inflicted greater punishment, than the law annexed to the offence."
>
> Category 4: *"[A]t other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit."* 3 Dall., at 389 (emphasis altered from original).

The second category—including any "law that *aggravates a crime*, or makes it *greater* than it was, when committed," *id.*, at 390—describes California's statute as long as those words are understood as Justice Chase understood them—*i. e.*, as referring to a statute that "inflict[s] *punishments*, where the party was not, by *law*, liable to *any punishment*," *id.*, at 389. See also 2 R. Wooddeson, A Systematical View of the Laws of England 638 (1792) (hereinafter Wooddeson, Systematical View) (discussing the *ex post facto* status of a law that affects punishment by "making therein some innovation, *or creating some forfeiture or disability, not incurred in the ordinary course of law*" (emphasis added)). After (but not before) the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (when the new law was enacted) did not trigger any such liability. See also H. Black, American Constitutional Law § 266, p. 700 (4th ed. 1927) (hereinafter Black, American Constitutional Law) ("[A]n act condoned by the expiration of the statute of limitations is no longer a punishable offense"). It is consequently not surprising that New Jersey's highest court long ago recognized that Chase's alternative description of second category laws "*exactly describes* the operation" of the kind of statute at issue here. *Moore* v. *State*, 43 N. J. L. 203, 217 (1881) (emphasis added). See also H. Black, Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws § 235, p. 298 (1887) (hereinafter Black, Constitutional Prohibitions) ("Such a statute" "certainly makes that a punishable offense which was previously a condoned and obliterated offense").

So to understand the second category (as applying where a new law inflicts a punishment upon a person not then sub-

ject to that punishment, to any degree) explains why and how that category differs from both the first category (making criminal noncriminal behavior) and the third category (aggravating the punishment). And this understanding is consistent, in relevant part, with Chase's second category examples—examples specifically provided to illustrate Chase's *alternative* description of laws "'inflict[ing] *punishments*, where the party was not, by *law*, liable to *any punishment*,'" *Calder*, 3 Dall., at 389.

Following Wooddeson, Chase cited as examples of such laws Acts of Parliament that banished certain individuals accused of treason. *Id.*, at 389, and n. ‡; see also *Carmell*, 529 U. S., at 522–524, and n. 11. Both Chase and Wooddeson explicitly referred to these laws as involving "banishment." *Calder*, *supra*, at 389, and n. ‡; 2 Wooddeson, Systematical View 638–639. This fact was significant because Parliament had enacted those laws not only after the crime's commission, but under circumstances where banishment "was simply not a form of penalty that could be imposed by the courts." *Carmell*, *supra*, at 523, n. 11; see also 11 W. Holdsworth, A History of English Law 569 (1938). Thus, these laws, like the California law at issue here, enabled punishment where it was not otherwise available "in the ordinary course of law," 2 Wooddeson, Systematical View 638. As this Court previously recognized in *Carmell*, *supra*, at 523, and n. 11, it was *this* vice that was relevant to Chase's purpose.

It is true, however, that Parliament's Acts of banishment, unlike the law in this case, involved a punishment (1) that the legislature imposed directly, and (2) that courts had *never* previously had the power to impose. But these differences are not determinative. The first describes not a retroactivity problem but an attainder problem that Justice Chase's language does not emphasize and with which the Constitution separately deals, Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. The second difference seems beside the point. The example of

Parliament's banishment laws points to concern that a legislature, knowing the accused and seeking to have the accused punished for a pre-existing crime, might enable punishment of the accused in ways that existing law forbids. That fundamental concern, related to basic concerns about retroactive penal laws and erosion of the separation of powers, applies with equal force to punishment like that enabled by California's law as applied to Stogner—punishment that courts lacked the power to impose at the time the legislature acted. See Black, Constitutional Prohibitions § 235, at 298 ("It would be superfluous to point out that such an act [reviving otherwise time-barred criminal liability] would fall within the evils intended to be guarded against by the prohibition in question"). Cf. 1 F. Wharton, Criminal Law § 444*a*, pp. 347–348, n. *b* (rev. 7th ed. 1874) (hereinafter Criminal Law).

In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category, for example, includes any "law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Calder*, *supra*, at 390. This Court has described that category as including laws that diminish "the quantum of evidence required to convict." *Carmell*, *supra*, at 532.

Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. See *United States* v. *Marion*, 404 U. S. 307, 322 (1971). And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979); 4 W. LaFave, J. Israel, & N. King, Criminal Procedure § 18.5(a), p. 718 (1999); Wharton, Criminal Pleading and Practice § 316, at 210. Indeed, this

Court once described statutes of limitations as creating "a presumption which renders proof unnecessary." *Wood* v. *Carpenter*, 101 U. S. 135, 139 (1879).

Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would "violate" previous evidence-related legal rules by authorizing the courts to " 'receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted]' " as sufficient proof of a crime, *supra*, at 612. Cf. *Collins*, 497 U. S., at 46 ("Subtle *ex post facto* violations are no more permissible than overt ones"); *Cummings* v. *Missouri*, 4 Wall. 277, 329 (1867) (The *Ex Post Facto* Clause "cannot be evaded by the form in which the power of the State is exerted"). Nonetheless, given Justice Chase's description of the second category, we need not explore the fourth category, or other categories, further.

Third, likely for the reasons just stated, numerous legislators, courts, and commentators have long believed it well settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution. Such sentiments appear already to have been widespread when the Reconstruction Congress of 1867—the Congress that drafted the Fourteenth Amendment—rejected a bill that would have revived time-barred prosecutions for treason that various Congressmen wanted brought against Jefferson Davis and "his coconspirators," Cong. Globe, 39th Cong., 2d Sess., 279 (1866–1867) (comments of Rep. Lawrence). Radical Republicans such as Roscoe Conkling and Thaddeus Stevens, no friends of the South, opposed the bill because, in their minds, it proposed an "*ex post facto* law," *id.*, at 68 (comments of Rep. Conkling), and threatened an injustice tantamount to "judicial murder," *id.*, at 69 (comments of Rep. Stevens). In this instance, Con-

gress ultimately passed a law extending *unexpired* limitations periods, ch. 236, 15 Stat. 183—a tailored approach to extending limitations periods that has also been taken in modern statutes, *e. g.*, 18 U. S. C. § 3293 (notes on effective date of 1990 amendment and effect of 1989 amendment); Cal. Penal Code Ann. § 805.5 (West Supp. 2003).

Further, Congressmen such as Conkling were not the only ones who believed that laws reviving time-barred prosecutions are *ex post facto*. That view was echoed in roughly contemporaneous opinions by State Supreme Courts. *E. g.*, *State* v. *Sneed*, 25 Tex. Supp. 66, 67 (1860); *Moore*, 43 N. J. L., at 216–217. Cf. *State* v. *Keith*, 63 N. C. 140, 145 (1869) (A State's repeal of an amnesty was "substantially an *ex post facto* law"). Courts, with apparent unanimity until California's decision in *Frazer*, have continued to state such views, and, when necessary, so to hold. *E. g.*, *People ex rel. Reibman* v. *Warden*, 242 App. Div. 282, 285, 275 N. Y. S. 59, 62 (1934); *United States* v. *Fraidin*, 63 F. Supp. 271, 276 (Md. 1945); *People* v. *Shedd*, 702 P. 2d 267, 268 (Colo. 1985) (en banc) *(per curiam); State* v. *Hodgson*, 108 Wash. 2d 662, 667–669, 740 P. 2d 848, 851–852 (1987) (en banc), cert. denied *sub nom. Fied* v. *Washington*, 485 U. S. 938 (1988); *Commonwealth* v. *Rocheleau*, 404 Mass. 129, 130–131, 533 N. E. 2d 1333, 1334 (1989); *State* v. *Nunn*, 244 Kan. 207, 218, 768 P. 2d 268, 277–278 (1989); *State* v. *O'Neill*, 118 Idaho 244, 247, 796 P. 2d 121, 124 (1990); *State* v. *Hirsch*, 245 Neb. 31, 39–40, 511 N. W. 2d 69, 76 (1994); *State* v. *Schultzen*, 522 N. W. 2d 833, 835 (Iowa 1994); *State* v. *Comeau*, 142 N. H. 84, 88, 697 A. 2d 497, 500 (1997) (citing *State* v. *Hamel*, 138 N. H. 392, 395–396, 643 A. 2d 953, 955–956 (1994)); *Santiago* v. *Commonwealth*, 428 Mass. 39, 42, 697 N. E. 2d 979, 981, cert. denied, 525 U. S. 1003 (1998). Cf. *Thompson* v. *State*, 54 Miss. 740, 743 (1877) (stating, without specifying further grounds, that a new law could not take away a vested statute-of-limitations defense); *State* v. *Cookman*, 127 Ore. App. 283, 289, 873 P. 2d 335, 338 (1994) (holding that a law resurrecting a time-barred crimi-

nal case "violates the Due Process Clause"), aff'd on state-law grounds, 324 Ore. 19, 920 P. 2d 1086 (1996); *Commonwealth* v. *Guimento*, 341 Pa. Super. 95, 97–98, 491 A. 2d 166, 167–168 (1985) (enforcing a state ban on *ex post facto* laws apparently equivalent to the federal prohibition); *People* v. *Chesebro*, 185 Mich. App. 412, 416, 463 N. W. 2d 134, 135–136 (1990) (reciting "the general rule" that, "'where a complete defense has arisen under [a statute of limitations], it cannot be taken away by a subsequent repeal thereof'").

Even where courts have upheld extensions of *unexpired* statutes of limitations (extensions that our holding today does not affect, see *supra*, at 613), they have consistently distinguished situations where limitations periods have *expired.* Further, they have often done so by saying that extension of existing limitations periods is not *ex post facto* "provided," "so long as," "because," or "if" the prior limitations periods have not expired—a manner of speaking that suggests a presumption that revival of time-barred criminal cases is *not* allowed. *E. g.*, *United States* v. *Madia*, 955 F. 2d 538, 540 (CA8 1992) ("'provided'"); *United States* v. *Richardson*, 512 F. 2d 105, 106 (CA3 1975) ("provided"); *People* v. *Anderson*, 53 Ill. 2d 437, 440, 292 N. E. 2d 364, 366 (1973) ("so long as"); *United States* v. *Haug*, 21 F. R. D. 22, 25 (ND Ohio 1957) ("so long as"), aff'd, 274 F. 2d 885 (CA6 1960), cert. denied, 365 U. S. 811 (1961); *United States* v. *Kurzenknabe*, 136 F. Supp. 17, 23 (NJ 1955) ("so long as"); *State* v. *Duffy*, 300 Mont. 381, 390, 6 P. 3d 453, 460 (2000) ("because"); *State* v. *Davenport*, 536 N. W. 2d 686, 688 (N. D. 1995) ("because"); *Andrews* v. *State*, 392 So. 2d 270, 271 (Fla. App. 1980) ("if"), review denied, 399 So. 2d 1145 (Fla. 1981). See, *e. g.*, *Shedd*, *supra*, at 268 (citing *Richardson*, *supra*, and *Andrews*, *supra*, as directly supporting a conclusion that a law reviving time-barred offenses is *ex post facto*). Cf. *Commonwealth* v. *Duffy*, 96 Pa. 506, 514 (1881) ("[I]n any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period

is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws").

Given the apparent unanimity of pre-*Frazer* case law, legal scholars have long had reason to believe this matter settled. As early as 1887, Henry Black reported that, although "not at all numerous," the "cases upon this point . . . unmistakably point to the conclusion that such an act would be *ex post facto* in the strict sense, and void." Constitutional Prohibitions § 235, at 297. Even earlier, in 1874, Francis Wharton supported this conclusion by emphasizing the historic role of statutes of limitations as "acts of grace or oblivion, and not of process," "extinguish[ing] all future prosecution" and making an offense unable to "be again called into existence at the caprice of the prince." 1 Criminal Law § 444*a*, at 347–348, n. *b*. More modern commentators—reporting on the same and subsequent cases—have come to the same conclusion. *E. g.*, 21 Am. Jur. 2d, Criminal Law § 294, pp. 349–350 (1998 and Supp. 2002); 16A C. J. S., Constitutional Law § 420, p. 372 (1984 and Supp. 2002); 4 LaFave, Israel, & King, Criminal Procedure § 18.5(a), at 718, n. 6; 2 C. Antieau & W. Rich, Modern Constitutional Law § 38.11, p. 445 (2d ed. 1997); Adlestein, Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial, 37 Wm. & Mary L. Rev. 199, 246 (1995); C. Corman, Limitation of Actions § 1.6, p. 35 (1993 Supp.); Black, Statutes of Limitations and the Ex Post Facto Clauses, 26 Ky. L. J. 42 (1937); Black, American Constitutional Law § 266, at 700. Cf. H. Wood, Limitation of Actions § 13, p. 43 (3d ed. 1901) (The State "may be said" to be "estopped from prosecuting"). Likewise, with respect to the closely related case of a law repealing an amnesty—a case not distinguished by the dissent—William Wade concluded early on that "[s]uch an act would be as clearly in contravention of the inhibition of *ex post facto* laws as though it undertook to annex criminality to an act innocent when done." Operation and Construction of Retroactive Laws

§ 286, p. 339 (1880). But cf. *post*, at 638–639 (KENNEDY, J., dissenting).

This Court itself has not previously spoken decisively on this matter. On the one hand, it has clearly stated that the Fifth Amendment's privilege against self-incrimination does not apply after the relevant limitations period has expired. *Brown* v. *Walker*, 161 U. S. 591, 597–598 (1896). And that rule may suggest that the expiration of a statute of limitations is irrevocable, for otherwise the passage of time would not have eliminated fear of prosecution.

On the other hand, in *Stewart* v. *Kahn*, 11 Wall. 493, 503–504 (1871), this Court upheld a statute, enacted during the Civil War, that retroactively tolled *all* civil and criminal limitations for periods during which the war had made service of process impossible or courts inaccessible. *Stewart*, however, involved a civil, not a criminal, limitations statute. *Id.*, at 500–501. Significantly, in reviewing this civil case, the Court upheld the statute as an exercise of Congress' war powers, *id.*, at 507, without explicit consideration of any potential collision with the *Ex Post Facto* Clause. Moreover, the Court already had held, independent of Congress' Act, that statutes of limitations were tolled for "the time during which the courts in the States lately in rebellion were closed to the citizens of the loyal States . . . ." *Id.*, at 503; see also *Hanger* v. *Abbott*, 6 Wall. 532, 539–542 (1868). Hence, the Court could have seen the relevant statute as ratifying a pre-existing expectation of tolling due to wartime exigencies, rather than as extending limitations periods that had truly expired. See *id.*, at 541; see also *Stewart*, *supra*, at 507. In our view, *Stewart* therefore no more dictates the outcome here than does seemingly contrary precedent regarding the Fifth Amendment privilege.

Instead, we believe that the outcome of this case is determined by the nature of the harms that California's law creates, by the fact that the law falls within Justice Chase's second category as Chase understood that category, and by

a long line of authority holding that a law of this type violates the *Ex Post Facto* Clause.

III

In a prodigious display of legal and historical textual research, the dissent finely parses cases that offer us support, see *post,* at 633–637; shows appreciation for 19th-century dissident commentary, see *post,* at 638–639; discusses in depth its understanding of late 17th-century and early 18th-century parliamentary history, *post,* at 642–649; and does its best to drive a linguistic wedge between Justice Chase's alternative descriptions of categories of *ex post facto* laws, *post,* at 640–641. All to what end? The dissent undertakes this Herculean effort to prove that it is *not* unfair, in any constitutionally relevant sense, to prosecute a man for crimes committed 25 to 42 years earlier when nearly a generation has passed since the law granted him an effective amnesty. Cf. *post,* at 649–653.

We disagree strongly with the dissent's ultimate conclusion about the fairness of resurrecting a long-dead prosecution. See *infra,* at 630–632. Rather, like Judge Learned Hand, we believe that this retroactive application of a later-enacted law is unfair. And, like most other judges who have addressed this issue, see *supra,* at 617–618, we find the words "*ex post facto*" applicable to describe this kind of unfairness. Indeed, given the close fit between laws that work this kind of unfairness and the Constitution's concern with *ex post facto* laws, we might well conclude that California's law falls within the scope of the Constitution's interdiction even were the dissent's historical and precedent-related criticisms better founded than they are.

We need not examine that possibility here, however, because the dissent's reading of the relevant history and precedent raises far too many problems to serve as a foundation for the reading of "*ex post facto*" that it proposes. In our view, that reading is too narrow; it is unsupported by prec-

edent; and it would deny liberty where the Constitution gives protection.

A

In the dissent's view, Chase's historical examples show that "*Calder*'s second category concerns only laws" that both (1) "subjec[t] the offender to increased punishment" and (2) do so by "*chang[ing] the nature of an offense* to make it greater than it was at the time of commission." *Post*, at 642 (emphasis added). The dissent does not explain what it means by "chang[ing] the nature of an offense," but we must assume (from the fact that this language comes in a dissent) that it means something beyond attaching otherwise unavailable punishment and requires, in addition, some form of recharacterization of the crime. After all, the dissent seeks to show through its discussion of the relevant historical examples that a new law subjecting to punishment a person not then legally subject to punishment does not fall within the second category *unless* the new law somehow changes the kind of crime that was previously at issue.

The dissent's discussion of the historical examples suffers from several problems. First, it raises problems of historical *accuracy.* In order to show the occurrence of a change in the kind or nature of the crime, the dissent argues that Parliament's effort to banish the Earl of Clarendon amounted to an effort "to elevate criminal behavior of lower magnitude to the level of treason." *Post,* at 643. The dissent supports this argument with a claim that "the allegations [against Clarendon] could not support a charge of treason." *Ibid.* Historians, however, appear to have taken a different view. But cf. *post,* at 646. In their view, at least one charge against Clarendon *did* amount to treason.

Clarendon was charged with "betraying his majesty's secret counsels to his enemies during the war." *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 350 (1667) (hereinafter *Clarendon's Trial*). In the words of one historian, this charge "undoubtedly contained treasonous matter."

Roberts, The Impeachment of the Earl of Clarendon, 13 Camb. Hist. J. 1, 13 (1957) (hereinafter Roberts, Impeachment); accord, G. Miller, Edward Hyde, Earl of Clarendon 21–22 (1983); 10 Dictionary of National Biography 383 (L. Stephen & S. Lee eds. reprint 1922). See also Roberts, The Law of Impeachment in Stuart England: A Reply to Raoul Berger, 84 Yale L. J. 1419, 1426 (1975); R. Berger, Impeachment: The Constitutional Problems 45, n. 193 (1974) (acknowledging and not contradicting the historian Henry Hallam's conclusion that " 'one of the articles did actually contain an unquestionable treason' "). And it was on the basis of this specific charge—a charge of conduct that amounted to treason—that the House of Commons (which had previously refused to impeach Clarendon on other charges that did not amount to treason) "voted to impeach Clarendon for high treason." Roberts, Impeachment 13; accord, *Clarendon's Trial* 350–351.

The House of Lords initially thought that the Commons had failed to provide sufficient evidence because it failed to provide "special articles" laying out "particulars to prove it." Roberts, Impeachment 14. The Lords and Commons deadlocked over whether a "general charge" was sufficient. *Ibid.* See also *Clarendon's Trial* 351–374. But Clarendon fled, thereby providing proof of guilt. 10 Dictionary of National Biography, *supra,* at 383; see also *Clarendon's Trial* 389–390; 2 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II, p. 373 (8th ed. 1855). See also Berger, *supra,* at 44–45, and n. 189. The Lords and Commons then agreed to banish Clarendon. The Act of banishment—the only item in this complicated history explicitly cited by Chase—explained that Clarendon was being banished because he had "been impeached by the Commons . . . of Treason and other misdemeanours" and had "fled whereby Justice cannot be done upon him according to his demerit." 19 & 20 Car. II, c. 2 (1667–1668) (reprint 1963).

In sum, Clarendon's case involved Parliament's punishment of an individual who was *charged* before Parliament *with treason and* satisfactorily *proved to have committed treason*, but whom Parliament punished by imposing "banishment" in circumstances where the party was *not, in "the ordinary course of law," liable to any "banishment."* See *supra*, at 614. Indeed, because Clarendon had fled the country, it had become impossible to hold a proper trial to subject Clarendon to punishment through "ordinary" proceedings. See 19 & 20 Car. II, c. 2; *Clarendon's Trial* 385–386. To repeat, the example of Clarendon's banishment is an example of an individual's being punished through legislation that subjected him to punishment otherwise unavailable, to any degree, through "the ordinary course of law"—just as Chase and his predecessor Wooddeson said. *Calder*, 3 Dall., at 389, and n. ‡; 2 Wooddeson, Systematical View 638. See also *Carmell*, 529 U. S., at 523, n. 11.

A second problem that the dissent's account raises is one of historical *completeness*. That account does not explain how the second relevant example—the banishment of the Bishop of Atterbury—can count as an example of a recharacterization of a pre-existing crime. The dissent concedes that Atterbury was charged with conduct constituting a "conspiracy to depose George I." *Post*, at 647. It ought then to note (but it does not note) that, like the charge of "'betraying his majesty's secret counsels,'" *supra*, at 622, this charge *was* recognized as a charge of treason, see 2 J. Stephen, A History of the Criminal Law of England 266–267 (1883). As the dissent claims, the evidence upon which Parliament based its decision to banish may have been "meager," and the punishment may even have been greater than some expected. *Post*, at 647. But the relevant point is that Parliament did not recharacterize the Bishop's crime. Rather, through extraordinary proceedings that concluded with a punishment that only the legislature could impose,

Parliament aggravated a predefined crime by imposing a punishment that courts could not have imposed in "the ordinary course."

Third, the dissent's account raises a problem of *vagueness.* The dissent describes Justice Chase's alternative description of the second category as "shed[ding] light on the meaning" of the category, *post,* at 641, and describes the historical references that accompany Chase's alternative description as "illustrative examples," *post,* at 649. But the question is would the dissent apply the term *ex post facto* to laws that fall within the alternative description—or would it not? If not, how does it reconcile its view with *Carmell?* See 529 U. S., at 522, n. 9; see also *id.*, at 523 (Wooddeson's categories "correlate precisely to *Calder*'s four categories"). If so, how does it explain the fact that the alternative description nowhere says anything about recharacterizing, or "changing the nature," of a crime?

In our view, the key to the Atterbury and Clarendon examples lies not in any kind of recharacterization, or the like, but in the fact that Atterbury and Clarendon suffered the "same sentence"—"*banishment.*" 2 Wooddeson, Systematical View 638; see also *Calder, supra,* at 389, n. ‡ (using the word "banishment" to describe both examples). As we have argued, *supra,* at 614, Parliament aggravated the crimes at issue by imposing an otherwise unavailable punishment—namely, banishment—which was, according to Wooddeson, a "forfeiture or disability, not incurred in the ordinary course of law," 2 Systematical View 638.

Fourth, the dissent's initial account suffers from a technical problem of *redundancy.* Were the second category always to involve the recharacterization of an offense in a way that subjects it to greater punishment, see *post,* at 642, the second category would be redundant. Any law falling within it would also necessarily fall within the third category, which already encompasses "'*[e]very* law that . . . inflicts a greater punishment,'" *supra,* at 612 (emphasis added).

Fifth, the dissent's historical account raises problems of *pertinence*. For one thing, to the extent that we are construing the scope of the *Calder* categories, we are trying not to investigate precisely what happened during the trials of Clarendon and Atterbury, but to determine how, several decades later, an 18th-century legal commentator and an 18th-century American judge who relied on that commentator—and, by extension, the Framers themselves—likely understood the scope of the words "*ex post facto*." Hence, the dissent's account seems of little relevance once we recognize that:

> (1) When Justice Chase set forth his alternative language for the second category (the language that the historical examples are meant to illuminate), he said nothing about recharacterizing crimes, *Calder*, 3 Dall., at 389;
>
> (2) When Chase speaks of laws "declaring acts to be treason, which were *not* treason, when committed," *ibid.*, he uses this language for his alternative description of *first category* laws, and *not second category* laws, *supra*, at 612; and
>
> (3) Wooddeson says nothing about recharacterizing crimes and instead uses the Clarendon and Atterbury examples to illustrate laws that "*principally affect the punishment*, making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law," 2 Systematical View 638 (some emphasis added).

Of course, we do not know whether Chase and Wooddeson, in using such language, had statutes of limitations specifically in mind. We know only that their descriptions of *ex post facto* laws and the relevant historical examples indicate an *ex post facto* category broad enough to include retroactive changes in, and applications of, those statutes. And we

know that those descriptions fit this case—the dissent's historical exegesis notwithstanding.

More importantly, even were we to accept the dissent's view that Chase's second category examples involved some kind of recharacterization of criminal behavior (which they did not), why would recharacterization be the *ex post facto* touchstone? Why, in a case where (a) application of a previously inapplicable punishment and (b) recharacterization (or "changing the nature") of criminal behavior do not come hand in hand, should the absence of the latter make a critical difference? After all, the presence of a recharacterization without new punishment works no harm. But the presence of the new punishment without recharacterization works *all* the harm. Indeed, it works retroactive harm—a circumstance relevant to the applicability of a constitutional provision aimed at preventing unfair retroactive laws. Perhaps that is why Justice Chase's alternative description—which, like Wooddeson's, speaks of laws "affect[ing] *the punishment*," *ibid.*—does not mention recharacterization or the like.

B

The dissent believes that our discussion of the case law is "less persuasive than it may appear at a first glance." *Post*, at 633. The dissent says that this case law is "deficient," and that we rely on an "inapposite" case and other cases that "flatly contradict" the "principles" on which we rely. *Post*, at 634, 635.

Having reviewed the relevant cases and commentary, we continue to believe that our characterizations are accurate. We say that courts, "with apparent unanimity until California's decision in *Frazer*, have continued to state" that "laws reviving time-barred prosecutions are *ex post facto*" and, "when necessary, so to hold." *Supra*, at 617. That statement is accurate. The dissent refers to no case, outside of California, that has held, or even suggested, anything to the contrary.

Of course, one might claim that the judges who wrote the cited opinions did not consider the matter as thoroughly as has the dissent or used precisely the same kind of reasoning. The dissent makes this kind of argument in its discussion of the old New Jersey case, *Moore* v. *State*, 43 N. J. L. 203 (1881)—a case that we believe supports our view. The dissent says that the *Moore* court "expressly stated that a statute reviving an expired limitations period 'is not covered by any of [Justice Chase's] classes.'" *Post*, at 635. And the dissent draws from this language the conclusion that *Moore* "flatly contradict[s]" our views. *Post*, at 635.

The dissent, however, has taken the language that it quotes out of context. In context, the court's statement reflects a conclusion that the language of Justice Chase's *first* description of the categories (which *Moore* used the word "classes" to describe) does not fit cases in which a State revives time-barred prosecutions. The *Moore* court immediately adds, however, that Chase's *alternative* description of second category laws *does* fit this case. Indeed, it "*easily embraces*" a statute that, like the statute here, retroactively extends an expired statute of limitations and "*exactly describes* [its] operation." 43 N. J. L., at 216–217 (emphasis added). Had the New Jersey court had the benefit of *Carmell*, 529 U. S., at 522–524, and n. 9, or perhaps even of the dissent itself, *post*, at 641, would it not have recognized Chase's alternative description as an authoritative account of elements of Chase's "classes"? Would it then not have withdrawn its earlier statement, which the dissent quotes? Would it not have simply held that the statute did fall within the second category? Our reading of the case leads us to answer these questions affirmatively, but we leave the interested reader to examine the case and draw his or her own conclusions.

The dissent draws special attention to another case, *State* v. *Sneed*, 25 Tex. Supp. 66 (1860), arguing that it is "inapposite" because it "avoided the issue" whether a law was

ex post facto "by holding that the statute was not meant to apply retroactively." *Post*, at 634. Here is the court's analysis, virtually in full:

> "In this case the bar of the statute of limitations of one year was completed before the Code went into operation . . . . The state having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit. To give an Act of the Legislature, passed after such loss, the effect of reviving the right of action in the State, would give it an operation *ex post facto*, which we cannot suppose the Legislature intended." 25 Tex. Supp., at 67.

The reader can make up his own mind.

Neither can we accept the dissent's view that Judge Learned Hand's like-minded comments in *Falter* were "unsupported," *post*, at 637. In fact, Judge Hand's comments had support in pre-existing case law, commentary, and published legislative debates, *supra*, at 616–620, and Hand's opinion specifically cited *Moore* and two other early cases, *Commonwealth* v. *Duffy*, 96 Pa. 506 (1880), and *People* v. *Buckner*, 281 Ill. 340, 117 N. E. 1023 (1917). *Falter*, 23 F. 2d, at 425.

We add that, whatever the exact counts of categories of cases that we cite, cf. *post*, at 633, it is not surprising that most of these cases involve dicta, while only a handful involve clear holdings. Where the law has long been accepted as clearly settled, few cases are likely to arise, and cases that do arise most likely involve bordering areas of law, such as new limitations statutes enacted *prior* to expiration of pre-existing limitations periods. Consistent with this expectation, one commentator noted in 1993 that the question whether to give retroactive effect to the extension of *unexpired* limitations periods had "become timely due to state legislature amendments during the early 1980s that lengthen the limitation period for the crimes of rape and sexual intercourse with a child." Corman, Limitation of Actions § 1.6,

at 36. The law at issue today represents a kind of extreme variant that, given the legal consensus of unconstitutionality, has not likely been often enacted in our Nation's history. Cf. 1 J. Bishop, Criminal Law § 219*a*, p. 127 (rev. 4th ed. 1868) (declining to answer whether a law reviving time-barred prosecutions was *ex post facto* in part because "it is not likely to come before the courts").

Neither should it be surprising if the reasoning in a string of cases stretching back over nearly 150 years is not perfectly consistent with modern conceptions of how legal analysis should proceed. After all, *Beazell* v. *Ohio*, 269 U. S. 167 (1925), an opinion relied on by the dissent, *post*, at 640, is itself vulnerable to criticism that its "method of analysis is foreclosed by this Court's precedents," *post*, at 637. See *Collins*, 497 U. S., at 45–46. In assessing the case law, we find the essential fact to be the unanimity of judicial views that the kind of statute before us is *ex post facto*. See *supra*, at 617–619.

The situation is similar with respect to commentators. Here, the essential fact is that, over a span of well over a century, commentators have come to the same conclusion, and have done so with virtual unanimity. See *supra*, at 619–620. We say "virtual," for the dissent identifies one commentator who did not, namely, Joel Bishop—the same commentator relied on 122 years ago by the dissent in *Moore*, *supra*, at 240. The *Moore* majority rejected Bishop's conclusion. So did other contemporary courts and commentators. *Supra*, at 617–620. We do the same.

C

The dissent says it is a "fallacy" to apply the label " 'unfair and dishonest' " to this statute, a law that revives long-dead prosecutions. *Post*, at 650. The dissent supports this conclusion with three arguments. First, it suggests that "retroactive extension of unexpired statutes of limitations" is no less unfair. *Ibid.* Second, the dissent refers to the small

likelihood that "criminals keep calendars" to mark the expiration of limitations periods, and it mocks the possibility that revival "destroys a reliance interest." *Ibid.* Third, the dissent emphasizes the harm that child molestation causes, a harm that "will plague the victim for a lifetime," and stresses the need to convict those who abuse children. *Post*, at 651.

In making the first argument, the dissent reverses field, abandoning its historical literalism to appeal to practical consequences. But history, case law, and constitutional purposes *all* are relevant. At a minimum, the first two of these adequately explain the difference between expired and unexpired statutes of limitations, and Chase's alternative description of second category laws itself supports such a distinction. See *supra*, at 613–614, 618–619.

In making its second argument, which denies the existence of significant reliance interests, the dissent ignores the potentially lengthy period of time (in this case, 22 years) during which the accused lacked notice that he might be prosecuted and during which he was unaware, for example, of any need to preserve evidence of innocence. See *supra*, at 609–610. Memories fade, and witnesses can die or disappear. See *supra*, at 615–616. Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and "recovered" memories faulty, but may nonetheless lead to prosecutions that destroy families. See, *e. g.*, Holdsworth, Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications, 22 Law & Psychol. Rev. 103, 103–104 (1998). Regardless, a constitutional principle must apply not only in child abuse cases, but in every criminal case. And, insofar as we can tell, the dissent's principle would permit the State to revive a prosecution for *any* kind of crime without *any* temporal limitation. Thus, in the criminal context, the dissent goes beyond our prior statements of what is constitutionally permissible even in the

analogous civil context. *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 312, n. 8, 315–316 (1945) (acknowledging that extension of even an expired *civil* limitations period can unconstitutionally infringe upon a "vested right"); *William Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633, 637 (1925) (holding the same). But see *post*, at 638, 653. It is difficult to believe that the Constitution grants greater protection from unfair retroactivity to property than to human liberty.

As to the dissent's third argument, we agree that the State's interest in prosecuting child abuse cases is an important one. But there is also a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution. And to hold that such a law is *ex post facto* does not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred.

In sum, California's law subjects an individual such as Stogner to prosecution long after the State has, in effect, granted an amnesty, telling him that he is "at liberty to return to his country . . . and that from henceforth he may cease to preserve the proofs of his innocence," Wharton, Criminal Pleading and Practice § 316, at 210. See also *Moore*, 43 N. J. L., at 223–224. It retroactively withdraws a complete defense to prosecution after it has already attached, and it does so in a manner that allows the State to withdraw this defense at will and with respect to individuals already identified. See *supra*, at 611. "Unfair" seems to us a fair characterization.

IV

The statute before us is unfairly retroactive as applied to Stogner. A long line of judicial authority supports characterization of this law as *ex post facto*. For the reasons stated, we believe the law falls within Justice Chase's second category of *ex post facto* laws. We conclude that a law enacted after expiration of a previously applicable limita-

tions period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution. The California court's judgment to the contrary is

Reversed.

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

California has enacted a retroactive extension of statutes of limitations for serious sexual offenses committed against minors. Cal. Penal Code Ann. § 803(g) (West Supp. 2003). The new period includes cases where the limitations period has expired before the effective date of the legislation. To invalidate the statute in the latter circumstance, the Court tries to force it into the second category of *Calder* v. *Bull*, 3 Dall. 386 (1798), which prohibits a retroactive law "'that *aggravates a crime*, or makes it *greater* than it was, when committed.'" *Ante*, at 612 (quoting *Calder*, *supra*, at 390 (emphasis in original)). These words, in my view, do not permit the Court's holding, but indeed foreclose it. A law which does not alter the definition of the crime but only revives prosecution does not make the crime "greater than it was, when committed." Until today, a plea in bar has not been thought to form any part of the definition of the offense.

To overcome this principle, the Court invokes "a long line of authority holding that a law of this type violates the *Ex Post Facto* Clause." *Ante*, at 621. The Court's list of precedents, *ante*, at 617–619, is less persuasive than it may appear at a first glance. Of the 22 cases cited by the Court, only 4 had to decide whether a revival of expired prosecutions was constitutional. See *Moore* v. *State*, 43 N. J. L. 203, 216–217 (1881); *United States* v. *Fraidin*, 63 F. Supp. 271, 276 (Md. 1945); *People* v. *Shedd*, 702 P. 2d 267, 268 (Colo. 1985) (en banc) *(per curiam)*; *Commonwealth* v. *Rocheleau*, 404 Mass. 129, 130–131, 533 N. E. 2d 1333, 1334 (1989), cited *ante*, at 617. These four cases—which are the only cases that are relevant—will be discussed in due course.

The case of *State* v. *Sneed*, 25 Tex. Supp. 66, 67 (1860), cited *ante*, at 617, is inapposite. There, the court avoided the issue by holding that the statute was not meant to apply retroactively. Interpreting the statute so as to avoid invalidation on constitutional grounds, *Sneed* did not pass on the merits. Even if the court addressed the merits, its cursory paragraph-long opinion, reproduced by the majority in its entirety, *ante*, at 629, contains no reference to Justice Chase's classification, nor indeed any analysis whatsoever. This unreasoned opinion scarcely supports the majority's novel interpretation of *Calder*'s second category.

In the remaining 17 cases, the question was not presented. As the Court itself concedes, eight of these cases considered only extensions of unexpired statutes of limitations, and upheld them. *Ante*, at 618. The Court does not mention that nine other cases have done so as well. See *People ex rel. Reibman* v. *Warden*, 242 App. Div. 282, 275 N. Y. S. 59 (1934); *State* v. *Hodgson*, 108 Wash. 2d 662, 740 P. 2d 848 (1987) (en banc); *State* v. *Nunn*, 244 Kan. 207, 768 P. 2d 268 (1989); *State* v. *O'Neill*, 118 Idaho 244, 796 P. 2d 121 (1990); *State* v. *Schultzen*, 522 N. W. 2d 833 (Iowa 1994); *State* v. *Comeau*, 142 N. H. 84, 697 A. 2d 497 (1997); *State* v. *Hamel*, 138 N. H. 392, 643 A. 2d 953 (1994); *Santiago* v. *Commonwealth*, 428 Mass. 39, 697 N. E. 2d 979 (1998), cited *ante*, at 617. Because these cases did not need to decide whether the *Ex Post Facto* Clause would bar the extension of expired limitations periods, the question did not receive the same amount of attention as if the courts were required to dispose of the issue.

The case law compiled by the Court is deficient, furthermore, at a more fundamental level. Our precedents hold that the reach of the *Ex Post Facto* Clause is strictly limited to the precise formulation of the *Calder* categories. We have made it clear that these categories provide "an exclusive definition of *ex post facto* laws," *Collins* v. *Youngblood*, 497 U. S. 37, 42 (1990), and have admonished that it is

"a mistake to stray *beyond Calder*'s four categories," *Carmell* v. *Texas*, 529 U. S. 513, 539 (2000). Justice Chase himself stressed that the categories must be construed with caution to avoid any unnecessary extension: "I am under a necessity to give a *construction*, or explanation of the words, '*ex post facto law*,' because they have not any certain meaning attached to them. But I will not go farther than I feel myself bound to do; and if I ever exercise the jurisdiction I will not decide *any law to be void, but in a very clear case.*" 3 Dall., at 395.

The Court seems to recognize these principles, *ante*, at 611–612, but then relies on cases which flatly contradict them. The opinion of the New Jersey's Court of Errors and Appeals in *Moore* v. *State*, *supra*, on which the Court places special emphasis, see *ante*, at 613, 617, 628, 630, 632, expressly stated that a statute reviving an expired limitations period "is not covered by any of [Justice Chase's] classes." 43 N. J. L., at 216. The *Moore* court made a fleeting mention that the statute might fall within Chase's fourth category, but immediately dismissed this line of inquiry. Instead, it proceeded to "[l]oo[k] away from his classification to what he states to have been the motive for and principle sustaining the edict." *Ibid.* As *Collins* and *Carmell* explained, this expansive approach to the *Ex Post Facto* Clause is contrary to *Calder*'s admonition that its categories must be followed with care.

The majority's lengthy defense of *Moore*'s legitimacy, *ante*, at 628, exposes the weaknesses both of that case and of the Court's opinion. The majority argues *Moore*'s statement that the statute was not covered by Justice Chase's categories referred only to the principal description of these categories, but not to the alternative one the Court now seeks to embrace. The view that a statute not covered by Justice Chase's main formulations—the only formulations our cases have treated as authoritative—may still be *ex post facto* if it falls within his historical examples is a view no court until

today has endorsed. The *Moore* court was no exception. When it held that the state statute was "not covered by any of [Justice Chase's] classes," *Moore* made clear it was looking beyond the language of the *Calder* categories: "Judge Chase did not consider his classes as exhaustive," and so "a statute substantially imposing punishment for a previous act which, without the statute, would not be so punishable, is an *ex post facto* law, although it may not be included in the letter of Judge Chase's rules." 43 N. J. L., at 216, 220. The point was further emphasized by the separate opinion of Chancellor Runyon, a member of the one-judge *Moore* majority that invalidated the law as *ex post facto:* "[W]here the enactment, in whatever guise legislative ingenuity or subtlety may present it, inflicts the substantial injury, and does the essential wrong which the constitution sought to guard against, a true interpretation will hold it to be within the prohibition." *Id.*, at 226. The references to "substantia[l] imposi[tion of] punishment" and "substantial injury" are reminiscent of the references to "substantial protections" and "substantial personal rights" used to enlarge the scope of the *Ex Post Facto* Clause and disapproved of in *Collins.* 497 U. S., at 46. By endorsing *Moore,* the majority seeks to resurrect this rejected reasoning here.

The other precedents the Court invokes—both the cases where extension of expired statutes of limitations was at issue and the cases which merely opined on the question in dicta—have the same flaw. The misconception causing it arises from Judge Learned Hand's dictum, mentioned while holding that an extension of an unexpired statute of limitations is not *ex post facto,* that if the statute had expired there would be a violation. *Falter* v. *United States,* 23 F. 2d 420, 425 (CA2 1928). Judge Hand based this distinction on a citation of the faulty decision in *Moore* and on his belief that whether an extension of a limitations period is *ex post facto* "turns upon how much violence is done to our instinctive feelings of justice and fair play." *Falter, supra,* at 425–426.

The Court's opinion is premised on the same approach. It relies on Judge Hand for the proposition that an extension of expired limitations periods "'seems to most of us unfair and dishonest.'" *Ante*, at 611 (quoting *Falter*, *supra*, at 426). In previous cases, however, the Court has explained that this conception of our *ex post facto* jurisprudence is incorrect: "[W]hile the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Carmell*, *supra*, at 533, n. 23 (citing *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U. S. 400, 409 (1990)).

It was the unsupported Hand observation that formed the rationale applied by many of the cases the Court cites, including all the post-*Moore* cases where expired limitations periods were at issue. See *Fraidin*, 63 F. Supp., at 276 (relying on *Falter* and containing no discussion of the *Calder* categories); *Shedd*, 702 P. 2d, at 268 (same); *Hodgson*, 108 Wash. 2d, at 667–668, 740 P. 2d, at 851 (relying on, and quoting from, *Falter*); *Rocheleau*, 404 Mass., at 130, 533 N. E. 2d, at 1334 (containing no *Calder* analysis but relying instead on its earlier decision in *Commonwealth* v. *Bargeron*, 402 Mass. 589, 524 N. E. 2d 829 (1988), which in turn was based on *Falter*); *O'Neill*, 118 Idaho, at 246, 796 P. 2d, at 123 (citing *Falter* and supplying no analysis of its own); *State* v. *Hirsch*, 245 Neb. 31, 39, 511 N. W. 2d 69, 76 (1994) (relying on *Falter*); *Hamel*, 138 N. H., at 395, 643 A. 2d, at 955 (same). Since these cases applied the methodology our Court has disavowed, they provide the majority with scant support. None of them even discussed the issue in terms of *Calder*'s second category, much less construed that category in the manner today's decision improperly proposes. The flaw of these cases is not, as the majority argues, that they are "not perfectly consistent with modern conceptions of how legal analysis should proceed," *ante*, at 630; the flaw is that their method of analysis is foreclosed by this Court's precedents.

The majority turns for help to a roster of commentators who concluded that revival of expired statutes of limitations is precluded by the *ex post facto* guarantee. See *ante*, at 619–620. Some of the commentators applied the same expansive approach we have declared impermissible in *Collins* and *Carmell*. Henry Black, on whose work the Court relies the most, see *ante*, at 613, 615, 619, openly acknowledged that the revival of expired statutes of limitations is not covered by any of the *Calder* categories. See Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws § 227, p. 291 (1887). Black, moreover, relied on the example of the civil statutes of limitations, which he believed could not be revived. *Id.*, § 235, at 296–297. The Court's later case law has rendered this interpretation questionable. See, *e. g.*, *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314–316 (1945). Other commentators relied, often with no analysis, on the *Moore* and *Falter* line of cases, which were plagued by methodological infirmities since discovered. See authorities cited *ante*, at 619. None of these scholars explained their conclusion by reference to *Calder*'s second category.

There are scholars who have considered with care the meaning of that category; and they reached the conclusion stated in this dissent, not the conclusion embraced by the majority. In his treatise on retroactive legislation, William Wade defined the category as covering the law "which undertakes to aggravate a past offence, and make it greater than when committed, endeavors to bring it under some description of transgression against which heavier penalties or more severe punishments have been denounced: as, changing the character of an act which, when committed, was a misdemeanor, to a crime; or, declaring a previously committed offence, of one of the classes graduated, and designated by the number of its degree, to be of a higher degree than it was when committed." Operation and Construction of Retroac-

tive Laws § 273, pp. 317–318 (1880). Joel Prentiss Bishop's work on statutory crimes concluded that a law reviving expired prosecution "is not within any of the recognized legal definitions of an *ex post facto* law." Commentaries on the Law of Statutory Crimes § 266, p. 294 (rev. 3d ed. 1901). The author's explanation is an apt criticism of the Court's opinion: "The punishment which it renders possible, by forbidding the defense of lapse of time, is exactly what the law provided when 'the fact' transpired. No bending of language, no supplying of implied meanings, can, in natural reason, work out the contrary conclusion. . . . The running of the old statute had taken from the courts the right to proceed against the offender, leaving the violated law without its former remedy; but it had not obliterated the fact that the law forbade the act when it was done, or removed from the doer's mind his original consciousness of guilt." *Id.*, § 266, at 294–295. In reaching his conclusion, Bishop considered, and rejected, the argument put forth by the *Moore* majority. Commentaries on the Law of Statutory Crimes, *supra*, § 266, at 295, and n. 5. This rejection does not, as the majority believes, undermine Bishop's conclusion, see *ante*, at 630; given *Moore*'s infirmities, it strengthens the validity of his interpretation.

This definition of *Calder*'s second category is necessary for consistency with our accepted understanding of categories one and three. The first concerns laws declaring innocent acts to be a crime; the third prohibits retroactive increases in punishment. 3 Dall., at 390. The first three categories guard against the common problem of retroactive redefinition of conduct by criminalizing it (category one), enhancing its criminal character (category two), or increasing the applicable punishment (category three). The link between these categories was noted by Justice Paterson in *Calder* itself: "The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or pen-

alty; and therefore they may be classed together." *Id.*, at 397.

The point is well illustrated in *Beazell* v. *Ohio*, 269 U. S. 167 (1925), whose formulation of the *Calder* categories we later described as "faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Collins*, 497 U. S., at 43. *Beazell* involved a retroactively applied law providing for joint trials for most felonies, with separate trials allowed only when requested by one of the defendants or the prosecutor, and only with the leave of the court. 269 U. S., at 168–169. The prior law had provided for separate trials whenever a defendant so requested. *Id.*, at 168. Reviewing an *ex post facto* challenge to the new law, the Court noted that the first three *Calder* categories address "the criminal quality attributable to an act." 269 U. S., at 170. Applying this definition, the Court held the state statute did not violate the *Ex Post Facto* Clause because "[i]t does not deprive [the defendant] of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out." *Ibid.* In other words, the Ohio statute fell into none of the first three *Calder* categories. The second category, as the *Beazell* Court understood it, covered those retroactive statutes which "affect the criminal quality of the act charged [by] chang[ing] the legal definition of the offense." 269 U. S., at 170. The California statute challenged by petitioner changes only the timespan within which the action against him may be filed; it does not alter the criminal quality assigned to the offense.

The Court's opinion renders the second *Calder* category unlimited and the surrounding categories redundant. A law which violates the first *Calder* category would also violate the Court's conception of category two, because such a law would "inflic[t] punishments, where the party was not, by law, liable to any punishment." *Ante*, at 612 (emphasis deleted and internal quotation marks omitted). The majority

attempts to eliminate this redundancy by limiting its definition to instances where the conduct was criminal, yet if Justice Chase's alternative description of the second category is supposed to be definitive of its scope, *ante*, at 611, it would seem to strike broader than the Court's limiting construction. Similarly, a retroactive law increasing punishment in violation of the third category would also constitute an "innovation" for which, prior to the passage of the new law, the offender was not liable, *ante*, at 612, and so be prohibited under the Court's unbounded interpretation of category two. The Court's new definition not only distorts the original meaning of the second *Calder* category, but also threatens the coherence of the overall *ex post facto* scheme.

Realizing the inconsistency, the majority scarcely refers to the authoritative language Justice Chase used to describe the second category. Instead, the Court relies on what it terms Justice Chase's alternative description of that category, which speaks about laws which "'inflict[ed] punishments, where the party was not, by law, liable to any punishment.'" *Ante*, at 612 (emphasis deleted) (quoting *Calder*, 3 Dall., at 389). These words are not, strictly speaking, a description of the second category itself; they are a description of the category's historical origins. Justice Chase used them to refer to certain laws passed by the British Parliament which led the Founders to adopt the *Ex Post Facto* Clause; he did not intend them as a definitive description of the laws prohibited by that constitutional provision. *Ibid.* This description of a category's origins may, of course, shed light on the meaning of Justice Chase's principal formulation, which was meant to be definitive. The Court, however, uses Chase's alternative description as the independent operative definition of that category. None of our precedents, until today, based their holding on the language of Justice Chase's alternative description, certainly not in situations when the statute under review would not fit within the principal formulation.

The Court, in any event, misunderstands the alternative description. As our precedents have instructed, this description must be viewed in the context of the history of the British parliamentary enactments to which Justice Chase referred. *Ante*, at 614; cf. *Carmell*, 529 U. S., at 526–530 (examining the historical circumstances of the case of Sir John Fenwick, cited by Justice Chase as an example of the fourth *ex post facto* category, in order "[t]o better understand the type of law that falls within that category"). With respect to the second category, Justice Chase provided two examples: the banishments of Lord Clarendon in 1667 and of Bishop Francis Atterbury in 1723. *Calder*, *supra*, at 389, and n. ‡ (citing 19 Car. II, c. 10; 9 Geo. I, c. 17). A consideration of both historical episodes confirms that *Calder*'s second category concerns only laws which change the nature of an offense to make it greater than it was at the time of commission, thereby subjecting the offender to increased punishment.

Justice Chase and, it can be presumed, the Founders were familiar with the parliamentary proceedings leading to the banishment of the Earl of Clarendon. Clarendon, former Lord Chancellor and principal advisor to Charles II, was impeached by the House of Commons on charges of treason. *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 330–334, 350 (1667) (hereinafter *Clarendon's Trial*); G. Miller, Edward Hyde, Earl of Clarendon 20–21 (1983). The House of Lords, however, refused to commit Clarendon to trial, finding the allegations not cognizable as treason under the law. *Clarendon's Trial* 358, 367. With the two Houses deadlocked, Clarendon left the country, an exit wise for his safety, perhaps, but not for his cause. For upon his departure the impeachment was abandoned yet Parliament agreed on a bill banishing Clarendon for treason and imposing an extensive range of civil disabilities. *Id.*, at 374, 385, 390–391.

The principal objection raised against the impeachment charges was that they did not, under the law of the time, constitute treason. *Id.*, at 342–346, 348–349, 350, 356–360, 367–372. The objection was not, it must be noted, that the charges were premised on innocent conduct. (If that were the nature of the objection, Justice Chase would have used the case to illustrate his first category, rather than his second one.) In fact, the impeachment explicitly alleged that Clarendon violated the law. See *id.*, at 330–333. The objection made by Chase and by later legal scholars was that by the act of banishment the House sought to elevate criminal behavior of lower magnitude to the level of treason, thereby redefining what constitutes a treasonous offense. Even if Parliament assumed, on the basis of Clarendon's flight, that the allegations were true, see *id.*, at 389–390, that constructive admission did not alter the fact that, under the laws of the time, the allegations could not support a charge of treason. By enacting the bill, Parliament declared these allegations sufficient to constitute treason. Some parliamentary colloquy suggested, moreover, that Clarendon was being punished for his flight, rather than for offenses alleged. See *id.*, at 389 ("[I]t is plain, if you proceed upon this bill, you go not upon your impeachment, but because he is fled from the justice of the land"). A flight from justice was not considered an offense so severe as to warrant banishment, "the highest punishment next to death." *Id.*, at 386. If the offense of flight was enhanced because of the prior offenses, then it was an increase in the gravity of the crime after its commission. Either way, the legislation increased the gravity of Clarendon's offense.

The bill passed against Clarendon accomplished what English common-law scholar Richard Wooddeson described as the danger against which the second *ex post facto* category was designed to guard. The bill "ma[de] some innovation, or creat[ed] some forfeiture or disability, not incurred in the ordinary course of law." 2 A Systematical View of the Laws

of England 638 (1792) (hereinafter Wooddeson). It was Wooddeson's interpretation of the English common law that Justice Chase relied upon. See *Calder*, 3 Dall., at 391; *Carmell*, *supra*, at 522–523, and n. 10; *ante*, at 614. The Court argues that the innovation deplored by Wooddeson was the imposition of a sanction (banishment) which, under settled law, was the prerogative of Parliament, not of the courts. *Ibid.* That may be so, but it cannot help the Court because this is not what California has done. Section 803(g) did not impose any punishment not otherwise contained in the California Penal Code. It did what legislatures have done throughout history: It specified when the criminal justice system may prosecute certain crimes. The majority tries to explain away this distinction as "not determinative," *ibid.*, but it makes all the difference. By imposing on a particular offender a punishment not prescribed by the existing legal norms a legislature signals its judgment that the gravity of the offense warrants its special intervention. In contrast, by prescribing general rules for the adjudication of offenses the legislature leaves the determination of the offender's culpability entirely to the courts.

The majority's explanation of the English precedents, in all events, is not the most logical one. Justice Chase's alternative description covered enactments which "inflicted *punishments*, where the party was not, by *law*, liable to *any punishment.*" *Calder*, *supra*, at 389. Though only a parliamentary Act could subject an individual to banishment in 17th-century England, Parliament's power to pass such Acts was unquestioned. See 11 W. Holdsworth, A History of English Law 569 (1938). A sanction of banishment was acknowledged as a punishment provided for by the existing laws, both at the time of Clarendon's trial and afterwards. See, *e. g.*, Craies, Compulsion of Subjects to Leave the Realm, 6 L. Q. Rev. 388, 392 (1890) ("[B]anishment, perpetual or temporary, was well known to the common law"); An Act for Punishment of Rogues, 39 Eliz. 1, c. 4, s. 4 (1597) (permit-

ting banishment of dangerous rogues); the Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 28 (1829) (providing for the banishment of Jesuits). By law, then, a charge of high treason would have made Clarendon liable to banishment, which is inconsistent with Justice Chase's formulation.

To explain away the inconsistency, the Court redefines the words "by law" to refer only to punishments "not otherwise available 'in the ordinary course of law.'" *Ante*, at 614 (quoting 2 Wooddeson 638). As already explained, it was an accepted procedure in 17th-century England for Parliament to pass laws imposing banishment.

The majority must mean, then, that banishment was not available through the courts. At the time of Clarendon's trial, however, British courts were empowered to adjudicate treason and to punish it with death. 1 M. Hale, Pleas of the Crown *348–*351; see also 2 Jowitt's Dictionary of English Law 1799–1800 (2d ed. 1977). If the charges against Clarendon accurately alleged treason, he was eligible, through ordinary judicial proceedings, to receive capital punishment, which was obviously a sanction more severe than banishment. For the majority's historical explanation to work, Justice Chase's alternative description of the second category would have to prohibit laws which inflicted a punishment where the party was not, through normal judicial proceedings, liable to that precise punishment but was liable to a greater one. This formulation can hardly be reconciled with the words Justice Chase used, much less with his principal formulation of the second category. A legislature does not make an individual's crime "*greater* than it was, when committed," *Calder*, *supra*, at 390, by assigning a punishment less severe than the one available through the courts.

If Justice Chase's reference to Clarendon's trial is to have explanatory power, one must look for an alternative interpretation. What was repulsive to Chase and Wooddeson in Clarendon's trial was not the imposition of banishment as such, but that the sanction was outside the limits of what

Clarendon's offense merited under the law established at the time of its commission, and was instead premised on Parliament's exaggeration of the gravity of the offense. Viewed this way, the Clarendon example lends no support to the majority's position, but instead undercuts it.

It must be acknowledged that, as the majority points out, a number of historians have treated one of the charges levied against Clarendon, that of betraying the King's secrets to the enemy, as impeachable treason. *Ante*, at 622–623. The historical judgment, however, is not as uniform as the Court makes it seem. See 7 E. Foss, Judges of England 130 (1864) ("No one can read the articles [against Clarendon] without seeing the weakness and frivolity of the allegations, none of them, even if true, amounting to treason"); R. Berger, Impeachment: The Constitutional Problems 45–46 (1974) (explaining the articles of impeachment against Clarendon as based on the Parliament's power to declare certain nontreasonous offenses to be treason).

Historians are in agreement, though, that the Commons could not substantiate the charge of betraying secrets to the enemy. 2 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 367, 373 (rev. ed. 1881); Roberts, The Impeachment of the Earl of Clarendon, 13 Camb. Hist. J. 13–14 (1957); Roberts, The Law of Impeachment in Stuart England, 84 Yale L. J. 1419, 1426 (1975); Berger, *supra*, at 45, n. 193. It is due to this absence of evidence that the Commons refused to produce particulars of the treason charge against Clarendon, insisting instead the Lords trust their word that the underlying conduct was treasonous. Although the technical grounds for the Lords' objection to this charge was the lack of specificity, the objection can also be viewed as reflecting a belief that the Commons were attempting to aggravate Clarendon's offenses by labeling them as treason absent any justification. As Henry Hallam has explained in his respected study of the English constitutional history, "if the

house of lords shall be of opinion, either by consulting the judges or otherwise, that no treason is specially alleged, they should, notwithstanding any technical words, treat the offence as a misdemeanor." 2 Hallam, *supra*, at 413. Justice Chase could have viewed the betrayal of secrets charge in a similar way, as a subterfuge through which the Commons were trying to elevate Clarendon's offenses to the level of treason.

The proposed interpretation of Clarendon's example is reinforced by considering the proceedings against Bishop Francis Atterbury, who, in the midst of hysteria over both real and supposed Jacobite plots, was accused of conspiracy to depose George I. The evidence against Atterbury was meager, and supporters of the Crown, fearing that neither the common-law courts nor even the House of Lords would convict, introduced a bill of banishment. G. Bennett, Tory Crisis in Church and State, 1688–1730, pp. 258–265 (1975); *Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 640 (1723) (reprint 2000) (hereinafter *Atterbury's Trial*). The bill declared Atterbury a traitor, and subjected him to a range of punishments not previously imposed, including exile and civil death. *Id.*, at 644–646; Bennett, *supra*, at 265. The Duke of Wharton, who registered the lengthiest dissent, commented that "this Bill seems as irregular in the punishments it inflicts, as it is in its foundation, and carries with it an unnatural degree of hardship." *Atterbury's Trial* 691. The only bill of comparable harshness was the Act banishing Clarendon. Those sanctions were more mild, *id.*, at 691–692, but, as we have seen, just as violative of the rule against penalties imposed after the fact. As in the case of Clarendon, Parliament adjudged Atterbury's offense to be so grave as to merit a singularly severe punishment. The bill designed vindictive forfeitures and disabilities not imposed in the ordinary course of law.

The Atterbury case illustrates again the close relationship between the second and the third *Calder* categories. See

supra, at 639–640 (quoting *Calder*, 3 Dall., at 397 (Paterson, J.)). As already explained, *supra*, at 640–641, the Court's misconstruction of Justice Chase's historical examples takes the second category out of this logical continuum. Contrary to the majority's belief, *ante*, at 625, an interpretation which highlights the link between these two categories is more faithful to the original understanding. Richard Wooddeson, the Court's preferred commentator, discussed these two categories together, noting that both "principally affect *the punishment.*" 2 Wooddeson 638–640; see also *id.*, at 624.

Atterbury's trial also illustrates why the majority's interpretation of the historical examples as premised on the courts' inability to impose banishment is untenable. See *supra*, at 645–646. Had Atterbury been convicted of treason through the courts, he would have been subject to capital punishment. Parliament's decision to prosecute Atterbury may have been driven by fear of backlash provoked by a death sentence, for Atterbury enjoyed considerable popularity and sympathy in some circles. See Bennett, *supra*, at 259. Wooddeson speculated, in an observation in tension with the majority's interpretation, that Atterbury's sentence may have been motivated by a desire "of mitigating punishment." 2 Wooddeson 639. The mitigation, of course, was in comparison to the possible death verdict, not, as already explained, in comparison to the ordinary noncapital punishment Atterbury could have received.

Clarendon's and Atterbury's trials show why Stogner's case does not belong in *Calder*'s second *ex post facto* category. The California Legislature did not change retroactively the description of Stogner's alleged offense so as to subject him to an unprecedented and particularly severe punishment. The offense is described in the same terms as before the passage of § 803(g); the punishment remains the same. The character of the offense is therefore unchanged; it is perceived by the criminal justice system in the same way as before, and punished with the same force. The only

change is that Stogner may now be prosecuted, whereas prior to the statute the prosecution could not have taken place. These illustrative examples, then, suggest the second *Calder* category encompasses only the laws which, to the detriment of the defendant, change the character of the offense to make it greater than it was at the time of commission.

The majority seems to suggest that retroactive extension of expired limitations periods is "'arbitrary and potentially vindictive legislation,'" *ante*, at 611 (quoting *Weaver* v. *Graham*, 450 U. S. 24, 29, and n. 10 (1981)), but does not attempt to support this accusation. And it could not do so. The California statute can be explained as motivated by legitimate concerns about the continuing suffering endured by the victims of childhood abuse.

The California Legislature noted that "young victims often delay reporting sexual abuse because they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause." *People* v. *Frazer*, 21 Cal. 4th 737, 744, 982 P. 2d 180, 183–184 (1999). The concern is amply supported by empirical studies. See, *e. g.*, Summit, Abuse of the Child Sexual Abuse Accommodation Syndrome, in 1 J. of Child Sexual Abuse 153, 156–163 (1992); Lyon, Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation, in Critical Issues in Child Sexual Abuse 107, 114–120 (J. Conte ed. 2002).

The problem the legislature sought to address is illustrated well by this case. Petitioner's older daughter testified she did not report the abuse because she was afraid of her father and did not believe anyone would help her. After she left petitioner's home, she tried to forget the abuse. Petitioner's younger daughter did not report the abuse because she was scared. He tried to convince her it was a normal way of life. Even after she moved out of petitioner's house, she was afraid to speak for fear she would not be

believed. She tried to pretend she had a normal childhood. It was only her realization that the father continued to abuse other children in the family that led her to disclose the abuse, in order to protect them.

The Court tries to counter by saying the California statute is "'unfair and dishonest'" because it violated the State's initial assurance to the offender that "'he has become safe from its pursuit'" and deprived him of "the 'fair warning.'" *Ante*, at 611 (quoting *Falter* v. *United States*, 23 F. 2d, at 426; *Weaver*, *supra*, at 28). The fallacy of this rationale is apparent when we recall that the Court is careful to leave in place the uniform decisions by state and federal courts to uphold retroactive extension of unexpired statutes of limitations against an *ex post facto* challenge. *Ante*, at 613.

There are two rationales to explain the proposed dichotomy between unexpired and expired statutes, and neither works. The first rationale must be the assumption that if an expired statute is extended, the crime becomes more serious, thereby violating category two; but if an unexpired statute is extended, the crime does not increase in seriousness. There is no basis in logic, in our cases, or in the legal literature to support this distinction. Both extensions signal, with equal force, the policy to prosecute offenders.

This leaves the second rationale, which must be that an extension of the expired statute destroys a reliance interest. We should consider whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to place a gloating phone call to the victim. The first expectation is minor and likely imaginary; the second is not, but there is no conceivable reason the law should honor it. And either expectation assumes, of course, the very result the Court reaches; for if the law were otherwise, there would be no legitimate expectation. The reliance exists, if at all, because of the circular reason that the Court today says so; it does not exist as part of our traditions or social understanding.

In contrast to the designation of the crime, which carries a certain measure of social opprobrium and presupposes a certain punishment, the statute of limitations has little or no deterrent effect. See Note, Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival, 22 Ind. L. Rev. 989, 1014 (1989) ("The statute of limitations has no measurable impact on allegedly criminal behavior, neither encouraging nor deterring such conduct"); Note, Ex Post Facto Limitations on Legislative Power, 73 Mich. L. Rev. 1491, 1513 (1975) ("[W]hile many defendants rely on substantive definitions of proscribed conduct, few rely on many of the numerous laws regulating the enforcement processes"). The Court does not claim a sex offender would desist if he knew he would be liable to prosecution when his offenses were disclosed.

The law's approach to the analogous problem of reliance by wrongdoers in the civil sphere is instructive. We have held that expired statutes of limitations can be repealed to revive a civil action. See, *e. g.*, *Chase Securities Corp.*, 325 U. S., at 314; *Plaut* v. *Sprendthrift Farm, Inc.*, 514 U. S. 211, 229 (1995). These holdings were made in the areas of contracts and investments where reliance does exist and does matter. We allow the civil wrong to be vindicated nonetheless. If we do so in the civil sphere where reliance is real, we should do so in the criminal sphere where it is, for the most part, a fictional construct.

When a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime. See Briere & Runtz, Post Sexual Abuse Trauma: Data and Implications for Clinical Practice, 2 J. of Interpersonal Violence 367, 374–376 (1987); 1 J. Myers, Evidence in Child Abuse and Neglect Cases § 4.2, pp. 221–223 (2d ed. 1992); Browne & Finkelhor, Initial and Long-Term Effects: A Review of the Research, in A Sourcebook on Child Sexual Abuse 143, 150–164 (D. Finkelhor et al. eds. 1986). The victims whose interests § 803(g) takes into consideration have been subjected to

sexual abuse within the confines of their own homes and by people they trusted and relied upon for protection. A familial figure of authority can use a confidential relation to conceal a crime. The violation of this trust inflicts deep and lasting hurt. Its only poor remedy is that the law will show its compassion and concern when the victim at last can find the strength, and know the necessity, to come forward. When the criminal has taken distinct advantage of the tender years and perilous position of a fearful victim, it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher. The victims whose cause is now before the Court have at last overcome shame and the desire to repress these painful memories. They have reported the crimes so that the violators are brought to justice and harm to others is prevented. The Court now tells the victims their decision to come forward is in vain.

The gravity of the crime was known, and is being measured, by its wrongfulness when committed. It is a common policy for States to suspend statutes of limitations for civil harms against minors, in order to "protec[t] minors during the period when they are unable to protect themselves." 2 C. Corman, Limitation of Actions § 10.2.1, p. 104 (1991). Some States toll the limitations periods for minors even where a guardian is appointed, see *id.*, at 105–106, and even when the tolling conflicts with statutes of repose, *id.*, at 108. The difference between suspension and reactivation is so slight that it is fictional for the Court to say, in the given context, the new policy somehow alters the magnitude of the crime. The wrong was made clear by the law at the time of the crime's commission. The criminal actor knew it, even reveled in it. It is the commission of the then-unlawful act that the State now seeks to punish. The gravity of the crime is left unchanged by altering a statute of limitations of which the actor was likely not at all aware.

The California statute does not fit any of the remaining *Calder* categories: It does not criminalize conduct which was innocent when done; it allows the prosecutor to seek the same punishment as the law authorized at the time the offense was committed and no more; and it does not alter the government's burden to establish the elements of the crime. Any concern about stale evidence can be addressed by the judge and the jury, and by the requirement of proof beyond reasonable doubt. Section 803(g), moreover, contains an additional safeguard: It conditions prosecution on a presentation of independent evidence that corroborates the victim's allegations by clear and convincing evidence. Cal. Penal Code Ann. §§ 803(g)(1), (2)(B) (West Supp. 2003). These protections, as well as the general protection against oppressive prosecutions offered by the Due Process Clause, should assuage the majority's fear, *ante*, at 631, that the statute will have California overrun by vindictive prosecutions resting on unreliable recovered memories. See *United States* v. *Lovasco*, 431 U. S. 783, 789 (1977).

The statute does not violate petitioner's rights under the Due Process Clause. We have held, in the civil context, that expired statutes of limitations do not implicate fundamental rights under the Clause. See, *e. g.*, *Chase Securities Corp.*, *supra*, at 314. For reasons already explained, see *supra*, at 652, there is no reason to reach a different conclusion here.

The Court's stretching of *Calder*'s second category contradicts the historical understanding of that category, departs from established precedent, and misapprehends the purposes of the *Ex Post Facto* Clause. The Court also disregards the interests of those victims of child abuse who have found the courage to face their abusers and bring them to justice. The Court's opinion harms not only our *ex post facto* jurisprudence but also these and future victims of child abuse, and so compels my respectful dissent.

Syllabus

NIKE, INC., ET AL. *v.* KASKY

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 02–575. Argued April 23, 2003—Decided June 26, 2003

Certiorari dismissed. Reported below: 27 Cal. 4th 939, 45 P. 3d 243.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Thomas C. Goldstein*, *Amy Howe*, *Walter Dellinger*, *David J. Brown*, and *James N. Penrod.*

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*, *Jeffrey P. Minear*, and *Jeffrey A. Lamken.*

Paul R. Hoeber argued the cause for respondent. With him on the brief were *Alan M. Caplan*, *Roderick P. Bushnell*, *Patrick J. Coughlin*, *Randi Dawn Bandman*, *Albert H. Meyerhoff*, and *Sylvia Sum.**

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*Briefs of *amici curiae* urging reversal were filed for ABC Inc. et al. by *Bruce E. H. Johnson*, *P. Cameron DeVore*, *Kelli L. Sager*, *Henry S. Hoberman*, *Theresa A. Chmara*, *Richard M. Schmidt, Jr.*, *David A. Schulz*, *R. Bruce Rich*, *Jonathan Bloom*, *Susanna M. Lowy*, *Anthony M. Bongiorno*, *Harold W. Fuson, Jr.*, *Jonathan R. Donnellan*, *Stuart D. Karle*, *Barbara W. Wall*, *Jack N. Goodman*, *James M. Lichtman*, *Neal A. Jackson*, *George Freeman*, *René P. Milam*, *Henry Z. Horbaczewski*, *Lucy A. Dalglish*, *Jane E. Kirtley*, *Bruce W. Sanford*, *Robin Bierstedt*, *Karlene W. Goller*, and *Eric N. Lieberman;* for the American Civil Liberties Union et al. by *Mark J. Lopez*, *Steven R. Shapiro*, and *Ann Brick;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* for the Arthur W. Page Society et al. by *Bruce P. Keller* and *Michael R. Potenza;* for the Association of National Advertising, Inc., et al. by *Howard J. Rubin* and *Cory Greenberg;* for the Business Roundtable by *Carter G. Phillips*, *Alan Charles Raul*, and *Joseph R. Guerra;* for the Center for Individual Freedom by *Erik S. Jaffe* and *Renee L. Giachino;* for the Center for the Advancement of Capitalism by *Thomas A. Bowden;* for the Chamber of Commerce of the United States of America by *Kenneth W. Starr*, *Richard A.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Cordray, and *Robin S. Conrad;* for the Civil Justice Association of California by *Fred J. Hiestand;* for Defenders of Property Rights et al. by *Nancie G. Marzulla* and *Roger J. Marzulla;* for ExxonMobil et al. by *David H. Remes;* for the National Association of Manufacturers by *Andrew L. Frey*, *Andrew H. Schapiro*, *Kenneth S. Geller*, *David M. Gossett*, *Martin H. Redish*, *Jan S. Amundson*, and *Quentin Riegel;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra;* for Pfizer Inc. by *Bert W. Rein*, *Jeffrey B. Kindler*, and *Steven C. Kany;* for the Product Liability Advisory Council, Inc., by *Steven G. Brody;* for SRiMedia et al. by *Thomas H. Clarke, Jr.;* for the Thomas Jefferson Center for the Protection of Free Expression et al. by *Robert M. O'Neil* and *J. Joshua Wheeler;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *Herschel T. Elkins*, Senior Assistant Attorney General, and *Ronald A. Reiter*, Supervising Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Gregg D. Renkes* of Alaska, *Terry Goddard* of Arizona, *Richard Blumenthal* of Connecticut, *Charles J. Crist, Jr.*, of Florida, *Lisa Madigan* of Illinois, *Richard Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Anabelle Rodríguez* of Puerto Rico, *Lawrence E. Long* of South Dakota, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Campaign Legal Center by *Trevor Potter;* for the Consumer Attorneys of California by *Sharon J. Arkin;* for Domini Social Investments LLC et al. by *James E. Pfander;* for Global Exchange by *William Aceves;* for the National Association of Consumer Advocates by *Robert M. Bramson;* for Public Citizen by *Alan B. Morrison*, *Allison M. Zieve*, *Scott L. Nelson*, and *David C. Vladeck;* for ReclaimDemocracy.org by *Brenda Wright*, *Lisa J. Danetz*, *John C. Bonifaz*, and *Bonita Tenneriello;* for the Sierra Club et al. by *Patrick Gallagher* and *Thomas McGarity;* and for Representative Dennis J. Kucinich et al. by *Erwin Chemerinsky* and *Catherine Fisk.*

William Perry Pendley and *Joseph F. Becker* filed a brief for the Mountain States Legal Foundation as *amicus curiae.*

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, and with whom JUSTICE SOUTER joins as to Part III, concurring.

Beginning in 1996, Nike was besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities. See App. to Pet. for Cert. 3a. Nike responded to these charges in numerous ways, such as by sending out press releases, writing letters to the editors of various newspapers around the country, and mailing letters to university presidents and athletic directors. See *id.*, at 3a–4a. In addition, in 1997, Nike commissioned a report by former Ambassador to the United Nations Andrew Young on the labor conditions at Nike production facilities. See *id.*, at 67a. After visiting 12 factories, "Young issued a report that commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers." *Ibid.*

In April 1998, respondent Marc Kasky, a California resident, sued Nike for unfair and deceptive practices under California's Unfair Competition Law, Cal. Bus. & Prof. Code Ann. § 17200 *et seq.* (West 1997), and False Advertising Law, § 17500 *et seq.* Respondent asserted that "in order to maintain and/or increase its sales," Nike made a number of "false statements and/or material omissions of fact" concerning the working conditions under which Nike products are manufactured. Lodging of Petitioners 2 (¶ 1). Respondent alleged "no harm or damages whatsoever regarding himself individually," *id.*, at 4–5 (¶ 8), but rather brought the suit "on behalf of the General Public of the State of California and on information and belief," *id.*, at 3 (¶ 3).

Nike filed a demurrer to the complaint, contending that respondent's suit was absolutely barred by the First Amendment. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. App. to Pet. for Cert. 80a–81a. Respondent appealed, and the California Court of Appeal affirmed, holding that Nike's statements

"form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment." *Id.*, at 79a. The California Court of Appeal also rejected respondent's argument that it was error for the trial court to deny him leave to amend, reasoning that there was "no reasonable possibility" that the complaint could be amended to allege facts that would justify any restrictions on what was—in the court's view—Nike's "noncommercial speech." *Ibid.*

On appeal, the California Supreme Court reversed and remanded for further proceedings. The court held that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech." 27 Cal. 4th 939, 946, 45 P. 3d 243, 247 (2002). However, the court emphasized that the suit "is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved." *Ibid.*

We granted certiorari to decide two questions: (1) whether a corporation participating in a public debate may "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions"; and (2) even assuming the California Supreme Court properly characterized such statements as commercial speech, whether the "First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by that court in the decision below." Pet. for Cert. i. Today, however, the Court dismisses the writ of certiorari as improvidently granted.

In my judgment, the Court's decision to dismiss the writ of certiorari is supported by three independently sufficient

reasons: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U. S. C. § 1257; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.

I

The first jurisdictional problem in this case revolves around the fact that the California Supreme Court never entered a final judgment. Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a final judgment or decree. See *ibid.* A literal interpretation of the statute would preclude our review whenever further proceedings remain to be determined in a state court, "no matter how dissociated from the only federal issue" in the case. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945). We have, however, abjured such a "mechanical" construction of the statute, and accepted jurisdiction in certain exceptional "situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975).[1]

Nike argues that this case fits within the fourth category of such cases identified in *Cox*, which covers those cases in which "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review" might prevail on nonfederal grounds, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,"

[1] Notably, we recognized in *Cox* that in most, if not all, of these exceptional situations, the "additional proceedings anticipated in the lower state courts . . . would not require the decision of other federal questions that might also require review by the Court at a later date." 420 U. S., at 477.

and "refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 482–483. In each of the three cases that the Court placed in the fourth category in *Cox*, the federal issue had not only been finally decided by the state court, but also would have been finally resolved by this Court whether the Court agreed or disagreed with the state court's disposition of the issue. Thus, in *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963), the federal issue was whether the National Labor Relations Board had exclusive jurisdiction over the controversy; in *Mercantile Nat. Bank at Dallas* v. *Langdeau*, 371 U. S. 555 (1963), the federal issue was whether a special federal venue statute applied to immunize the defendants in a state-court action; and in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the federal issue was whether a Florida statute requiring a newspaper to carry a candidate's reply to an editorial was constitutional. In *Cox* itself, the federal question was whether the State could prohibit the news media from publishing the name of a rape victim. In none of those cases would the resolution of the federal issue have been affected by further proceedings.

In Nike's view, this case fits within the fourth *Cox* category because if this Court holds that Nike's speech was noncommercial, then "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U. S., at 482–483; see also Reply Brief for Petitioners 4; Reply to Brief in Opposition 4–5. Notably, Nike's argument assumes that all of the speech at issue in this case is either commercial or noncommercial and that the speech therefore can be neatly classified as either absolutely privileged or not.

Theoretically, Nike is correct that we could hold that *all* of Nike's allegedly false statements are absolutely privileged even if made with the sort of "malice" defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), thereby precluding any further proceedings or amendments that might over-

come Nike's First Amendment defense. However, given the interlocutory posture of the case before us today, the Court could also take a number of other paths that would neither preclude further proceedings in the state courts, nor finally resolve the First Amendment questions in this case. For example, if we were to affirm, Nike would almost certainly continue to maintain that some, if not all, of its challenged statements were protected by the First Amendment and that the First Amendment constrains the remedy that may be imposed. Or, if we were to reverse, we might hold that the speech at issue in this case is subject to suit only if made with actual malice, thereby inviting respondent to amend his complaint to allege such malice. See Tr. of Oral Arg. 42–43. Or we might conclude that some of Nike's speech is commercial and some is noncommercial, thereby requiring further proceedings in the state courts over the legal standards that govern the commercial speech, including whether actual malice must be proved.

In short, because an opinion on the merits in this case could take any one of a number of different paths, it is not clear whether reversal of the California Supreme Court would "be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come." *Cox*, 420 U. S., at 482–483. Nor is it clear that reaching the merits of Nike's claims now would serve the goal of judicial efficiency. For, even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely. See *Flynt* v. *Ohio*, 451 U. S. 619, 621 (1981) *(per curiam)* (noting that in most, if not all, of the cases falling within the four *Cox* exceptions, there was "no probability of piecemeal review with respect to federal issues"). Accordingly, in my view, the judgment of the California Supreme Court does not fall within the fourth *Cox* exception and cannot be regarded as final.

II

The second reason why, in my view, this Court lacks jurisdiction to hear Nike's claims is that neither party has standing to invoke the jurisdiction of the federal courts. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 154–155 (1990) ("Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process"). Without alleging that he has any personal stake in the outcome of this case, respondent is proceeding as a private attorney general seeking to enforce two California statutes on behalf of the general public of the State of California. He has not asserted any federal claim; even if he had attempted to do so, he could not invoke the jurisdiction of a federal court because he failed to allege any injury to himself that is "distinct and palpable." *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Thus, respondent does not have Article III standing. For that reason, were the federal rules of justiciability to apply in state courts, this suit would have been "dismissed at the outset." *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 617 (1989).[2]

Even though respondent would not have had standing to commence suit in federal court based on the allegations in the complaint, Nike—relying on *ASARCO*—contends that it has standing to bring the case to this Court. See Reply Brief for Petitioners 5. In *ASARCO*, a group of taxpayers brought a suit in state court seeking a declaration that the State's law on mineral leases on state lands was invalid. After the Arizona Supreme Court "granted plaintiffs a declaratory judgment that the state law governing mineral

[2] Because the constraints of Article III do not apply in state courts, see *ASARCO*, 490 U. S., at 617, the California courts are free to adjudicate this case.

leases is invalid," 490 U. S., at 611,[3] the defendants sought to invoke the jurisdiction of this Court. In holding that the defendants had standing to invoke the jurisdiction of the federal courts, we noted that the state proceedings had "resulted in a final judgment altering tangible legal rights," *id.*, at 619, and we adopted the following rationale:

> "When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *Id.*, at 623–624.

The rationale supporting our jurisdictional holding in *ASARCO*, however, does not extend to this quite different case. Unlike *ASARCO*, in which the state-court proceedings ended in a declaratory judgment invalidating a state law, no "final judgment altering tangible legal rights" has been entered in the instant case. *Id.*, at 619. Rather, the California Supreme Court merely held that respondent's complaint was sufficient to survive Nike's demurrer and to allow the case to go forward. To apply *ASARCO* to this case would effect a drastic expansion of *ASARCO*'s reasoning, extending it to cover an interlocutory ruling that merely allows a trial to proceed.[4] Because I do not believe such a

[3] The Arizona Supreme Court also remanded the case for the trial court to determine what further relief might be appropriate. See *id.*, at 611. Thus, while leaving open the question of remedy on remand, the state-court judgment in *ASARCO* finally decided the federal issue. See *id.*, at 612 (holding that the federal issues had been adjudicated by the state court and that the remaining issues would not give rise to any further federal question).

[4] JUSTICE BREYER would extend *ASARCO*—which provides an exception to our normal standing requirement—to encompass not merely a defendant's challenge to an adverse state-court judgment but also a

significant expansion of *ASARCO* is warranted, my view is that Nike lacks the requisite Article III standing to invoke this Court's jurisdiction.

III

The third reason why I believe this Court has appropriately decided to dismiss the writ as improvidently granted centers around the importance of the difficult First Amendment questions raised in this case. As Justice Brandeis famously observed, the Court has developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (concurring opinion). The second of those rules is that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Id.*, at 346–347. The novelty and importance of the constitutional questions presented in this case provide good reason for adhering to that rule.

This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.[5] See *post*, at 676–678. On the one hand,

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defendant's motion to dismiss a state-court complaint alleging that semicommercial speech was false and misleading. See *post*, at 668–670 (dissenting opinion). Regardless of whether the "speech-chilling injury" associated with the defense of such a case may or may not outweigh the benefit of having a public forum in which the defendant may establish the truth of the contested statements, such an unprecedented expansion would surely change the character of our standing doctrine, greatly extending *ASARCO*'s reach.

[5] Further complicating the novel First Amendment issues in this case is the fact that in this Court Nike seeks to challenge the constitutionality of the private attorney general provisions of California's Unfair Competition Law and False Advertising Law. It apparently did not raise this specific challenge below. Whether the scope of protection afforded to Nike's speech should differ depending on whether the speech is challenged in a

if the allegations of the complaint are true, direct communications with customers and potential customers that were intended to generate sales—and possibly to maintain or enhance the market value of Nike's stock—contained significant factual misstatements. The regulatory interest in protecting market participants from being misled by such misstatements is of the highest order. That is why we have broadly (perhaps overbroadly) stated that "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). On the other hand, the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike's labor practices, but with similar practices used by other multinational corporations. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 2. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance. See, *e. g.*, Brief for ExxonMobil et al. as *Amici Curiae* 2; Brief for Pfizer Inc. as *Amicus Curiae* 11–12. That is why we have provided such broad protection for misstatements about public figures that are not animated by malice. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

Whether similar protection should extend to cover corporate misstatements made about the corporation itself, or whether we should presume that such a corporate speaker knows where the truth lies, are questions that may have to be decided in this litigation. The correct answer to such questions, however, is more likely to result from the study of a full factual record than from a review of mere unproven allegations in a pleading. Indeed, the development of such

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public or a private enforcement action, see *post*, at 678, is a difficult and important question that I believe would benefit from further development below.

a record may actually contribute in a positive way to the public debate. In all events, I am firmly convinced that the Court has wisely decided not to address the constitutional questions presented by the certiorari petition at this stage of the litigation.

Accordingly, I concur in the decision to dismiss the writ as improvidently granted.

JUSTICE KENNEDY, dissenting.

I dissent from the order dismissing the writ of certiorari as improvidently granted.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

During the 1990's, human rights and labor groups, newspaper editorial writers, and others severely criticized the Nike corporation for its alleged involvement in disreputable labor practices abroad. See Lodging of Petitioners 7–8, 96–118, 127–162, 232–235, 272–273. This case focuses upon whether, and to what extent, the First Amendment protects certain efforts by Nike to respond—efforts that took the form of written communications in which Nike explained or denied many of the charges made.

The case arises under provisions of California law that authorize a private individual, acting as a "private attorney general," effectively to prosecute a business for unfair competition or false advertising. Cal. Bus. & Prof. Code Ann. §§ 17200, 17204, 17500, 17535 (West 1997). The respondent, Marc Kasky, has claimed that Nike made false or misleading commercial statements. And he bases this claim upon statements that Nike made in nine specific documents, including press releases and letters to the editor of a newspaper, to institutional customers, and to representatives of nongovernmental organizations. Brief for Respondent 5.

The California Court of Appeal affirmed dismissal of Kasky's complaint without leave to amend on the ground that

"the record discloses noncommercial speech, addressed to a topic of public interest and responding to public criticism of Nike's labor practices." App. to Pet. for Cert. 78a. The Court of Appeal added that it saw "no merit to [Kasky's] scattershot argument that he might still be able to state a cause of action on some theory allowing content-related abridgement of noncommercial speech." *Id.*, at 79a.

Kasky appealed to the California Supreme Court. He focused on the commercial nature of the communications at issue, while pointing to language in this Court's cases stating that the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563 (1980). Kasky did not challenge the lower courts' denial of leave to amend his complaint. He also conceded that, if Nike's statements fell outside the category of "commercial speech," the First Amendment protected them and "the ultimate issue is resolved in Nike's favor." Appellant's Brief on the Merits in No. S087859 (Cal.), p. 1; accord, Appellant's Reply Brief in No. S087859 (Cal.), pp. 1–2.

The California Supreme Court held that the speech at issue falls within the category of "commercial speech." Consequently, the California Supreme Court concluded, the First Amendment does not protect Nike's statements insofar as they were false or misleading—regardless of whatever role they played in a public debate. 27 Cal. 4th 939, 946, 969, 45 P. 3d 243, 247, 262 (2002). Hence, according to the California Supreme Court, the First Amendment does not bar Kasky's lawsuit—a lawsuit that alleges false advertising and related unfair competition (which, for ease of exposition, I shall henceforth use the words "false advertising" to describe). The basic issue presented here is whether the California Supreme Court's ultimate holding is legally correct. Does the First Amendment permit Kasky's false advertising "prosecution" to go forward?

After receiving 34 briefs on the merits (including 31 *amicus* briefs) and hearing oral argument, the Court dismisses the writ of certiorari, thereby refusing to decide the questions presented, at least for now. In my view, however, the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on. Under similar circumstances, the Court has found that failure to review an interlocutory order entails "an inexcusable delay of the benefits [of appeal] Congress intended to grant." *Mills* v. *Alabama*, 384 U. S. 214, 217 (1966). I believe delay would be similarly wrong here. I would decide the questions presented, as we initially intended.

I

Article III's "case or controversy" requirement does not bar us from hearing this case. Article III requires a litigant to have "standing"—*i. e.*, to show that he has suffered "injury in fact," that the injury is "fairly traceable" to actions of the opposing party, and that a favorable decision will likely redress the harm. *Bennett* v. *Spear*, 520 U. S. 154, 162 (1997) (internal quotation marks omitted). Kasky, the state-court plaintiff in this case, might indeed have had trouble meeting those requirements, for Kasky's complaint specifically states that Nike's statements did not harm Kasky personally. Lodging of Petitioners 4–5 (¶ 8). But Nike, the state-court defendant—not Kasky, the plaintiff—has brought the case to this Court. And Nike has standing to complain here of Kasky's actions.

These actions threaten Nike with "injury in fact." As a "private attorney general," Kasky is in effect enforcing a state law that threatens to discourage Nike's speech. See Cal. Bus. & Prof. Code Ann. §§ 17204, 17535 (West 1997). This Court has often found that the enforcement of such a

law works constitutional injury even if enforcement proceedings are not complete—indeed, even if enforcement is no more than a future threat. See, *e. g.*, *Houston* v. *Hill*, 482 U. S. 451, 459, n. 7 (1987) (standing where there is " 'a genuine threat of enforcement' " against future speech); *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974) (same). Cf. *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785, n. 21 (1978) (The "burden and expense of litigating [an] issue" itself can "unduly impinge on the exercise of the constitutional right"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 52–53 (1971) (plurality opinion) ("The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough"). And a threat of a civil action, like the threat of a criminal action, can chill speech. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 278 (1964) ("Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law' ").

Here, of course, an action to enforce California's laws—laws that discourage certain kinds of speech—amounts to more than just a genuine, future threat. It is a present reality—one that discourages Nike from engaging in speech. It thereby creates "injury in fact." *Supra*, at 667. Further, that injury is directly "traceable" to Kasky's pursuit of this lawsuit. And this Court's decision, if favorable to Nike, can "redress" that injury. *Ibid.*

Since Nike, not Kasky, now seeks to bring this case to federal court, why should Kasky's standing problems make a critical difference? In *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 618 (1989), this Court specified that a defendant *with* standing may complain of an adverse state-court judgment, even if the *other* party—the party who brought the suit in state court and obtained that judgment—would have lacked standing to bring a case in federal court. See also *Virginia* v. *Hicks*, *ante*, at 120–121.

In *ASARCO*, state taxpayers (who ordinarily lack federal "standing") sued a state agency in state court, seeking a judgment declaring that the State's mineral leasing procedures violated federal law. See 490 U. S., at 610. ASARCO and other mineral leaseholders intervened as defendants. *Ibid.* The plaintiff taxpayers obtained a state-court judgment declaring that the State's mineral leasing procedures violated federal law. The defendant mineral leaseholders asked this Court to review the judgment. And this Court held that the leaseholders had standing to seek reversal of that judgment here.

The Court wrote:

> "When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari [1] if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where [2] the requisites of a case or controversy are also met." *Id.*, at 623–624 (bracketed numbers added).

No one denies that "requisites of a case or controversy" other than standing are met here. But is there "direct, specific, and concrete injury"?

In *ASARCO* itself, such "injury" consisted of the threat, arising out of the state court's determination, that the defendants' leases *might* later be canceled (if, say, a third party challenged those leases in later proceedings and showed they were not "made for 'true value' "). *Id.*, at 611–612, 618. Here that "injury" consists of the threat, arising out of the state court's determination, that defendant Nike's speech on public matters might be "chilled" immediately and legally restrained in the future. See *supra*, at 668. Where is the meaningful difference?

I concede that the state-court determination in *ASARCO* was more "final" in the sense that it unambiguously ordered a declaratory judgment, see 490 U. S., at 611–612 (finding that two exceptions to normal finality requirements applied), while the state-court determination here, where such declaratory relief was not sought, takes the form of a more intrinsically interlocutory holding, see *ante*, at 662, and n. 4 (STEVENS, J., concurring). But with respect to "standing," what possible difference could that circumstance make? The state court in *ASARCO* finally resolved federal questions related to state leasehold procedures; the state court here finally resolved the basic free speech issue—deciding that Nike's statements constituted "commercial speech" which, when "false or misleading," the government "may entirely prohibit," 27 Cal. 4th, at 946, 45 P. 3d, at 247. After answering the basic threshold question, the state court in *ASARCO* left other, more specific questions for resolution in further potential or pending proceedings, 490 U. S., at 611–612. The state court here did the same.

In *ASARCO*, the relevant further proceedings might have taken place in a new lawsuit; here they would have taken place in the same lawsuit. But that difference has little bearing on the likelihood of injury. Indeed, given the nature of the speech-chilling injury here and the fact that it is likely to occur immediately, I should think that constitutional standing in this case would flow from standing in *ASARCO a fortiori*.

II

No federal statute prevents us from hearing this case. The relevant statute limits our jurisdiction to "*[f]inal judgments or decrees* rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257(a) (emphasis added). But the California Supreme Court determination before us, while technically an interim decision, is a "final judgment or decree" for purposes of this statute.

That is because this Court has interpreted the statute's phrase "final judgment" to refer, in certain circumstances, to a state court's final determination of a federal issue, even if the determination of that issue occurs in the midst of ongoing litigation. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975). In doing so, the Court has said that it thereby takes a "*pragmatic* approach," not a "mechanical" approach, to "determining finality." *Id.*, at 477, 486 (emphasis added). And it has set forth several criteria that determine when an interim state-court judgment is "final" for purposes of the statute, thereby permitting our consideration of the federal matter at issue.

The four criteria relevant here are those determining whether a decision falls within what is known as *Cox*'s "fourth category" or "fourth exception." They consist of the following:

> (1) "the federal issue has been finally decided in the state courts";
>
> (2) in further pending proceedings, "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";
>
> (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and
>
> (4) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 482–483.

Each of these four conditions is satisfied in this case.

A

Viewed from *Cox*'s "pragmatic" perspective, "the federal issue has been finally decided in the state courts." *Id.*, at

482, 486. The California Supreme Court considered nine specific instances of Nike's communications—those upon which Kasky says he based his legal claims. Brief for Respondent 5. These include (1) a letter from Nike's Director of Sports Marketing to university presidents and athletic directors presenting "facts" about Nike's labor practices; (2) a 30-page illustrated pamphlet about those practices; (3) a press release (posted on Nike's Web site) commenting on those practices; (4) a posting on Nike's Web site about its "code of conduct"; (5) a document on Nike's letterhead sharing its "perspective" on the labor controversy; (6) a press release responding to "[s]weatshop [a]llegations"; (7) a letter from Nike's Director of Labor Practices to the Chief Executive Officer of YWCA of America, discussing criticisms of its labor practices; (8) a letter from Nike's European public relations manager to a representative of International Restructuring Education Network Europe, discussing Nike's practices; and (9) a letter to the editor of The New York Times taking issue with a columnist's criticisms of Nike's practices. *Ibid.;* see also Lodging of Petitioners 121–125, 182–191, 198–230, 270, 285, 322–324. The California Supreme Court then held that all this speech was "commercial speech" and consequently the "governmen[t] may entirely prohibit" that speech if it is "false or misleading." 27 Cal. 4th, at 946, 45 P. 3d, at 247.

The California Supreme Court thus "finally decided" the federal issue—whether the First Amendment protects the speech in question from legal attack on the ground that it is "false or misleading." According to the California Supreme Court, nothing at all remains to be decided with respect to *that* federal question. If we permit the California Supreme Court's decision to stand, in all likelihood this litigation will now simply seek to determine whether Nike's statements were false or misleading, and perhaps whether Nike was negligent in making those statements—matters involving questions of California law.

I concede that some other, possibly related federal constitutional issue *might* arise upon remand for trial. But some such likelihood is always present in ongoing litigation, particularly where, as in past First Amendment cases, this Court reviews interim state-court decisions regarding, for example, requests for a temporary injunction or a stay pending appeal, or (as here) denial of a motion to dismiss a complaint. *E. g.*, *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)* (denial of a stay pending appeal); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971) (temporary injunction); *Mills* v. *Alabama*, 384 U. S. 214 (1966) (motion to dismiss).

Some such likelihood was present in *Cox* itself. The *Cox* plaintiff, the father of a rape victim, sued a newspaper in state court, asserting a right to damages under state law, which forbade publication of a rape victim's name. The trial court, believing that the statute imposed strict liability on the newspaper, granted summary judgment in favor of the victim. See *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. 60, 64, 200 S. E. 2d 127, 131 (1973), rev'd, 420 U. S. 469 (1975). The State Supreme Court affirmed in part and reversed in part. That court agreed with the plaintiff that state law provided a cause of action and that the cause of action was consistent with the First Amendment. 231 Ga., at 64, 200 S. E. 2d, at 131. However, the State Supreme Court disagreed about the standard of liability. Rather than strict liability, the standard, it suggested, was one of "wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." *Ibid.* And it remanded the case for trial. The likelihood that further proceedings would address federal constitutional issues—concerning the relation between, for instance, the nature of the privacy invasion, the defendants' state of mind, and the First Amendment—would seem to have been far higher there than in any further proceedings here. Despite that likelihood, and because the State Supreme Court held in effect that the First Amend-

ment did not protect the speech at issue, this Court held that its determination of *that* constitutional question was "plainly final." *Cox*, 420 U. S., at 485. California's Supreme Court has made a similar holding, and its determination of the federal issue is similarly "final."

B

The second condition specifies that, in further proceedings, the "party seeking review here"—*i. e.*, Nike—"might prevail on the merits on nonfederal grounds." *Id.*, at 482. If Nike shows at trial that its statements are neither false nor misleading, nor otherwise "unfair" under California law, Cal. Bus. & Prof. Code Ann. §§17200, 17500 (West 1997), it will show that those statements did not constitute unfair competition or false advertising under California law—a nonfederal ground. And it will "prevail on the merits on nonfederal grounds," *Cox*, 420 U. S., at 482. The second condition is satisfied.

C

The third condition requires that "reversal of the state court on the federal issue . . . be preclusive of any further litigation on the relevant cause of action." *Id.*, at 482–483. Taken literally, this condition is satisfied. An outright reversal of the California Supreme Court would reinstate the judgment of the California intermediate court, which affirmed dismissal of the complaint without leave to amend. *Supra*, at 665–666. It would forbid Kasky to proceed insofar as Kasky's state-law claims focus on the nine documents previously discussed. And Kasky has conceded that his claims rest on statements made in those documents. Brief for Respondent 5.

I concede that this Court might not reverse the California Supreme Court outright. It might take some middle ground, neither affirming nor fully reversing, that permits this litigation to continue. See *ante*, at 659–660 (STEVENS, J., concurring). But why is that possibility relevant? The

third condition specifies that "*reversal*"—not some *other* disposition—will preclude "further litigation."

The significance of this point is made clear by our prior cases. In *Cox*, this Court found jurisdiction despite the fact that it *might* have chosen a middle First Amendment ground—perhaps, for example, precluding liability (for publication of a rape victim's name) where based on negligence, but not where based on malice. And such an intermediate ground, while producing a judgment that the State Supreme Court decision was erroneous, would have permitted the litigation to go forward. Cf. Brief for Appellants in *Cox Broadcasting Corp.* v. *Cohn*, O. T. 1973, No. 73–938, p. 68, n. 127 (arguing that "'summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection'"). Similarly in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the Court might have held that the Constitution permits a State to require a newspaper to carry a candidate's reply to an editorial—but only *in certain circumstances*—thereby potentially leaving a factual issue whether those circumstances applied. Cf. Brief for Appellant in *Miami Herald Publishing Co.* v. *Tornillo*, O. T. 1973, No. 73–797, pp. 26–27, and n. 60 (noting that the State Supreme Court based its decision in part on a conclusion, unsupported by record evidence, that control of mass media had become substantially concentrated). One can imagine similar intermediate possibilities in virtually every case in which the Court has found this condition satisfied, including those involving technical questions of statutory jurisdiction and venue, cf. *ante*, at 659 (STEVENS, J., concurring).

Conceivably, one might argue that the third condition is *not* satisfied here despite literal compliance, see *supra*, at 674 and this page, on the ground that, from a pragmatic perspective, outright reversal is not a very realistic possibility. But that proposition simply is not so. In my view, the probabilities are precisely the contrary, and a true reversal is a highly realistic possibility.

To understand how I reach this conclusion, the reader must recall the nature of the holding under review. The California Supreme Court held that certain specific communications, exemplified by the nine documents upon which Kasky rests his case, fall within that aspect of the Court's commercial speech doctrine that says the First Amendment protects only *truthful* commercial speech; hence, to the extent commercial speech is false or misleading, it is unprotected. See *supra*, at 666.

The Court, however, has added, in commercial speech cases, that the First Amendment "'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.'" *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 534 (1980); accord, *Central Hudson*, 447 U. S., at 562–563, n. 5. And in other contexts the Court has held that speech on matters of public concern needs "'breathing space'"—potentially incorporating certain false or misleading speech—in order to survive. *New York Times*, 376 U. S., at 272; see also, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974); *Time, Inc.* v. *Hill*, 385 U. S. 374, 388–389 (1967).

This case requires us to reconcile these potentially conflicting principles. In my view, a proper resolution here favors application of the last mentioned public-speech principle, rather than the first mentioned commercial-speech principle. Consequently, I would apply a form of heightened scrutiny to the speech regulations in question, and I believe that those regulations cannot survive that scrutiny.

First, the communications at issue are not purely commercial in nature. They are better characterized as involving a mixture of commercial and noncommercial (public-issue-oriented) elements. The document *least* likely to warrant protection—a letter written by Nike to university presidents and athletic directors—has several commercial characteristics. See Appendix, *infra* (reproducing pages 190 and 191 of Lodging of Petitioners). As the California Supreme Court

implicitly found, 27 Cal. 4th, at 946, 45 P. 3d, at 247, it was written by a "commercial speaker" (Nike), it is addressed to a "commercial audience" (potential institutional buyers or contractees), and it makes "representations of fact about the speaker's own business operations" (labor conditions). *Ibid.* See, *e. g.*, *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 66–67 (1983).

But that letter also has other critically important and, I believe, predominant noncommercial characteristics with which the commercial characteristics are "inextricably intertwined." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988). For one thing, the letter appears outside a traditional advertising format, such as a brief television or newspaper advertisement. It does not propose the presentation or sale of a product or any other commercial transaction, *United States* v. *United Foods, Inc.*, 533 U. S. 405, 409 (2001) (describing this as the "usua[l]" definition for commercial speech). Rather, the letter suggests that its contents might provide "information useful in discussions" with concerned faculty and students. Lodging of Petitioners 190. On its face, it seeks to convey information to "a diverse audience," including individuals who have "a general curiosity about, or genuine interest in," the public controversy surrounding Nike, *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975).

For another thing, the letter's content makes clear that, in context, it concerns a matter that is of significant public interest and active controversy, and it describes factual matters related to that subject in detail. In particular, the letter describes Nike's labor practices and responds to criticism of those practices, and it does so because those practices themselves play an important role in an existing public debate. This debate was one in which participants advocated, or opposed, public collective action. See, *e. g.*, Lodging of Petitioners 143 (article on student protests), 232–236 (fact sheet with "Boycott Nike" heading). See generally *Roth* v.

United States, 354 U. S. 476, 484 (1957) (The First Amendment's protections of speech and press were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes"). That the letter is factual in content does not argue against First Amendment protection, for facts, sometimes facts alone, will sway our views on issues of public policy.

These circumstances of form and content distinguish the speech at issue here from the more purely "commercial speech" described in prior cases. See, *e. g.*, *United Foods*, *supra*, at 409 (commercial speech "usually defined as speech that does *no more than* propose a commercial transaction" (emphasis added)); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 473–474 (1989) (describing this as "the test"); *Central Hudson*, 447 U. S., at 561 (commercial speech defined as "expression related *solely* to the economic interests of the speaker and its audience" (emphasis added)). The speech here is unlike speech—say, the words "dolphin-safe tuna"—that commonly appears in more traditional advertising or labeling contexts. And it is unlike instances of speech where a communication's contribution to public debate is peripheral, not central, cf. *id.*, at 562–563, n. 5.

At the same time, the regulatory regime at issue here differs from traditional speech regulation in its use of private attorneys general authorized to impose "false advertising" liability even though they themselves have suffered no harm. See Cal. Bus. & Prof. Code Ann. §§ 17204, 17535 (West 1997). In this respect, the regulatory context is unlike most traditional false advertising regulation. And the "false advertising" context differs from other regulatory contexts—say, securities regulation—where a different balance of concerns calls for different applications of First Amendment principles. Cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456–457 (1978).

These three sets of circumstances taken together—circumstances of format, content, and regulatory context—warrant

treating the regulations of speech at issue differently from regulations of purer forms of commercial speech, such as simple product advertisements, that we have reviewed in the past. And, where all three are present, I believe the First Amendment demands heightened scrutiny.

Second, I doubt that this particular instance of regulation (through use of private attorneys general) can survive heightened scrutiny, for there is no reasonable "fit" between the burden it imposes upon speech and the important governmental "'interest served,'" *Fox*, *supra*, at 480. Rather, the burden imposed is disproportionate.

I do not deny that California's system of false advertising regulation—including its provision for private causes of action—furthers legitimate, traditional, and important public objectives. It helps to maintain an honest commercial marketplace. It thereby helps that marketplace better allocate private goods and services. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 765 (1976). It also helps citizens form "intelligent opinions as to how [the marketplace] ought to be regulated or altered." *Ibid.*

But a private "false advertising" action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech—at least if extended to encompass the type of speech at issue under the standards of liability that California law provides, see Cal. Bus. & Prof. Code Ann. §§ 17200, 17500 (West 1997) (establishing regimes of strict liability, as well as liability for negligence); *Cortez* v. *Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 181, 999 P. 2d 706, 717 (2000) (stating that California's unfair competition law imposes strict liability). The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute

a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm. Cf. *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 134–135 (1992); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 67–71 (1963).

That threat means a commercial speaker must take particular care—considerably more care than the speaker's noncommercial opponents—when speaking on public matters. A large organization's unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough exceptions exist to warrant qualification—even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker's efforts to engage in public debate—particularly where a "false advertising" law, like California's law, imposes liability based upon negligence or without fault. See *Gertz*, 418 U. S., at 340; *Time*, 385 U. S., at 389. At the least, they create concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not. See *First Nat. Bank*, 435 U. S., at 785–786; see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995).

At the same time, it is difficult to see why California needs to permit such actions by private attorneys general—at least with respect to speech that is not "core" commercial speech but is entwined with, and directed toward, a more general public debate. The Federal Government regulates unfair competition and false advertising in the absence of such suits. 15 U. S. C. § 41 *et seq.* As far as I can tell, California's delegation of the government's enforcement authority to private individuals is not traditional, and may be unique, Tr. of Oral Arg. 42. I do not see how "false advertising"

regulation could suffer serious impediment if the Constitution limited the scope of private attorney general actions to circumstances where more purely commercial and less public-debate-oriented elements predominate. As the historical treatment of speech in the labor context shows, substantial government regulation can coexist with First Amendment protections designed to provide room for public debate. Compare, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969) (upholding prohibition of employer comments on unionism containing threats or promises), with *Thomas* v. *Collins*, 323 U. S. 516, 531–532 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

These reasons convince me that it is likely, if not highly probable, that, if this Court were to reach the merits, it would hold that heightened scrutiny applies; that, under the circumstances here, California's delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.

Returning to the procedural point at issue, I believe this discussion of the merits shows that not only will "reversal" of the California Supreme Court "on the federal issue" prove "preclusive of any further litigation on the relevant cause of action," *Cox*, 420 U. S., at 482–483, but also such "reversal" is a serious possibility. Whether we take the words of the third condition literally or consider the circumstances pragmatically, that condition is satisfied.

D

The fourth condition is that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 483. This condition is met because refusal immediately to review the state-court decision before us will "seriously erode" the federal constitutional policy in favor of free speech.

If permitted to stand, the state court's decision may well "chill" the exercise of free speech rights. See *id.*, at 486; *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 56 (1989). Continuation of this lawsuit itself means increased expense, and, if Nike loses, the results may include monetary liability (for "restitution") and injunctive relief (including possible corrective "counterspeech"). See, *e. g.*, *Cel-Tech Communications, Inc.* v. *Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179, 973 P. 2d 527, 539 (1999); *Consumers Union of U. S., Inc.* v. *Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 971–972, 6 Cal. Rptr. 2d 193, 197–198 (1992). The range of communications subject to such liability is broad; in this case, it includes a letter to the editor of The New York Times. The upshot is that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability. Cf. *Gertz*, *supra*, at 340 (warning that overly stringent liability for false or misleading speech can "lead to intolerable self-censorship"); *Time*, *supra*, at 389 ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone' ").

This concern is not purely theoretical. Nike says without contradiction that because of this lawsuit it has decided "to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media." Brief for Petitioners 39. It adds that it has not released its annual Corporate Responsibility Report, has decided not to pursue a listing in the Dow Jones Sustainability Index, and has refused "dozens of invitations . . . to speak on corporate responsibility issues." *Ibid.* Numerous *amici*—including some who do not believe that Nike has fully and accurately explained its labor practices—argue that California's decision will "chill" speech and

thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important public issues. Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 2–3; Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 10–12; Brief for ABC Inc. et al. as *Amici Curiae* 6–13; Brief for Pfizer Inc. as *Amicus Curiae* 10–14.

In sum, all four conditions are satisfied here. See *supra*, at 671. Hence, the California Supreme Court's judgment falls within the scope of the term "final" as it appears in 28 U. S. C. § 1257(a), and no statute prevents us from deciding this case.

III

There is no strong prudential argument against deciding the questions presented. Compare *ante*, at 663–664 (STEVENS, J., concurring), with *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). These constitutional questions are not easy ones, for they implicate both free speech and important forms of public regulation. But they arrive at the threshold of this case, asking whether the Constitution permits this private attorney general's lawsuit to go forward on the basis of the pleadings at hand. This threshold issue was vigorously contested and decided, adverse to Nike, below. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 534–535 (1992). And further development of the record seems unlikely to make the questions presented any easier to decide later.

At the same time, waiting extracts a heavy First Amendment price. If this suit goes forward, both Nike and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. See *Time*, 385 U. S., at 389; *Gertz*, 418 U. S., at 340. That is what a "chilling effect" means. It is present here.

IV

In sum, I can find no good reason for postponing a decision in this case. And given the importance of the First Amendment concerns at stake, there are strong reasons not to do so. The position of at least one *amicus*—opposed to Nike on the merits of its labor practice claims but supporting Nike on its free speech claim—echoes a famous sentiment reflected in the writings of Voltaire: 'I do not agree with what you say, but I will fight to the end so that you may say it.' See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3. A case that implicates that principle is a case that we should decide.

I would not dismiss as improvidently granted the writ issued in this case. I respectfully dissent from the Court's contrary determination.

APPENDIX TO OPINION OF BREYER, J.

What follows is a copy of the letter to university presidents and athletic directors at issue in this case, Lodging of Petitioners 190–191:

June 18, 1996

Dear President and Director of Athletics,

As most of you have probably read, heard or seen, NIKE, Inc. has recently come under attack from the Made in the USA Foundation, and other labor organizers, who claim that child labor is used in the production of its goods. While you may also be aware that NIKE has gone on the record to categorically deny these allegations as completely false and irresponsible, I would like to extend the courtesy of providing you with many of the facts that have been absent from the media discourse on this issue. I hope you will find this information useful in discussions with faculty and students who may be equally disturbed by these charges.

First and foremost, wherever NIKE operates around the globe, it is guided by principles set forth in a code of conduct that binds its production subcontractors to a signed Memorandum of Understanding. This Memorandum strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity provisions.

NIKE enforces its standards through daily observation by staff members who are responsible for monitoring adherence to the Memorandum. NIKE currently employs approximately 800 staff members in Asia alone to oversee operations. Every NIKE subcontractor knows that the enforcement of the Memorandum includes systematic, unannounced evaluation by third-party auditors. These thorough reviews include interviews with workers; examination of safety equipment and procedures, review of free health-care facilities, investigation of worker grievances and audits of payroll records.

Furthermore, over the past 20 years we have established long-term relationships with select subcontractors, and we believe that our sense of corporate responsibility has influenced the way they conduct their business. After all, it is incumbent upon leaders like NIKE to ensure that these violations do not occur in our subcontractor's factories.

NIKE, INC. ONE BOWERMAN DRIVE, BEAVERTON, OR 97005-6453 TEL:503-671-6453 FAX:503-671-6300

Appendix to opinion of BREYER, J.

June 18, 1996
Page 2

We have found over the years that, given the vast area of our operations and the difficulty of policing such a network, some violations occur. However, we have been proud that in all material respects the code of conduct is complied with. The code is not just word. We live by it. NIKE is proud of its contribution in helping to build economies, provide skills, and create a brighter future for millions of workers around the world.

As a former Director of Athletics, and currently the Director of Sports Marketing at NIKE, I am indeed sensitive to these issues. I would be more than happy to make myself available to either discuss the issues and/or receive any opinions or insights you may have. We are committed to the world of sports and all that it stands for. I remain at your disposal.

Kindest regards.

Steve Miller

Steve Miller
Director
NIKE Sports Marketing

SM:en

cc: Phillip H. Knight
Donna Gibbs
Kit Morris
Erin Patton

Reporter's Note

The next page is purposely numbered 901. The numbers between 686 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 2 THROUGH
OCTOBER 2, 2003

JUNE 2, 2003

Certiorari Granted—Reversed and Remanded. (See No. 02–1295, *ante*, p. 52.)

Certiorari Granted—Vacated and Remanded

No. 01–1840. DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN *v.* REGULA. C. A. 9th Cir. Motions of Bert Bell/Pete Rozelle NFL Player Retirement Plan and ERISA Industry Committee for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Black & Decker Disability Plan* v. *Nord*, 538 U. S. 822 (2003). Reported below: 266 F. 3d 1130.

Certiorari Dismissed

No. 02–9867. MOORE *v.* PLASTER ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 313 F. 3d 442.

No. 02–9969. TILLI *v.* SMITH. Super. Ct. Pa. 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: 806 A. 2d 475.

Miscellaneous Orders

No. 02–763. BARNHART, COMMISSIONER OF SOCIAL SECURITY *v.* THOMAS. C. A. 3d Cir. [Certiorari granted, 537 U. S. 1187.]

Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 02–9579. IN RE STEELE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [538 U. S. 960] denied.

No. 02–10267. CHEH *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 23, 2003, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 02–10326. IN RE BARCLAY. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 23, 2003, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 02–9897. IN RE BREWER; and

No. 02–10054. IN RE FLYNN. Petitions for writs of mandamus denied.

Certiorari Denied

No. 02–925. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS ET AL. *v.* NANDA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 303 F. 3d 817.

No. 02–1191. DONATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 306 F. 3d 1217.

No. 02–1253. RIGGS ET AL. *v.* SAN JUAN COUNTY, UTAH, ET AL.;

No. 02–1444. SAN JUAN COUNTY, UTAH, ET AL. *v.* RIGGS ET AL.; and

No. 02–1445. SAN JUAN HEALTH SERVICES ET AL. *v.* RIGGS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 309 F. 3d 1216.

No. 02–1272. DEPAOLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 41 Fed. Appx. 543.

No. 02–1273. ARMENDARIZ-MONTOYA *v.* SONCHIK, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 291 F. 3d 1116.

No. 02–1291. TAX & ACCOUNTING SOFTWARE CORP. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 301 F. 3d 1254.

No. 02–1367. EUSTACE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 905.

No. 02–1375. SCHALL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 59 P. 3d 848.

No. 02–1406. CALLOWHILL CENTER ASSOCIATES, LLP *v.* SOCIETY CREATED TO REDUCE URBAN BLIGHT ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 804 A. 2d 116.

No. 02–1417. CREDIT LYONNAIS ROUSE, LTD. *v.* OCEAN VIEW CAPITAL, INC., ET AL.;

No. 02–1418. SUMITOMO CORPORATION OF AMERICA ET AL. *v.* OCEAN VIEW CAPITAL, INC., FKA TRIANGLE WIRE & CABLE, INC.; and

No. 02–1434. GLOBAL MINERALS & METALS CORP. ET AL. *v.* VIACOM INC. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 306 F. 3d 469.

No. 02–1426. CALHOUN *v.* LILLENAS PUBLISHING ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 298 F. 3d 1228.

No. 02–1428. SLADEK *v.* ZEMAN. C. A. 10th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 448.

No. 02–1435. SALUGA *v.* TUREK. C. A. 6th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 746.

No. 02–1437. RAISER *v.* DASCHLE, UNITED STATES SENATOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 305.

No. 02–1440. MEADE *v.* DECISIONS OF THE ORPHANS COURT FOR ANNE ARUNDEL COUNTY ET AL. Cir. Ct. Anne Arundel County, Md. Certiorari denied.

No. 02–1446. EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC CO. *v.* MT. OLIVET TABERNACLE CHURCH. Sup. Ct. Pa. Certiorari denied. Reported below: 571 Pa. 60, 811 A. 2d 565.

No. 02–1447. NORTHWEST AIRLINES CORP. ET AL. *v.* CHASE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 310 F. 3d 953.

No. 02–1460. VAUGHAN *v.* COX ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 316 F. 3d 1210.

No. 02–1461. SHERIDAN *v.* TRUSTEES OF COLUMBIA UNIVERSITY. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 296 App. Div. 2d 314, 745 N. Y. S. 2d 18.

No. 02–1509. MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA *v.* KARAHA BODAS CO., L. L. C.; and

No. 02–1510. PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA *v.* KARAHA BODAS CO., L. L. C. C. A. 2d Cir. Certiorari denied. Reported below: 313 F. 3d 70.

No. 02–1517. TOWLE, DENISON, SMITH & TAVERA, LLP, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. Fed. Cir. Certiorari denied. Reported below: 56 Fed. Appx. 488.

No. 02–1525. NORMAN *v.* UNITED STATES PUBLIC HEALTH SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–1539. BESTOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 02–1549. YAMASHITA *v.* JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 02–1558. REES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 258 Wis. 2d 981, 654 N. W. 2d 94.

No. 02–1572. RAPIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 64 Fed. Appx. 417.

No. 02–7782. MAYES ET AL. *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 827 So. 2d 967.

No. 02–9054. KAFELE *v.* KARNES ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 1475, 779 N. E. 2d 1049.

No. 02–9719. DANIELS *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–9720. HONESTY *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–9804. NELSON *v.* GIOFFREDI AND ASSOCIATES ET AL. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 02–9808. BROWN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 145 Md. App. 726.

No. 02–9809. ARNOLD *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 835 So. 2d 1112.

No. 02–9810. NGHIEM *v.* AGHA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 489.

No. 02–9811. WENDT *v.* WAKEFIELD. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–9813. MASON *v.* SPENDER ET AL. C. A. 8th Cir. Certiorari denied.

No. 02–9816. WASHINGTON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–9823. FRANKLIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 1, 776 N. E. 2d 26.

No. 02–9833. HISTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–9839. WALKER *v.* MOSLEY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–9841. EDWARDS *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–9848. BILBREY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9850. WHITE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 414.

No. 02–9855. DARBY *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Wis. Certiorari denied. Reported below: 258 Wis. 2d 270, 653 N. W. 2d 160.

No. 02–9857. DORSEY *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 02–9861. DEDEAUX *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 834 So. 2d 712.

No. 02–9862. DRASAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–9865. JONES *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 02–9866. MYERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 335, 780 N. E. 2d 186.

No. 02–9870. MILLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–9871. METTERS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 02–9874. LAZARD *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 02–9882. MEDINA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 834 So. 2d 176.

No. 02–9885. BRANCH *v.* TEXAS; and BRANCH *v.* COURT OF APPEALS OF TEXAS, FIFTH DISTRICT. Ct. Crim. App. Tex. Certiorari denied.

No. 02–9893. YOVEV *v.* CALIFORNIA FAIR PLAN ASSN. ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9899. BUI PHU XUAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9900. TURNER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–9906. GRAMS *v.* MORGENSTERN. Sup. Ct. Mont. Certiorari denied. Reported below: 313 Mont. 421, 63 P. 3d 512.

No. 02–9964. SMITH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 367, 780 N. E. 2d 221.

No. 02–9974. STROHL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 813 A. 2d 909.

No. 02–9991. JONES *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 825 So. 2d 604.

No. 02–10041. MITCHELL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 438 Mass. 535, 781 N. E. 2d 1237.

No. 02–10043. ELLIS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 02–10084. DORENBOS *v.* GORMAN, SUPERINTENDENT, LARCH CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 882.

No. 02–10109. NOLING *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 98 Ohio St. 3d 44, 781 N. E. 2d 88.

No. 02–10138. BARRITT *v.* COLEMAN, ACTING WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 480.

No. 02–10157. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 351 Ark. 215, 91 S. W. 3d 54.

No. 02–10168. DAVIS *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–10196. BEDOYA *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10256. PURNELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10304. GLOVER *v.* BENNETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10327. HARRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 670.

No. 02–10347. BOWEN, aka TUMA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10360. OVEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–10380. HAYNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10388. DYSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 821 A. 2d 363.

No. 02–10390. LESTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 302.

No. 02–10396. GUERRERO-CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 921.

No. 02–10398. FULBRIGHT *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 51 Fed. Appx. 866.

No. 02–10405. TREJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 597.

No. 02–10413. QUIROS-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 450.

No. 02–10414. SANCHEZ-LLAMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 259.

No. 02–10423. LAI *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 929.

No. 02–10429. CASTLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10430. CHANCEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 507.

No. 02–10432. ESKRIDGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 817.

No. 02–10435. KING, aka KLAUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 291.

No. 02–10438. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 314 F. 3d 265.

No. 02–10439. PAYNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 397.

No. 02–10440. STOVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 351.

No. 02–10441. RIVIERE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 55 Fed. Appx. 102.

No. 02–10448. CARRATALA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 877.

No. 02–10451. WALTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 657.

No. 02–10452. WADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 168.

No. 02–10453. AVILEZ-LA GUARDIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 46 Fed. Appx. 38.

No. 02–10454. RODRIGUEZ BARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 345.

No. 02–10456. HOLLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 639.

No. 02–10460. CONGDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 636.

No. 02–10463. SERENA-CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 918.

No. 02–10464. BANKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10465. FLORES *v.* LUND, SUPERINTENDENT, CLARINDA CORRECTIONAL FACILITY. C. A. 8th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 868.

No. 02–10466. WILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 703.

No. 02–10467. GLORIA-COLUNGA *v.* UNITED STATES; and TAMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119 (first judgment) and 920 (second judgment).

No. 02–10468. BRAXTON *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 684.

No. 02–10472. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119.

No. 02–10478. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10479. DIAZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 718.

No. 02–10480. SANTOS-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119.

No. 02–10483. GARCIA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 319 F. 3d 726.

No. 02–10484. HERNANDEZ-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119.

No. 02–10497. KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 64 Fed. Appx. 361.

No. 02–10503. RENTERIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 828.

No. 02–10513. HOLLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 902.

No. 02–10514. HERNANDEZ-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 318 F. 3d 1299.

No. 02–10524. OKORO *v.* CALLAGHAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 324 F. 3d 488.

No. 02–1226. SCHISM ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Motion of Mary Jane Schism Short for substitution as petitioner in place of William O. Schism, deceased, granted. Certiorari denied. Reported below: 316 F. 3d 1259.

No. 02–1429. MARIE ET AL. *v.* MCGREEVEY, GOVERNOR OF NEW JERSEY, ET AL. C. A. 3d Cir. Motion of Sandra Cano, former "Doe" of *Doe* v. *Bolton*, 410 U. S. 179 (1973), et al. for

leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 314 F. 3d 136.

Rehearing Denied

No. 02–1202. eWEALTH USA, INC., ET AL. *v.* LINCOLN BENEFIT LIFE CO., INC., 538 U. S. 961;

No. 02–7812. RICE *v.* DOVE, WARDEN, ET AL., 537 U. S. 1198;

No. 02–8445. TATAII *v.* YOSHINA, 537 U. S. 1238;

No. 02–8579. GIEGLER *v.* JAMROG, WARDEN, 538 U. S. 930;

No. 02–8837. MARTINEZ *v.* NEW YORK, 538 U. S. 963;

No. 02–9034. HALL *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 538 U. S. 951; and

No. 02–9121. CONDIT *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, 538 U. S. 966. Petitions for rehearing denied.

No. 01–10795. BROWN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 537 U. S. 864. Motion for leave to file petition for rehearing denied.

JUNE 4, 2003

Dismissal Under Rule 46

No. 02–1503. CITY OF HAWTHORNE, CALIFORNIA, ET AL. *v.* CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 309 F. 3d 1113.

JUNE 5, 2003

Miscellaneous Order

No. 02–10977 (02A1020). IN RE CHARM. 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.

Probable Jurisdiction Noted

No. 02–1674. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1675. NATIONAL RIFLE ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1676. FEDERAL ELECTION COMMISSION ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1702. MCCAIN, UNITED STATES SENATOR, ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1727. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1733. NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1734. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1740. ADAMS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1747. PAUL, UNITED STATES CONGRESSMAN, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1753. CALIFORNIA DEMOCRATIC PARTY ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1755. AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.; and

No. 02–1756. CHAMBER OF COMMERCE OF THE UNITED STATES ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of four hours allotted for oral argument. Briefs of the parties who were plaintiffs in the District Court are to address the questions presented in the jurisdictional statements and are to be filed with the Clerk of the Court and served upon the parties who were defendants in the District Court on or before 3 p.m., Tuesday, July 8, 2003. Briefs of the parties who were defendants in the District Court are to be filed with the Clerk of the Court and served upon the parties who were plaintiffs in the District Court on or before 3 p.m., Tuesday, August 5, 2003. Any reply briefs by parties who were plaintiffs in the District Court are to be filed with the Clerk of the Court and served upon parties who were defendants in the District Court on or before 3 p.m., Thursday, August 21, 2003. Cases set for oral argument at 10:00 a.m., Monday, September 8, 2003. Reported below: 251 F. Supp. 2d 176 and 948.

Certiorari Denied

No. 02–10979 (02A1021). CHARM *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.

JUNE 9, 2003

Certiorari Granted—Remanded

No. 02–312. H & R BLOCK, INC. *v.* ANDERSON ET AL. C. A. 11th Cir. The Court reversed the judgment below in *Beneficial Nat. Bank* v. *Anderson*, *ante*, p. 1. Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 287 F. 3d 1038.

Certiorari Dismissed

No. 02–9903. STRABLE *v.* STRABLE. Ct. App. S. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–9936. ELDRIDGE *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–9957. SHELTON *v.* EIKERMAN. C. A. 8th 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. 02A932. VENGADASALAM *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 02M100. PFEIFFER *v.* GEORGIA DEPARTMENT OF TRANSPORTATION. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 02–10676. IN RE PHELPS;
No. 02–10690. IN RE STEVENSON;
No. 02–10728. IN RE VINCENT; and
No. 02–10734. IN RE BUSH. Petitions for writs of habeas corpus denied.

No. 02–10583. IN RE WOOD. Petition for writ of mandamus denied.

Certiorari Granted

No. 02–1343. ENGINE MANUFACTURERS ASSN. ET AL. *v.* SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 309 F. 3d 550.

No. 02–9410. CRAWFORD *v.* WASHINGTON. Sup. Ct. Wash. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 147 Wash. 2d 424, 54 P. 3d 656.

Certiorari Denied

No. 02–529. TRANSMISSION AGENCY OF NORTHERN CALIFORNIA *v.* SIERRA PACIFIC POWER CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 295 F. 3d 918.

No. 02–1131. NKOUNKOU *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 35 Fed. Appx. 680.

No. 02–1251. HEINRICH ET AL. *v.* SWEET ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 308 F. 3d 48.

No. 02–1276. DE LA O, ADMINISTRATRIX FOR THE ESTATE OF DE LA O *v.* HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 02–1292. NEMESIS VERITAS, L. P., FKA MCMAHAN & CO., ET AL. *v.* TOTO. C. A. 11th Cir. Certiorari denied. Reported below: 311 F. 3d 1077.

No. 02–1297. SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP *v.* CITY OF EDMOND, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 310 F. 3d 1258.

No. 02–1308. HO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 311 F. 3d 589.

No. 02–1311. PHILLIPS, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF PHILLIPS, DECEASED *v.* MONROE COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 311 F. 3d 369.

No. 02–1342. ADAMS *v.* CITY OF AUBURN, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 811.

No. 02–1422. BRELSFORD ET AL. *v.* RUTTER & WILBANKS CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 314 F. 3d 1180.

No. 02–1452. CITY OF CINCINNATI, OHIO *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 310 F. 3d 484.

No. 02–1454. SEMINOLE ENTERTAINMENT, INC., DBA RACHEL'S *v.* CITY OF CASSELBERRY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 813 So. 2d 186.

No. 02–1457. PTASYNSKI ET AL. *v.* RUTTER & WILBANKS CORP. ET AL.; and BAILEY ET AL. *v.* RUTTER & WILBANKS CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 498 (first judgment) and 501 (second judgment).

No. 02–1458. DAZET ET AL., INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED *v.* FOSTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 318 F. 3d 644.

No. 02–1462. COHEN *v.* KREMEN. C. A. 9th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 746.

No. 02–1465. GODWIN *v.* MOORE, CHIEF JUSTICE, SUPREME COURT OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 958.

No. 02–1467. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–1468. GONZALEZ ET AL. *v.* KOKOT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 3d 311.

No. 02–1475. MEYER *v.* DRELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 483.

No. 02–1476. SHERIFF, WASHOE COUNTY, NEVADA, ET AL. *v.* BURDG ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 118 Nev. 853, 59 P. 3d 484.

No. 02–1477. NIVENS ET AL. *v.* GILCHRIST. C. A. 4th Cir. Certiorari denied. Reported below: 319 F. 3d 151.

No. 02–1479. BISHAY *v.* CITIZENS BANK OF MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 56 Mass. App. 1104, 776 N. E. 2d 1040.

No. 02–1480. ISTVANIK *v.* ROGGE. C. A. 3d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 533.

No. 02–1561. BOWLES *v.* HARRIS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–1565. SWARTZ *v.* PATENT AND TRADEMARK OFFICE, BOARD OF PATENT APPEALS AND INTERFERENCES. C. A. Fed. Cir. Certiorari denied. Reported below: 50 Fed. Appx. 422.

No. 02–1567. MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* PIRTLE. C. A. 9th Cir. Certiorari denied. Reported below: 313 F. 3d 1160.

No. 02–1602. HEALTHCARE RECOVERIES, INC. *v.* HAMILTON. C. A. 5th Cir. Certiorari denied. Reported below: 310 F. 3d 385.

No. 02–1614. WHARTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 320 F. 3d 526.

No. 02–8719. HOLDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 247 F. 3d 741.

No. 02–9096. ROBISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 887.

No. 02–9408. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 314 F. 3d 329.

No. 02–9418. SUN BEAR, AKA JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 307 F. 3d 747.

No. 02–9476. RIPKOWSKI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 61 S. W. 3d 378.

No. 02–9779. THOMAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 97 Ohio St. 3d 309, 779 N. E. 2d 1017.

No. 02–9852. BOTTENFIELD *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 77 S. W. 3d 349.

No. 02–9918. COOPER *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–9919. CHHOUN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–9921. COOMBS *v.* MYERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 187.

No. 02–9922. NORTON *v.* HOLDEN, GOVERNOR OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 666.

No. 02–9924. BARNHILL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 834 So. 2d 836.

No. 02–9925. MEADER *v.* HATHAWAY, SHERIFF, CADDO PARISH, LOUISIANA, ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 825 So. 2d 596.

No. 02–9926. ROGERS *v.* TARRANT COUNTY, TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 02–9928. SPECHT *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9929. SONNIER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 693.

No. 02–9933. CRUTCHER *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–9935. CHATMON *v.* EASTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 261.

No. 02–9938. CONTRERAS *v.* COLLINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 351.

No. 02–9942. COOPER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9944. MOORE *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 02–9958. ROSAS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–9965. BOYD *v.* WARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 849.

No. 02–9968. WHITE *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 02–9970. PHILLIPS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 806 So. 2d 964.

No. 02–9973. BAKER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 321 F. 3d 769.

No. 02–9978. MARTIN *v.* NEBRASKA BOARD OF PAROLE ET AL. Ct. App. Neb. Certiorari denied.

No. 02–9983. CLARK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–9984. COUSIN *v.* LENSING, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 310 F. 3d 843.

No. 02–9989. PARNELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 02–9996. HAAG *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 570 Pa. 289, 809 A. 2d 271.

No. 02–10001. MOSSO *v.* MATESANZ, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 02–10002. MURAWSKI *v.* MATTOLA. Super. Ct. Pa. Certiorari denied. Reported below: 808 A. 2d 258.

No. 02–10008. PARKER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10009. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 212.

No. 02–10010. BURTON *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–10012. ANGLETON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 773 N. E. 2d 915.

No. 02–10018. CARTER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 02–10027. OLIVER *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10048. PAGAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 830 So. 2d 792.

No. 02–10071. DRUMHELLER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 570 Pa. 117, 808 A. 2d 893.

No. 02–10076. WILSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–10090. MATHIS *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 02–10103. MICKEY *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Randolph County, N. C. Certiorari denied.

No. 02–10156. BOWMAN *v.* DRAGOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10166. DE URIOSTE *v.* FINN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 439.

No. 02–10182. DRAYTON *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10193. AGRAMONTE *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10194. ANDERSON *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10206. MURRAY *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10213. HUNES *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 02–10227. CRICHLOW *v.* KINGSBROOK JEWISH MEDICAL CENTER. C. A. 2d Cir. Certiorari denied. Reported below: 34 Fed. Appx. 31.

No. 02–10254. FRENCH *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–10275. ROARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 743.

No. 02–10276. SMITH *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 142.

No. 02–10288. BURKE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 806 A. 2d 457.

No. 02–10355. YOUNG *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10421. SCAFF-MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10431. CHAMBERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10473. ROSS *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10474. TISIUS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 92 S. W. 3d 751.

No. 02–10489. CASTRO *v.* ANDREWS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 655.

No. 02–10501. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10504. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 484.

No. 02–10508. HORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10522. NELSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10525. JACOB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 36.

No. 02–10527. LEACH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 794.

No. 02–10529. WALKER, AKA WARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 278.

No. 02–10531. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 319 F. 3d 291.

No. 02–10534. REDD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 318 F. 3d 778.

No. 02–10538. KING *v.* THOMS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 435.

No. 02–10540. HANNUM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 872.

No. 02–10541. GONZALEZ-RAMIREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 36.

No. 02–10545. STEWART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 892.

No. 02–10548. ARRINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 935.

No. 02–10551. RIVERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 1.

No. 02–10553. SANTORO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10554. STRONG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10557. MYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10561. BOWEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10563. NINO *v.* CASTERLINE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 241.

No. 02–10569. EVANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 318 F. 3d 1011.

No. 02–10570. DUKES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10571. ELGIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 659.

No. 02–10572. DEAR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10573. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 318 F. 3d 585.

No. 02–10577. TRAINOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–10579. ZUNIGA-HERNANDEZ *v.* REESE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 02–10581. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10582. TUNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 48 Fed. Appx. 420.

No. 02–10587. BRISENO-AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 120.

No. 02–10590. PERDOMO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10593. BIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10594. REYES-OLVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 121.

No. 02–10595. ARREOLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 55.

No. 02–10602. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 318.

No. 02–1471. WRIGHT *v.* EMC MORTGAGE CORP. ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 02–1507. TORROMEO ET AL. *v.* TOWN OF FREMONT, NEW HAMPSHIRE. Sup. Ct. N. H. Motions of Pacific Legal Foundation and Defenders of Property Rights for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 148 N. H. 640, 813 A. 2d 389.

Rehearing Denied

No. 02–7099. OGUNDE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 537 U. S. 1076;

No. 02–7635. CAHN *v.* UNITED STATES ET AL., 537 U. S. 1234;

No. 02–8385. FRANKLIN *v.* HENSON ET AL., 537 U. S. 1219;

No. 02–8458. PADILLA *v.* UNITED STATES, 537 U. S. 1220;

No. 02–8865. JENKINS *v.* UNIVERSAL AMERICAN MORTGAGE CORP., 538 U. S. 963;

No. 02–8973. PACK *v.* RUMSFELD, SECRETARY OF DEFENSE, 538 U. S. 951;

No. 02–9092. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 538 U. S. 985;

No. 02–9243. SHIVERS *v.* UNITED STATES, 538 U. S. 955;

No. 02–9432. WOODFIN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 538 U. S. 990; and

No. 02–9470. BRANNIC *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, 538 U. S. 991. Petitions for rehearing denied.

JUNE 10, 2003

Certiorari Denied

No. 02–11011 (02A1036). TRUEBLOOD *v.* INDIANA. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JUNE 11, 2003

Miscellaneous Order

No. 02A1052. IN RE JOHNSON. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

JUNE 12, 2003

Dismissal Under Rule 46

No. 02–1388. TOSCO CORP. ET AL. *v.* SAN FRANCISCO BAYKEEPER, INC. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 309 F. 3d 1153.

Certiorari Denied

No. 02–11146 (02A1055). TRUEBLOOD *v.* INDIANA PAROLE BOARD ET AL. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JUNE 16, 2003

Certiorari Granted—Vacated and Remanded

No. 01–1865. ODEN *v.* NORTHERN MARIANAS COLLEGE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nguyen* v. *United States*, *ante*, p. 69. Reported below: 284 F. 3d 1058.

Miscellaneous Orders

No. 02M101. MCKENZIE *v.* BROOKS, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 02M102. TROWBRIDGE *v.* DEPARTMENT OF THE TREASURY ET AL. Motion for leave to file objection in the nature of a writ of error denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and reimbursement of expenses granted, and the River Master is awarded a total of $7,172.37 for the period January 1 through March 31, 2003. [For earlier order herein, see, *e. g.*, 537 U. S. 806.]

No. 132, Orig. ALABAMA ET AL. *v.* NORTH CAROLINA. Motion for leave to file bill of complaint granted. Defendant is allowed 30 days within which to file an answer. [For earlier order herein, see 537 U. S. 806.]

No. 02–1318. ZAPATA HERMANOS SUCESORES, S. A. *v.* HEARTHSIDE BAKING CO., INC., DBA MAURICE LENELL COOKY CO. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 02–10791. IN RE MARTIN; and
No. 02–10815. IN RE MOORE. Petitions for writs of habeas corpus denied.

No. 02–10148. IN RE DOCKERAY. Petition for writ of mandamus denied.

No. 02–10029. IN RE REED. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 02–1016. TILL ET UX. *v.* SCS CREDIT CORP. C. A. 7th Cir. Certiorari granted. Reported below: 301 F. 3d 583.

No. 02–9065. MUHAMMAD, AKA MEASE *v.* CLOSE. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted, and certiorari granted limited to the following questions: "1. Whether a plaintiff who wishes to bring a § 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of *Heck* v. *Humphrey*, 512 U. S. 477 (1994). 2. Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (*i. e.*, his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck* v. *Humphrey*." Corinne Beckwith, Esq., of Washington, D. C., is appointed to serve as counsel for petitioner in this case. Reported below: 47 Fed. Appx. 738.

Certiorari Denied

No. 02–938. CASTLE ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 301 F. 3d 1328.

No. 02–1121. SANDSTAD *v.* CB RICHARDS ELLIS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 309 F. 3d 893.

No. 02–1178. MCKILLOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 301 F. 3d 1270.

No. 02–1186. PRONSOLINO ET AL. *v.* NASTRI, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, REGION 9, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 291 F. 3d 1123.

No. 02–1225. TOCCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 306 F. 3d 279.

No. 02–1271. CITY OF CHARLESTON, SOUTH CAROLINA *v.* A FISHERMAN'S BEST, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 310 F. 3d 155.

No. 02–1304. ESPLANADE PROPERTIES, LLC *v.* CITY OF SEATTLE, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 307 F. 3d 978.

No. 02–1314. KANSAS ET AL. *v.* ROBINSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 295 F. 3d 1183.

No. 02–1317. COOK *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 318 F. 3d 1334.

No. 02–1326. MICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 252.

No. 02–1344. DIAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 311 F. 3d 456.

No. 02–1353. TENENBAUM *v.* WHITE, SECRETARY OF THE ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 416.

No. 02–1355. BARSTOW *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 308 F. 3d 1038.

No. 02–1482. OAKLEY-AVALON, L. P. *v.* DEAN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 02–1487. IN RE MIDDLESTEAD. C. A. 11th Cir. Certiorari denied.

No. 02–1490. BANKS *v.* COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW ET AL. Ct. App. D. C. Certiorari denied. Reported below: 805 A. 2d 990.

No. 02–1493. CUMMINGS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* CONNELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 316 F. 3d 886.

No. 02–1494. RAMTULLA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 301 F. 3d 202.

No. 02–1495. MIGUEL *v.* BANK OF NEW YORK, TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT SERIES 1995 B, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 309 F. 3d 1161.

No. 02–1496. WRAY *v.* JOHNSON ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 118 Nev. 1161.

No. 02–1497. PAIVA ET VIR *v.* COUNTRYWIDE HOME LOANS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 371.

No. 02–1505. CAREY, WARDEN *v.* SAFFOLD. C. A. 9th Cir. Certiorari denied. Reported below: 312 F. 3d 1031.

No. 02–1506. TPI, AKA THAI PETROCHEMICAL INDUSTRY PUBLIC CO. LTD. ET AL. *v.* WINTER STORM SHIPPING, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 310 F. 3d 263.

No. 02–1508. MCNEIL *v.* SCOTLAND COUNTY, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 242.

No. 02–1519. MOSS ET UX., ON BEHALF OF THEIR MINOR CHILD, MOSS, ET AL. *v.* CARRIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 596.

No. 02–1520. BEHLEN *v.* MERRILL LYNCH & CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 311 F. 3d 1087.

No. 02–1528. CITY OF CHARLESTON, SOUTH CAROLINA, ET AL. *v.* FERGUSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 308 F. 3d 380.

No. 02–1535. DAISEY *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 272.

No. 02–1555. MARTIN ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 96 S. W. 3d 38.

No. 02–1556. GARAAS *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF NORTH DAKOTA ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 652 N. W. 2d 918.

No. 02–1585. BAYSTATE TECHNOLOGIES, INC. *v.* BOWERS, DBA HLB TECHNOLOGY. C. A. Fed. Cir. Certiorari denied. Reported below: 320 F. 3d 1317.

No. 02–1587. DAHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 F. 3d 976.

No. 02–1588. DENARDO *v.* BARRANS ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 59 P. 3d 266.

No. 02–1618. MOORING *v.* EAST CAROLINA UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 250.

No. 02–1621. ROCKEFELLER *v.* ABRAHAM, SECRETARY OF ENERGY. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 425.

No. 02–1639. HIBBARD *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 58 M. J. 71.

No. 02–1650. CARIBE-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 319 F. 3d 12.

No. 02–1659. RIVERA-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 319 F. 3d 12.

No. 02–8448. VIALVA *v.* UNITED STATES; and

No. 02–8492. BERNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 F. 3d 467.

No. 02–8960. URBAEZ, AKA ALCANTARA SANTANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 289.

No. 02–10025. QUINTERO *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10032. SMITH *v.* KIRBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 14.

No. 02–10034. STANTON *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 593.

No. 02–10037. BELTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10052. WILLIAMS *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 553.

No. 02–10053. HARVEY *v.* LOMASON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 389.

No. 02–10057. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 298 App. Div. 2d 414, 751 N. Y. S. 2d 405.

No. 02–10060. CORNTASSEL *v.* RAY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 784.

No. 02–10062. THOMAS *v.* LOVELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–10063. GARBUSH *v.* WORKERS' COMPENSATION APPEAL BOARD OF PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied.

No. 02–10069. BURKE *v.* DARK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 187.

No. 02–10073. CHENG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–10077. VETA *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 02–10078. McClaran *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10080. Harris *v.* Campbell, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 66.

No. 02–10081. Gamez *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 02–10082. Cook *v.* Lavan, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 02–10085. Carter *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 02–10093. Moore *v.* Kinney, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 320 F. 3d 767.

No. 02–10101. Weik *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 356 S. C. 76, 587 S. E. 2d 683.

No. 02–10104. Ervin *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10106. Hill *v.* Hunt et al. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 204.

No. 02–10110. Osteen *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 918.

No. 02–10119. Navarro *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 02–10125. Reese *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 02–10127. Pickens *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 02–10128. Binns *v.* Knowles, Warden. C. A. 9th Cir. Certiorari denied.

No. 02–10133. GOWANS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10135. HENRY *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 02–10136. HOWARD *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 810 So. 2d 588.

No. 02–10137. HOCUTT *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10141. ISRAEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 837 So. 2d 381.

No. 02–10146. HUTCHINSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–10150. CANTY *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 660.

No. 02–10152. KING *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 798.

No. 02–10153. BOZMAN *v.* CITY OF ELYRIA, OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 02–10162. NIXON *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–10172. BRITT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 02–10183. DISANTO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied.

No. 02–10186. SWANKO *v.* WINN-DIXIE STORES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 902.

No. 02–10190. PANKOV *v.* PRECISION INTERCONNECT, A DIVISION OF LUDLOW CO., LP. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 771.

No. 02–10202. LAKE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10212. FURTICK *v.* SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES. Sup. Ct. S. C. Certiorari denied. Reported below: 352 S. C. 594, 576 S. E. 2d 146.

No. 02–10228. MAUPIN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 860.

No. 02–10241. HOSEA *v.* HAMMONDS. C. A. 11th Cir. Certiorari denied.

No. 02–10244. GRUENWALD *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 30 Kan. App. 2d xxxii, 56 P. 3d 315.

No. 02–10253. FARGO *v.* PHILLIPS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 603.

No. 02–10266. BYNUM *v.* SPARKMAN, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 02–10281. BYRD *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10283. BATES *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10289. STEVENSON *v.* ST. LUKE'S HOSPITAL ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–10292. ROBERTSON *v.* LOUISIANA STATE UNIVERSITY MEDICAL CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 591.

No. 02–10321. SHANNON *v.* CROUSE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 809.

No. 02–10332. WEASE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 628.

No. 02–10340. MBAKPUO *v.* DISCIPLINARY COUNSEL, SUPREME COURT OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 98 Ohio St. 3d 177, 781 N. E. 2d 208.

No. 02–10357. MISELIS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 56 Mass. App. 1113, 779 N. E. 2d 1004.

No. 02–10368. BARNES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 144.

No. 02–10370. FORD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10387. CONLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10407. WILSON *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 319 F. 3d 477.

No. 02–10409. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10412. TURNER *v.* KAPTURE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 630.

No. 02–10420. RANDOLPH *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–10428. CHANDLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10449. COVINGTON *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION (two judgments). C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 276.

No. 02–10458. CHARLES, AKA MCGHEE *v.* UNITED STATES; and No. 02–10596. AUGUSTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 313 F. 3d 1278.

No. 02–10502. BEERY *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 312 F. 3d 948.

No. 02–10509. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10512. FOSTER *v.* PAINTER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 172.

No. 02–10516. HATFIELD *v.* FOX, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 161.

No. 02–10552. KORNAFEL *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 55 Fed. Appx. 551.

No. 02–10588. MERCADO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 333 Ill. App. 3d 994, 777 N. E. 2d 641.

No. 02–10591. EDMONSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 212.

No. 02–10592. ERNESTO CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 121.

No. 02–10597. PEARL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 324 F. 3d 1210.

No. 02–10598. KEEPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 666.

No. 02–10599. MARQUINA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10604. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10606. VIEUX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10608. GORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 14.

No. 02–10609. HERDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 257.

No. 02–10613. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 972.

No. 02–10614. CALIX-ZAPATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 121.

No. 02–10615. CASTRO-JIMENEZ *v.* UNITED STATES (Reported below: 61 Fed. Appx. 921); CUERO-VALENCIA *v.* UNITED STATES (61 Fed. Appx. 920); LARA-MACHUCA *v.* UNITED STATES (61 Fed. Appx. 922); VARGAS-SAUCEDO *v.* UNITED STATES (61 Fed. Appx. 920); ACOSTA-MONTES *v.* UNITED STATES (61 Fed. Appx. 919); BALDERAS-CANALES *v.* UNITED STATES (61 Fed. Appx. 922); HERNANDEZ-BAUTISTA *v.* UNITED STATES (61 Fed. Appx. 922); LICEA-FEREGRINO *v.* UNITED STATES (61 Fed. Appx. 922); RAMIREZ-HERNANDEZ *v.* UNITED STATES (61 Fed. Appx. 921); and SAAVEDRA-RIOS *v.* UNITED STATES (61 Fed. Appx. 922). C. A. 5th Cir. Certiorari denied.

No. 02–10616. REDHOUSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 257.

No. 02–10618. RICKETTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 317 F. 3d 540.

No. 02–10621. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10622. DAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10625. BECKSTEAD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 633.

No. 02–10626. OVANDO-ROCHOL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 121.

No. 02–10628. NUNGARAY-BELTRAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 909.

No. 02–10631. DAY *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 211.

No. 02–10633. PEYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10639. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 587.

No. 02–10642. PEPPERS, AKA CAIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 58 Fed. Appx. 940.

No. 02–10643. MORONTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 56 Fed. Appx. 6.

No. 02–10649. RUBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 406.

No. 02–10654. PHILOGENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 932.

No. 02–10656. BARBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 175.

No. 02–10660. CASTILLO *v.* UNITED STATES; JESSE *v.* UNITED STATES; MCNEAL *v.* UNITED STATES; NAGEL *v.* UNITED STATES; RIVERA *v.* UNITED STATES; SHERIDAN *v.* UNITED STATES; and THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920 (fifth and seventh judgments), 921 (first and second judgments), and 922 (third judgment); 67 Fed. Appx. 245 (fourth judgment) and 246 (sixth judgment).

No. 02–10664. ZHANG AI PING, AKA AH GOW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 879.

No. 02–10667. TARIN-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 243.

No. 02–10669. AYALA-BERMUDES, AKA AYALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 917.

No. 02–10671. DE LA GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 918.

No. 02–10677. MUNOZ-MOSQUERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10680. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 205.

No. 02–10682. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10686. HENDERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 320 F. 3d 92.

No. 02–10687. HANNAH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 416.

No. 02–10688. FLORES-FLORES *v.* UNITED STATES; HERNANDEZ PRADO *v.* UNITED STATES; LARA-QUINTANILLA *v.* UNITED STATES; SOLARES-CUBA *v.* UNITED STATES; GARCIA-SANCHEZ *v.* UNITED STATES; ROSALES *v.* UNITED STATES; RODRIGUEZ-PEREZ *v.* UNITED STATES; and MONDRAGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920 (first judgment), 921 (third through eighth judgments), and 922 (second judgment).

No. 02–10698. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 731.

No. 02–10699. MILLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10706. DAVIS, AKA SWANSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 719.

No. 02–712. PATTEN *v.* WAL-MART STORES EAST, INC. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 300 F. 3d 21.

No. 02–1485. TOWN OF MIDDLEBURY, CONNECTICUT, ET AL. *v.* GOODRICH CORP., FKA B. F. GOODRICH CO., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 311 F. 3d 154.

No. 02–1339. ILLINOIS *v.* COX. App. Ct. Ill., 5th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 318 Ill. App. 3d 161, 739 N. E. 2d 1066.

No. 02–1425. BELL, WARDEN *v.* HOUSE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 311 F. 3d 767.

No. 02–10105 (02A949). HILL *v.* HILL ET AL. Sup. Ct. N. C. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied. Certiorari denied. Reported below: 356 N. C. 301, 570 S. E. 2d 507.

Rehearing Denied

No. 02–1194. CAMPBELL *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 538 U. S. 978;

No. 02–1259. STEVENS *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, 538 U. S. 979;

No. 02–1296. BROWN, SPECIAL REPRESENTATIVE FOR REEVES, DECEASED *v.* MUND ET AL., 538 U. S. 979;

No. 02–8686. BEGOVIC *v.* CITY OF DOVER, NEW HAMPSHIRE, 538 U. S. 949;

No. 02–8964. SLATE *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, 538 U. S. 982;

No. 02–8984. SWAFFORD *v.* FLORIDA, 538 U. S. 982;

No. 02–9029. VAUGHN *v.* MONEY, WARDEN, 538 U. S. 984;

No. 02–9110. DRAGER *v.* ILLINOIS, 538 U. S. 986;

No. 02–9224. BENJAMIN-ANDERSON *v.* FLORIDA POWER CORP. ET AL., 538 U. S. 1003; and

No. 02–9593. BOYD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL., 538 U. S. 1018. Petitions for rehearing denied.

No. 02–889. CRUMP *v.* UNITED STATES ET AL., 538 U. S. 922; and

No. 02–8084. JOHNSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 537 U. S. 1206. Motions for leave to file petitions for rehearing denied.

JUNE 17, 2003

Dismissal Under Rule 46

No. 02–6980. STOKES, AKA MUHAMMED *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 40 Fed. Appx. 610.

Certiorari Denied

No. 02–11122 (02A1047). MARTIN *v.* MITCHELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 280 F. 3d 594.

JUNE 19, 2003

Miscellaneous Order

No. 02–1674. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1675. National Rifle Assn. et al. *v.* Federal Election Commission et al.;

No. 02–1676. Federal Election Commission et al. *v.* McConnell, United States Senator, et al.;

No. 02–1702. McCain, United States Senator, et al. *v.* McConnell, United States Senator, et al.;

No. 02–1727. Republican National Committee et al. *v.* Federal Election Commission et al.;

No. 02–1733. National Right to Life Committee, Inc., et al. *v.* Federal Election Commission et al.;

No. 02–1734. American Civil Liberties Union *v.* Federal Election Commission et al.;

No. 02–1740. Adams et al. *v.* Federal Election Commission et al.;

No. 02–1747. Paul, United States Congressman, et al. *v.* Federal Election Commission et al.;

No. 02–1753. California Democratic Party et al. *v.* Federal Election Commission et al.;

No. 02–1755. American Federation of Labor and Congress of Industrial Organizations et al. *v.* Federal Election Commission et al.; and

No. 02–1756. Chamber of Commerce of the United States et al. *v.* Federal Election Commission et al. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 911.] Briefs of the parties who were plaintiffs in the District Court are not to exceed 50 pages for the opening briefs and 20 pages for the reply briefs, except that the plaintiffs in No. 02–1674 may file an opening brief not to exceed 75 pages, and the political party plaintiffs in Nos. 02–1727, 02–1733, and 02–1753 may file a consolidated opening brief not to exceed 100 pages. The Solicitor General may file a brief not to exceed 140 pages, and the intervenor-defendants may file a brief not to exceed 75 pages.

June 23, 2003

Certiorari Granted—Vacated and Remanded

No. 02–7118. Gomes, aka Keaton *v.* United States. C. A. 2d 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 *Sell* v. *United States*, *ante*, p. 166. Reported below: 289 F. 3d 71.

Certiorari Dismissed

No. 02–10475. SMITH *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. 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–2348. IN RE DISBARMENT OF APPLEBERRY. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. D–2349. IN RE DISBARMENT OF DANERI. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. D–2350. IN RE DISBARMENT OF CARSEY. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. D–2351. IN RE DISBARMENT OF LAYER. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. D–2352. IN RE DISBARMENT OF MONAHAN. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. D–2353. IN RE DISBARMENT OF GIBBONS. Disbarment entered. [For earlier order herein, see 538 U. S. 903.]

No. 02M76. IN RE HERRING ET AL. Motion for leave to file petition for writ of error *coram nobis* denied.

No. 02M103. HALL *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 01–1531. MAYNES *v.* COLORADO, 536 U. S. 906. Motion of petitioner to strike petition for writ of certiorari denied.

No. 02–10934. IN RE HUTCHING. Petition for writ of habeas corpus denied.

No. 02–10175. IN RE BRUNER; and
No. 02–10335. IN RE CLARK. Petitions for writs of mandamus denied.

Certiorari Granted

No. 02–1389. UNITED STATES *v.* GALLETTI ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 314 F. 3d 336.

No. 02–1238. NIXON, ATTORNEY GENERAL OF MISSOURI *v.* MISSOURI MUNICIPAL LEAGUE ET AL.;

No. 02–1386. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* MISSOURI MUNICIPAL LEAGUE ET AL.; and

No. 02–1405. SOUTHWESTERN BELL TELEPHONE, L. P., FKA SOUTHWESTERN BELL TELEPHONE CO. *v.* MISSOURI MUNICIPAL LEAGUE ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 299 F. 3d 949.

No. 02–1667. TENNESSEE *v.* LANE ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 315 F. 3d 680.

Certiorari Denied

No. 02–1123. ASHCROFT, ATTORNEY GENERAL *v.* SINGH. C. A. 9th Cir. Certiorari denied. Reported below: 295 F. 3d 1037.

No. 02–1350. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* FIRST UNITARIAN CHURCH OF SALT LAKE CITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 308 F. 3d 1114.

No. 02–1364. WIENER *v.* LAWRENCE-PICASO, INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 295 App. Div. 2d 273, 744 N. Y. S. 2d 392.

No. 02–1374. ALBRECHTSEN *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM. C. A. 7th Cir. Certiorari denied. Reported below: 309 F. 3d 433.

No. 02–1384. JOE'S STONE CRAB, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 296 F. 3d 1265.

No. 02–1393. SAUCERMAN ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 241.

No. 02–1464. SNYDER, WARDEN, ET AL. *v.* ROSALES-GARCIA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 322 F. 3d 386.

No. 02–1512. ARBON STEEL & SERVICE CO., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 315 F. 3d 1332.

No. 02–1516. ISI INTERNATIONAL, INC. *v.* BORDEN LADNER GERVAIS, LLP, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 316 F. 3d 731.

No. 02–1518. SANDERS *v.* MAY DEPARTMENT STORES CO. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 940.

No. 02–1526. POWELL *v.* ALLEGHANY CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 18.

No. 02–1527. ROGALSKI *v.* JANSEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 53 Fed. Appx. 227.

No. 02–1530. FURST ET AL. *v.* FEINBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 94.

No. 02–1531. FINDLEY *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 213 W. Va. 80, 576 S. E. 2d 807.

No. 02–1533. NELSON *v.* COLEMAN. Sup. Ct. Ala. Certiorari denied. Reported below: 881 So. 2d 549.

No. 02–1534. BODELL *v.* ANDERSON ET AL. Ct. App. Ky. Certiorari denied.

No. 02–1536. BOROUGH OF TENAFLY, NEW JERSEY, ET AL. *v.* TENAFLY ERUV ASSN., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 309 F. 3d 144.

No. 02–1538. MARTIN *v.* BMW MANUFACTURING CORP. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 143.

No. 02–1542. TANCREDI ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 316 F. 3d 308.

No. 02–1548. NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES *v.* ESTATE OF RADUAZO, DECEASED. Sup. Ct. N. H. Certiorari denied. Reported below: 148 N. H. 687, 814 A. 2d 147.

No. 02–1551. GAYMAN *v.* PRINCIPAL FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 311 F. 3d 851.

No. 02–1554. GADDA *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–1560. VENGADASALAM *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 327.

No. 02–1571. DWIGHT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 288.

No. 02–1586. SELIMI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 854.

No. 02–1589. BALDI ET UX. *v.* FARRIN ET AL. C. A. 1st Cir. Certiorari denied.

No. 02–1598. BISHOP *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 493.

No. 02–1599. NEBRASKA PUBLIC SERVICE COMMISSION *v.* LINCOLN ELECTRIC SYSTEM ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 265 Neb. 70, 655 N. W. 2d 363.

No. 02–1601. RATCLIFF *v.* EXXONMOBIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 210.

No. 02–1622. WEAVER *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–1630. WALLACE *v.* RELIANCE STANDARD LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 318 F. 3d 723.

No. 02–1652. CITY OF CHICAGO, ILLINOIS, ET AL. *v.* NEWSOME. C. A. 7th Cir. Certiorari denied. Reported below: 319 F. 3d 301.

No. 02–1654. VETERINARY SURGICAL CONSULTANTS, P. C. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 02–1682. YEAGLE DRYWALL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 100.

No. 02–1664. BECHHOEFER *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 312 F. 3d 563.

No. 02–1669. SWIFT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 318 F. 3d 250.

No. 02–1706. SWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 886.

No. 02–8550. MURPHY *v.* REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES. Sup. Ct. Va. Certiorari denied.

No. 02–9745. DORSEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–9792. WILLIAMS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 97 S. W. 3d 462.

No. 02–10107. HUTCHISON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 303 F. 3d 720.

No. 02–10160. MENOTTI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1156, 811 N. E. 2d 788.

No. 02–10161. NICKENS *v.* PEARSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 730.

No. 02–10165. CHALFANT *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 02–10167. BARBER *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–10169. TYNER *v.* SIZER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 145.

No. 02–10170. WILLIAMS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 02–10176. LUTHER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 02–10177. PIERRE *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 02–10178. ROBINSON *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 632.

No. 02–10179. STOCKS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 02–10181. CURTIS *v.* OHIO. Ct. App. Ohio, Jefferson County. Certiorari denied.

No. 02–10184. WHITE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10185. CALLOWAY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 301.

No. 02–10187. APPLEBERRY *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 02–10188. ALEXANDER *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 823.

No. 02–10203. SARGENT *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 02–10210. GIRARD *v.* DONALD W. WYATT DETENTION FACILITY INC. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 50 Fed. Appx. 5.

No. 02–10211. GOMEZ *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 02–10215. HARMON *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 02–10216. HUEY *v.* RAYMOND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 329.

No. 02–10218. GARNER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10226. CRAWFORD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 716.

No. 02–10229. MCCLINTON *v.* KARLEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–10230. JONES *v.* COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 311 F. 3d 306.

No. 02–10232. JOHNSON *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–10234. HOPKINS *v.* INDETERMINATE SENTENCE REVIEW BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 43 Fed. Appx. 123.

No. 02–10236. GUYTON *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 02–10238. HENDERSON *v.* VISA U. S. A. INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 355.

No. 02–10239. HOSTETTER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 02–10240. HUNTER *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 867.

No. 02–10242. GLASS *v.* VANNATTA, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 02–10243. JONES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–10249. JOHNSON *v.* CORNELL CORRECTIONS, INC., ET AL. Sup. Ct. R. I. Certiorari denied.

No. 02–10251. HUSKETH *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 157.

No. 02–10252. GARY *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 02–10255. HARVEY *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10262. LEVER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 02–10263. JENKINS *v.* BRADSHAW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 570.

No. 02–10271. J. B. C. *v.* P. A. B. Super. Ct. Pa. Certiorari denied. Reported below: 813 A. 2d 897 and 898.

No. 02–10272. MARVEL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 829 A. 2d 141.

No. 02–10279. ZIMMERMAN *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 174.

No. 02–10280. ROBINSON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–10282. PATTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10285. PRENATT *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 02–10287. RIVERA *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 431.

No. 02–10293. SPYCHALA *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–10295. FARRIS *v.* NATIONSBANC MORTGAGE CORP. ET AL. Ct. App. Ga. Certiorari denied.

No. 02–10297. CHAVEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 832 So. 2d 730.

No. 02–10302. MORRIS, AKA MARKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 02–10309. WRIGHT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–10322. BROWN *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 322 F. 3d 768.

No. 02–10323. APPLEBY *v.* RECHT, JUDGE, CIRCUIT COURT OF WEST VIRGINIA, OHIO COUNTY. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 213 W. Va. 503, 583 S. E. 2d 800.

No. 02–10337. COLBY *v.* CZERNIAK, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 183 Ore. App. 311, 52 P. 3d 1058.

No. 02–10348. DIAZ ARMAS *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–10399. DYSON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–10411. THOMPSON *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 02–10424. LIGHTNER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 02–10461. HARVEY *v.* WARD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 02–10481. BAIDAS *v.* JENIFER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied.

No. 02–10492. DOUGLAS *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 02–10505. TEAL *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 776.

No. 02–10506. WILLIAMS *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 259.

No. 02–10510. KING *v.* KELCHNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MUNCY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10515. HILL *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 02–10518. HACKNEY *v.* TURNER, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 02–10537. BITTICK *v.* MOONEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 664.

No. 02–10544. SHARWELL *v.* SHARWELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 847.

No. 02–10567. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–10629. CARROLL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 356 N. C. 526, 573 S. E. 2d 899.

No. 02–10645. ARREOLA RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 122.

No. 02–10655. BARTLETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10657. ALLEN *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 02–10675. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 668.

No. 02–10679. WALTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 129.

No. 02–10683. WISE *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10685. GOMEZ-HERRERA, AKA GOMEZ, AKA HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 245.

No. 02–10697. MAREK *v.* GROSSHANS. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 841.

No. 02–10701. GRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 319 F. 3d 1174.

No. 02–10704. WYNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 917.

No. 02–10705. RIVERA-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 322 F. 3d 350.

No. 02–10710. GUEVARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 595.

No. 02–10713. WESNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 501.

No. 02–10714. TOLENTINO-TAVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 398.

No. 02–10718. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 315 F. 3d 399.

No. 02–10722. GANT *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10723. PEVELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10727. WALTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 321 F. 3d 442.

No. 02–10729. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 106.

No. 02–10730. ORTEGA-BRITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 311 F. 3d 1136.

No. 02–10733. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 419.

No. 02–10736. ARAUJO-AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10737. MADRID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 423.

No. 02–10738. RUIZ-MOTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 917.

No. 02–10739. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 318.

No. 02–10741. DIAZ-CLARK, AKA LNU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 319.

No. 02–10742. WHITESELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 314 F. 3d 1251.

No. 02–10743. VILLAREAL-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 322.

No. 02–10746. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10747. CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10749. CARLISLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 311 F. 3d 866.

No. 02–10750. DINNALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 02–10754. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 638.

No. 02–10759. CORONA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 245.

No. 02–10764. WALLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 02–10765. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 698.

No. 02–10772. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 301 F. 3d 59.

No. 02–10773. BOUCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 869.

No. 02–10776. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920.

No. 02–10777. ORTEGA-TINOCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 920.

No. 02–10781. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 211.

No. 02–10782. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10783. SANTIAGO RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 869.

No. 02–10784. RIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 314 F. 3d 796.

No. 02–10785. SOROLA-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 245.

No. 02–10787. WINEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 73.

No. 02–10788. NEGRON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 02–10793. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10807. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 901.

No. 02–10821. WHITTENBURG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 02–10822. GARCIA-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10823. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 421.

No. 02–10825. GARZA-HERNANDEZ *v.* UNITED STATES (Reported below: 61 Fed. Appx. 921); PEREZ-HUERTA *v.* UNITED STATES (61 Fed. Appx. 922); ZAPATA-MARTINEZ *v.* UNITED STATES (61 Fed. Appx. 921); SOLIS-BRIONES *v.* UNITED STATES (61 Fed. Appx. 920); CARBAJAL-TAGLE *v.* UNITED STATES (61 Fed. Appx. 921); MARTINEZ-RODRIGUEZ *v.* UNITED STATES (61 Fed. Appx. 920); SALINAS-RODRIGUEZ *v.* UNITED STATES (61 Fed. Appx. 922); CORTES-GALLEGOS *v.* UNITED STATES (61 Fed. Appx. 922); MENDOZA-MARTINEZ *v.* UNITED STATES (61 Fed. Appx. 921); HERNANDEZ-HERNANDEZ *v.* UNITED STATES (61 Fed. Appx. 922); GONZALEZ-MEDRANO *v.* UNITED STATES (61 Fed. Appx. 921); MELGAR-PEREZ *v.* UNITED STATES (67 Fed. Appx. 243); BARDALES STRURBER, AKA FIGUEROA-LANDEROS *v.* UNITED STATES (67 Fed. Appx. 243); AMAYA-ZAPATA *v.* UNITED STATES (67 Fed. Appx. 243); CATETE-FLORES, AKA MORENO *v.* UNITED STATES (67 Fed. Appx. 243); DELGADO-MEDELLIN *v.* UNITED STATES (67 Fed. Appx. 243); GUILLERMO PARRA *v.* UNITED STATES (67 Fed. Appx. 243); SANCHEZ-POMPA *v.* UNITED STATES (67 Fed. Appx. 246); MENDOZA-JIMENEZ, AKA JIMENEZ MENDOZA *v.* UNITED STATES (67 Fed. Appx. 246); ESPINOSA-VALLES, AKA ESPINOZA *v.* UNITED STATES (67 Fed. Appx. 246); GONZALEZ-DAVILA *v.* UNITED STATES (67 Fed. Appx. 246); SALAZAR-PALACIOS *v.* UNITED STATES (67 Fed. Appx. 247); YANEZ NORIEGA *v.* UNITED STATES (67 Fed. Appx. 246); GALLEGOS-GARZA *v.* UNITED STATES (67 Fed. Appx. 246); and PEREZ-MEZA *v.* UNITED STATES (67 Fed. Appx. 247). C. A. 5th Cir. Certiorari denied.

No. 02–10827. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 325 F. 3d 1032.

No. 02–10828. BAUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 63.

No. 02–10831. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–1305. DICKSON ET AL. *v.* MICROSOFT CORP. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 309 F. 3d 193.

No. 02–1514. SWARTZ *v.* SCHERING-PLOUGH CORP. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 02–1591. NEBRASKA TELECOMMUNICATIONS ASSN. ET AL. *v.* CITY OF LINCOLN, NEBRASKA, DBA LINCOLN ELECTRIC SYSTEM. Sup. Ct. Neb. Motion of Independent Telephone and Telecommunications Alliance et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 265 Neb. 70, 655 N. W. 2d 363.

Rehearing Denied

No. 01–10784. MORRISON *v.* UNITED STATES, 537 U. S. 863;

No. 02–1138. STEPHENS *v.* UNION CARBIDE CORP. ET AL., 538 U. S. 961;

No. 02–1208. MEADE *v.* DECISIONS OF THE ORPHANS' COURT FOR ANNE ARUNDEL COUNTY, MARYLAND, ET AL. (three judgments), 538 U. S. 998;

No. 02–1266. MCDONALD *v.* TENNESSEE, 538 U. S. 1025;

No. 02–1274. MIDDLESTEAD *v.* TAYLOR, CIRCUIT JUDGE, DADE COUNTY, FLORIDA, ET AL., 538 U. S. 1013;

No. 02–1412. BIRD *v.* DAVIS, GOVERNOR OF CALIFORNIA, ET AL., 538 U. S. 1014;

No. 02–7612. BROOKS *v.* WALLS, WARDEN, 538 U. S. 1001;

No. 02–8659. SMITH *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL., 538 U. S. 948;

No. 02–9044. HALL *v.* LENDIS, 538 U. S. 984;

No. 02–9108. CROWELL *v.* MISSISSIPPI ET AL., 538 U. S. 986;

No. 02–9221. PALMER *v.* DEPARTMENT OF JUSTICE ET AL., 538 U. S. 987;

No. 02–9244. IN RE SACCO, 538 U. S. 998;

No. 02–9285. VERA *v.* OGDEN CITY, UTAH, 538 U. S. 1014;

No. 02–9291. BOLTZ *v.* UNITED STATES, 538 U. S. 968;

No. 02–9335. NEWLAND *v.* TURPIN, WARDEN, 538 U. S. 1015;

No. 02–9363. STROUPE *v.* TANDY CORP. ET AL., 538 U. S. 1004;

No. 02–9364. BROWN *v.* FLORIDA, 538 U. S. 1004;

No. 02–9678. ADAMS *v.* TEXAS, 538 U. S. 1020;

No. 02–9782. BOONE *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 538 U. S. 1022; and

No. 02–9916. IN RE PEDRAZA, 538 U. S. 997. Petitions for rehearing denied.

JUNE 24, 2003

Dismissal Under Rule 46

No. 02–1563. SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA *v.* IOWA MANAGEMENT & CONSULTANTS, INC. Sup. Ct. Iowa. Certiorari dismissed under this Court's Rule 46.1. Reported below: 656 N. W. 2d 167.

JUNE 27, 2003

Affirmed on Appeal

No. 02–1577. CITY OF COMBES, TEXAS, ET AL. *v.* EAST RIO HONDO WATER SUPPLY CORP. ET AL. Affirmed on appeal from D. C. S. D. Tex. Reported below: 244 F. Supp. 2d 778.

Certiorari Granted—Vacated and Remanded

No. 02–583. LIMON *v.* KANSAS. Ct. App. Kan. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lawrence* v. *Texas*, *ante*, p. 558. Reported below: 30 Kan. App. 2d xxxv, 41 P. 3d 303.

Certiorari Granted—Remanded

No. 02–733. GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA ET AL. *v.* GARAMENDI, INSURANCE COMMISSIONER, STATE OF CALIFORNIA. C. A. 9th Cir. The Court reversed the judgment below in *American Ins. Assn.* v. *Garamendi*, *ante*, p. 396. Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 296 F. 3d 832.

Certiorari Dismissed

No. 02–10444. SHELTON *v.* COFFMAN ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 02–10446. MCBRIDE *v.* GEORGIA DEPARTMENT OF CORRECTIONS 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–2336. IN RE DISBARMENT OF KLIMOW. Disbarment entered. [For earlier order herein, see 537 U. S. 1183.]

No. D–2354. IN RE DISBARMENT OF PORRO. Disbarment entered. [For earlier order herein, see 538 U. S. 919.]

No. 02M89. MEDINA *v.* UNITED STATES. Renewed motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 02M104. STANDARD *v.* UNITED STATES;
No. 02M105. SIMS *v.* NEW PROVIDENCE ET AL.;
No. 02M107. MYERS *v.* DEPARTMENT OF AGRICULTURE; and
No. 02M108. BROWN *v.* HENRY, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02M106. JONES *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 02–182. GEORGIA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. D. C. D. C. [Probable jurisdiction noted, 537 U. S. 1151.] Motion of appellant to dispense with printing the joint appendix granted.

No. 02–693. LAMIE *v.* UNITED STATES TRUSTEE. C. A. 4th Cir. [Certiorari granted, 538 U. S. 905.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 02–1774. IN RE RIGGS ET AL. Motion of petitioners to expedite consideration of petition for writ of mandamus and/or prohibition denied.

No. 02–9486. SLAGEL *v.* RUTH ET AL. App. Ct. Ill., 5th Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [538 U. S. 1028] denied.

No. 02–10324. REGAN *v.* GOVERNING BOARD OF THE SONORA UNION HIGH SCHOOL DISTRICT ET AL. Ct. App. Cal., 5th App. Dist.; and

No. 02–10638. JASKOT *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 18, 2003, 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. 02–1596. IN RE HEIMBECKER; and

No. 02–10326. IN RE BARCLAY. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 02–1580. VIETH ET AL. *v.* JUBELIRER, PRESIDENT OF THE PENNSYLVANIA SENATE, ET AL. Appeal from D. C. M. D. Pa. Probable jurisdiction noted. Reported below: 241 F. Supp. 2d 478.

Certiorari Granted

No. 02–458. RAYMOND B. YATES, M. D., P. C. PROFIT SHARING PLAN ET AL. *v.* HENDON, TRUSTEE. C. A. 6th Cir. Certiorari granted. Reported below: 287 F. 3d 521.

No. 02–857. HOUSEHOLD CREDIT SERVICES, INC., ET AL. *v.* PFENNIG. C. A. 6th Cir. Certiorari granted. Reported below: 295 F. 3d 522.

No. 02–1377. DOE *v.* CHAO, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari granted. Reported below: 306 F. 3d 170.

No. 02–626. SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL. C. A. 11th Cir. Motions of Pacific Legal Foundation, Lake Worth Drainage District et al., Florida Fruit and Vegetable Association et al., National Water Resources Association et al., and City of New York et al. for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 280 F. 3d 1364.

Certiorari Denied

No. 02–117. MINNESOTA *v.* MARTIN, GUARDIAN AD LITEM FOR HOFF. Sup. Ct. Minn. Certiorari denied. Reported below: 642 N. W. 2d 1.

No. 02–197. MONSANTO CO. *v.* BAYER CROPSCIENCE, S. A. C. A. Fed. Cir. Certiorari denied. Reported below: 284 F. 3d 1323.

No. 02–429. DETHMERS MANUFACTURING CO., INC. *v.* AUTOMATIC EQUIPMENT MANUFACTURING CO. C. A. Fed. Cir. Certiorari denied. Reported below: 272 F. 3d 1365.

No. 02–434. WOODFORD, WARDEN *v.* KARIS; and
No. 02–6265. KARIS *v.* WOODFORD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 283 F. 3d 1117.

No. 02–563. AMERICAN COALITION OF LIFE ACTIVISTS ET AL. *v.* PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 290 F. 3d 1058.

No. 02–597. WOODFORD, WARDEN *v.* JENNINGS. C. A. 9th Cir. Certiorari denied. Reported below: 290 F. 3d 1006.

No. 02–815. CITY OF SACRAMENTO, CALIFORNIA, ET AL. *v.* BARDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 292 F. 3d 1073.

No. 02–1007. DUKE UNIVERSITY *v.* MADEY. C. A. Fed. Cir. Certiorari denied. Reported below: 307 F. 3d 1351.

No. 02–1213. XU LIU ET AL. *v.* PRICE WATERHOUSE LLP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 3d 749.

No. 02–1349. MERLINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 310 F. 3d 137.

No. 02–1409. CABLE CAR ADVERTISERS, INC., DBA CABLE CAR CHARTERS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 467.

No. 02–1419. SHENANGO INC. ET AL. *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 307 F. 3d 174.

No. 02–1430. KRZALIC ET AL. *v.* REPUBLIC TITLE CO. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 3d 875.

No. 02–1441. PAPPAS *v.* BLOOMBERG, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 290 F. 3d 143.

No. 02–1500. EYL *v.* CIBA-GEIGY CORP. ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 264 Neb. 582, 650 N. W. 2d 744.

No. 02–1545. ABRAMS ET AL. *v.* CITY OF SAN DIEGO, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 02–1550. LAL *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 703.

No. 02–1557. ROADEN *v.* DERMOTT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 332.

No. 02–1559. HARLOW CORP. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 56 Fed. Appx. 513.

No. 02–1562. MADIGAN *v.* NABISCO BRANDS, INC./RJ REYNOLDS CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 46 Fed. Appx. 329.

No. 02–1564. RANEY *v.* RANEY. Sup. Ct. Va. Certiorari denied.

No. 02–1570. COTTER, INDIVIDUALLY AND AS TRUSTEE OF THE VERLA DOYLE FAMILY TRUST *v.* BURKHALTER ET AL. Ct. App. Tenn. Certiorari denied.

No. 02–1573. JOHNSON *v.* BUFFALO POLICE DEPARTMENT. C. A. 2d Cir. Certiorari denied. Reported below: 46 Fed. Appx. 11.

No. 02–1575. SNYDER-FALKINHAM ET AL. *v.* STOCKBURGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 243.

No. 02–1578. CONRAIL, C/O TRANSPORTATION DISPLAYS, INC. *v.* SOCIETY CREATED TO REDUCE URBAN BLIGHT ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 772 A. 2d 1040.

No. 02–1582. YOUNG *v.* WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 57 Fed. Appx. 492.

No. 02–1592. MILLS ET AL. *v.* DAVIS, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 480.

No. 02–1600. PATEL *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 319 F. 3d 1317.

No. 02–1612. HOLLOWAY *v.* JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 836.

No. 02–1625. DAWKINS ET UX. *v.* WITT, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 318 F. 3d 606.

No. 02–1627. CAVELY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 318 F. 3d 987.

No. 02–1636. ALEMAN *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 320 F. 3d 687.

No. 02–1641. WILSON *v.* CIRCUIT COURT OF MADISON COUNTY, ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 855 So. 2d 489.

No. 02–1656. PHONOMETRICS, INC. *v.* WESTIN HOTEL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 319 F. 3d 1328.

No. 02–1661. MAHORNER *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 02–1683. WEAVER *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–1693. TRI, INC. *v.* BOISE CASCADE OFFICE PRODUCTS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 915.

No. 02–1714. NAGEL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 258 Wis. 2d 983, 654 N. W. 2d 95.

No. 02–1738. PROL *v.* PROL. Super. Ct. Pa. Certiorari denied. Reported below: 804 A. 2d 69.

No. 02–7489. ROSALES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 103.

No. 02–7669. GREY BEAR *v.* NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES. Sup. Ct. N. D. Certiorari denied. Reported below: 651 N. W. 2d 611.

No. 02–9131. BOWIE *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Catawba County, N. C. Certiorari denied.

No. 02–9456. LIPSCOMB *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 487.

No. 02–9825. GIRALDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 584.

No. 02–9907. HUSBAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 3d 247.

No. 02–9934. DEWITT *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 41 Fed. Appx. 481.

No. 02–10310. SHELTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 48 Fed. Appx. 106.

No. 02–10311. SMITH *v.* EHRLICH, GOVERNOR OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 45 Fed. Appx. 317.

No. 02–10312. STONE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10314. SHEARS *v.* MICHIGAN. Cir. Ct. Muskegon County, Mich. Certiorari denied.

No. 02–10315. SERRANO *v.* MEJIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 469.

No. 02–10325. SPIGNER *v.* AUSTIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 479.

No. 02–10329. GARRETT *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10331. WEST *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 02–10334. S. C. ET VIR *v.* W. F. S. ET AL. Sup. Ct. Miss. Certiorari denied.

No. 02–10338. CROWDER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10339. DUNLAP *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 301 F. 3d 873.

No. 02–10343. JONES *v.* MENDEZ, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 188.

No. 02–10346. HERNANDEZ, AKA HERNANDEZ LLANAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 02–10349. SCOTT *v.* 183RD DISTRICT COURT, HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–10351. BOWLING *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 642.

No. 02–10352. SHIELDS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–10366. KRONCKE *v.* SALDATE ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–10369. PANNELL *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 632.

No. 02–10379. DOORBAL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 837 So. 2d 940.

No. 02–10382. PATRICK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 02–10389. DEFOY *v.* MCCULLOUGH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 53 Fed. Appx. 199.

No. 02–10392. NASH *v.* BLUMEX U. S. A., INC. C. A. 2d Cir. Certiorari denied. Reported below: 50 Fed. Appx. 500.

No. 02–10393. PRIEST *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 243.

No. 02–10401. JACKSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 837 So. 2d 410.

No. 02–10402. ALONSO LECHUGA *v.* AYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–10410. WHITE *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 02–10415. MULAZIM, AKA CARPENTER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 635.

No. 02–10416. MCGHEE *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 02–10417. STEPHENS *v.* DAIMLERCHRYSLER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 817.

No. 02–10418. SHELTON *v.* MAKEL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 02–10419. SIMUEL *v.* CURRY, SUPERINTENDENT, POLK YOUTH INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 168.

No. 02–10422. BULLARD *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 491.

No. 02–10425. POWELL *v.* COWAN, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 02–10426. MOORE ET AL. *v.* JOHNSON, GOVERNOR OF NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 265.

No. 02–10427. MOORE *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 861.

No. 02–10433. BROWN *v.* MCGINNIS, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10436. KYLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 297 App. Div. 2d 558, 747 N. Y. S. 2d 155.

No. 02–10437. SMITH *v.* LEWIS, SUPERINTENDENT, HALES CREEK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 02–10442. AWIIS *v.* WASHINGTON DEPARTMENT OF CORRECTIONS. Ct. App. Wash. Certiorari denied.

No. 02–10443. ALVAREZ *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10445. AYRES *v.* EARNHARDT'S GILBERT DODGE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 921.

No. 02–10447. BRAUN *v.* PLASTOMER CORP. Ct. App. Mich. Certiorari denied.

No. 02–10450. CURTIS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 02–10485. BAINES *v.* HORNUNG, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 02–10491. SCHWARTZ *v.* WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 02–10507. VINNIE *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied.

No. 02–10565. JACKSON *v.* CROKER ET AL. C. A. 5th Cir. Certiorari denied.

No. 02–10566. OGUAGHA *v.* CRAVENER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 44 Fed. Appx. 651.

No. 02–10576. LAIR *v.* HORN ET AL. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 02–10603. WOMACK *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 678.

No. 02–10624. BERGLUND *v.* CITY OF MAPLEWOOD, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 805.

No. 02–10636. PEABODY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 02–10647. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 301 App. Div. 2d 663, 753 N. Y. S. 2d 872.

No. 02–10650. SANCHEZ *v.* WALTERS, SUPERINTENDENT, CASWELL CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 703.

No. 02–10653. SECRESS *v.* SECRESS. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 02–10662. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 678.

No. 02–10681. RUTLEDGE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 02–10702. GULLEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 02–10709. FRACTION *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 02–10717. ZHENGXING *v.* TOMLINSON, CHAIRMAN, UNITED STATES BROADCASTING BOARD OF GOVERNORS. C. A. D. C. Cir. Certiorari denied.

No. 02–10731. WHITAKER *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 53 Fed. Appx. 255.

No. 02–10745. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10767. McGrath *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 02–10770. Castillo-Perez *v.* United States (Reported below: 61 Fed. Appx. 920); Duran-Rivas *v.* United States (61 Fed. Appx. 922); Gabarete-Guardado *v.* United States (67 Fed. Appx. 246); Guillen-Segura *v.* United States (61 Fed. Appx. 921); Hernandez-Santiago *v.* United States (61 Fed. Appx. 920); Iraheta-Barrera, aka Diaz-Hernandez *v.* United States (61 Fed. Appx. 920); Jimenez-Aguilera *v.* United States (61 Fed. Appx. 921); Lanza-Chan *v.* United States (61 Fed. Appx. 921); Lopez-Guzman *v.* United States (67 Fed. Appx. 247); Lopez-Salas *v.* United States (61 Fed. Appx. 921); Ortiz-Zacarias *v.* United States (61 Fed. Appx. 920); Carlos Rivera *v.* United States (61 Fed. Appx. 920); Rodriguez *v.* United States (67 Fed. Appx. 246); Sanchez-Quijano *v.* United States (61 Fed. Appx. 920); Sanchez-Ramos *v.* United States (67 Fed. Appx. 246); Servin-Mendez *v.* United States (61 Fed. Appx. 920); Medellin Tovias *v.* United States (61 Fed. Appx. 921); Zamora-Ramirez *v.* United States (61 Fed. Appx. 921); Bolanos-Morales *v.* United States (61 Fed. Appx. 920); and Terminel-Barrios *v.* United States (67 Fed. Appx. 246). C. A. 5th Cir. Certiorari denied.

No. 02–10774. Beltran-Rodriguez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 51 Fed. Appx. 688.

No. 02–10780. Kennedy *v.* Mendez, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 52 Fed. Appx. 188.

No. 02–10797. Alva-Otoya *v.* United States (Reported below: 61 Fed. Appx. 920); Avila-Aguilar *v.* United States (61 Fed. Appx. 921); Castillo-Rosales, aka Castillo *v.* United States (61 Fed. Appx. 920); Mauricio Contreras *v.* United States (61 Fed. Appx. 920); Garcia-Sandoval *v.* United States (61 Fed. Appx. 920); Herrera-Muniz *v.* United States (61 Fed. Appx. 922); Mireles-Hernandez *v.* United States (61 Fed. Appx. 921); Mundo-Jimenez *v.* United States (61 Fed. Appx. 921); Ramirez-Sosa *v.* United States (61 Fed. Appx. 921); Rios-Garcia *v.* United States (61 Fed. Appx. 920); Ruiz-Lopez *v.* United States (61 Fed. Appx. 921); Sanchez-Ledezma *v.* United States (61 Fed. Appx. 921); Rodriguez-Castillo *v.*

UNITED STATES (64 Fed. Appx. 416); MORENO-CASTILLO *v.* UNITED STATES (67 Fed. Appx. 246); and URAPO-PACHECO *v.* UNITED STATES (67 Fed. Appx. 245). C. A. 5th Cir. Certiorari denied.

No. 02–10799. AKANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 54 Fed. Appx. 890.

No. 02–10802. WEEKS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 902.

No. 02–10805. MATHIESON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 317.

No. 02–10812. PENA ROSARIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 215.

No. 02–10813. PURCELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 921.

No. 02–10835. CLAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 420.

No. 02–10836. VAUGHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 02–10843. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 521.

No. 02–10845. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 02–10851. OLIVER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10852. O'LESKA *v.* WHITE, SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 320.

No. 02–10857. SANCHEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 921.

No. 02–10860. HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–10861. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 02–10864. RASHID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 02–10865. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 02–10866. DAY *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 716.

No. 02–10867. NEVAREZ NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 776.

No. 02–10869. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 315 F. 3d 972.

No. 02–10870. EADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 64 Fed. Appx. 874.

No. 02–10871. DELANCY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 319.

No. 02–10877. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 629.

No. 02–10883. JULIEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 318 F. 3d 316.

No. 02–10885. BREDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 878.

No. 02–10889. CURRIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 320 F. 3d 52.

No. 02–10891. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 02–10895. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 980.

No. 02–10900. MARTINEZ-ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 922.

No. 02–10907. MCCOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 02–10908. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 921.

No. 02–10911. PIERCEFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 327 F. 3d 690.

No. 02–10913. MARCELINO ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 588.

No. 02–10920. CUAUTLE-TAPIA *v.* UNITED STATES; and CORTEZ-VILLANUEVA, AKA TORRES-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 922 (first judgment) and 923 (second judgment).

No. 02–10921. WONG CHANG, AKA GONG LING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 59 Fed. Appx. 361.

No. 02–10923. DOMINGUEZ-DOMINGUEZ, AKA RIVERA-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 921.

No. 02–355. SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC. *v.* VEECK, DBA REGIONAL WEB. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 293 F. 3d 791.

No. 02–367. AMERICAN CYANAMID CO. *v.* GEYE ET AL. Sup. Ct. Tex. Motion of Croplife America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 79 S. W. 3d 21.

No. 02–649. DEE-K ENTERPRISES, INC., ET AL. *v.* HEVEAFIL SDN. BHD. ET AL. C. A. 4th Cir. Motion of American Antitrust Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 299 F. 3d 281.

No. 02–1149. KELLY, COMMISSIONER, NEW YORK CITY POLICE DEPARTMENT, ET AL. *v.* KRIMSTOCK ET AL. C. A. 2d Cir. Motion of respondent Valerie Krimstock for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 306 F. 3d 40.

No. 02–1411. BOEING CO. *v.* UNITED STATES EX REL. ROBY. C. A. 6th Cir. Motions of Chamber of Commerce of the United States of America and National Defense Industrial Association for

leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 302 F. 3d 637.

No. 02–1432. HEIMMERMANN ET AL. *v.* FIRST UNION MORTGAGE CORP.; and HIRSCH ET AL. *v.* BANKAMERICA CORP. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 305 F. 3d 1257 (first judgment); 58 Fed. Appx. 835 (second judgment).

No. 02–10383. MASON *v.* NORWEST BANK, N. A., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 53 Fed. Appx. 403.

No. 02–10373. WALTON *v.* SCHWARTZ, WARDEN. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 43 Fed. Appx. 131.

Rehearing Denied

No. 02–1018. WILSON *v.* JOHNSON, ACTING SECRETARY OF THE NAVY, 537 U. S. 1194;

No. 02–1378. BELL *v.* POTTER, POSTMASTER GENERAL, 538 U. S. 1000;

No. 02–1385. BELL *v.* POTTER, POSTMASTER GENERAL, 538 U. S. 1000;

No. 02–5521. YOUNG *v.* PATRICK ET AL., 537 U. S. 920;

No. 02–6207. IN RE PATTERSON-BEGGS, 537 U. S. 1070;

No. 02–6400. MATHIS *v.* UNITED STATES, 537 U. S. 984;

No. 02–8253. HUNT *v.* LEE COUNTY SHERIFF ET AL., 537 U. S. 1236;

No. 02–9045. SHABTAI *v.* GIULIANI ET AL., 538 U. S. 984;

No. 02–9052. COBAS *v.* BURGESS, 538 U. S. 984;

No. 02–9103. BROOKS *v.* HOOKS, WARDEN, ET AL., 538 U. S. 985;

No. 02–9117. IN RE DOPP, 538 U. S. 997;

No. 02–9162. SHABTAI *v.* CITY OF NEW YORK, NEW YORK, ET AL., 538 U. S. 1002;

No. 02–9307. DAVIS *v.* WILLIAMS, WARDEN, 538 U. S. 1015;

No. 02–9396. BENTLEY *v.* DELAWARE DEPARTMENT OF FAMILY SERVICES ET AL., 538 U. S. 989;

No. 02–9464. DUNCAN *v.* WOOD ET AL., 538 U. S. 1017;

No. 02–9783. BONN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 538 U. S. 1008;

No. 02–9902. THIBEAUX *v.* TOBIAS ET AL., 538 U. S. 1043;

No. 02–9937. ELDRIDGE *v.* STEPP, WARDEN, ET AL., 538 U. S. 1044; and

No. 02–10115. CAMPBELL *v.* UNITED STATES, 538 U. S. 1049. Petitions for rehearing denied.

JULY 1, 2003

Miscellaneous Order

No. 03A14. GILBERT *v.* OKLAHOMA. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. JUSTICE KENNEDY took no part in the consideration or decision of this application.

Certiorari Denied

No. 02–11255 (02A1073). SWISHER *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 325 F. 3d 225.

JULY 2, 2003

Dismissal Under Rule 46

No. 02–10894. PETERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 48 Fed. Appx. 348.

JULY 3, 2003

Miscellaneous Orders

No. 02A1005. HAWKINS *v.* UNITED STATES. Application for stay of sentence pending appeal, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 02A1060. PAUL *v.* MADISON APARTMENTS. Super. Ct. N. J., Passaic County, Special Civil Part. Application for stay of

judgment pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 02A1086. SANTIAGO *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. Application for stay of removal pending appeal, addressed to JUSTICE GINSBURG and referred to the Court, denied.

JULY 9, 2003

Miscellaneous Order

No. 03–5183 (03A26). IN RE NOEL. 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. 03–5168 (03A23). NOEL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 322 F. 3d 500.

No. 03–5224 (03A36). NOEL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Sup. Ct. Ark. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 353 Ark. 915, 120 S. W. 3d 599.

JULY 22, 2003

Certiorari Denied

No. 03–5372 (03A48). TOLES *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.

JULY 23, 2003

Miscellaneous Order

No. 03–5458 (03A68). IN RE RANSOM. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and

by him referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 02–10220 (03A27). RANSOM *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: 62 Fed. Appx. 557.

JULY 24, 2003

Dismissal Under Rule 46

No. 02–1483. HAMEROFF ET AL. *v.* AGENCY FOR HEALTH CARE ADMINISTRATION. Dist. Ct. App. Fla., 1st Dist. Certiorari dismissed under this Court's Rule 46.1. Reported below: 816 So. 2d 1145.

Miscellaneous Orders

No. 03A76. BRADSHAW, WARDEN *v.* COOEY. Application to vacate stay of execution of sentence of death entered by the United States District Court for the Northern District of Ohio on July 23, 2003, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. 03–5429 (03A62). IN RE COOEY. 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 mandamus and/or prohibition denied.

Certiorari Denied

No. 03–5254 (03A38). WILLINGHAM *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.

No. 03–5424 (03A60). JANECKA *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 03–5472 (03A69). COOEY *v.* OHIO. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 99 Ohio St. 3d 345, 792 N. E. 2d 720.

AUGUST 4, 2003

Miscellaneous Orders

No. 02–473. UNITED STATES *v.* BANKS. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1187.] Motion of the Solicitor General to allow David B. Salmons to argue *pro hac vice* granted.

No. 02–628. FREW, ON BEHALF OF HER DAUGHTER, FREW, ET AL. *v.* HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL. C. A. 5th Cir. [Certiorari granted, 538 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–749. RAYTHEON CO. *v.* HERNANDEZ. C. A. 9th Cir. [Certiorari granted, 537 U. S. 1187.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 02–1019. ARIZONA *v.* GANT. Ct. App. Ariz. [Certiorari granted, 538 U. S. 976.] Motion of National Association of Police Organizations for leave to file a brief as *amicus curiae* granted.

No. 02–1290. UNITED STATES POSTAL SERVICE *v.* FLAMINGO INDUSTRIES (USA) LTD. ET AL. C. A. 9th Cir. [Certiorari granted, 538 U. S. 1056.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 02–1674. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1675. NATIONAL RIFLE ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1676. FEDERAL ELECTION COMMISSION ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1702. MCCAIN, UNITED STATES SENATOR, ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1727. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1733. NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1734. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1740. ADAMS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1747. PAUL, UNITED STATES CONGRESSMAN, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1753. CALIFORNIA DEMOCRATIC PARTY ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1755. AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.; and

No. 02–1756. CHAMBER OF COMMERCE OF THE UNITED STATES ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 911.] Motion for divided argument of plaintiffs in Nos. 02–1674, 02–1727, 02–1733, 02–1734, 02–1753, 02–1755, and 02–1756 granted, except that 60 minutes are allotted for argument on Title I and § 213 of the Bipartisan Campaign Reform Act of 2002, and 50 minutes are allotted on the remainder of the challenged provisions. Motion of Emily Echols et al. and Barret Austin O'Brock for divided argument granted limited to 10 minutes for plaintiffs. Motions for divided argument of plaintiffs in Nos. 02–1675, 02–1740, and 02–1747 denied. Motion of the Solicitor General for divided argument granted.

Rehearing Denied

No. 01–7842. WOODALL *v.* UNITED STATES, 535 U. S. 1099;

No. 01–10370. MCCONE *v.* WOODHOUSE, ATTORNEY GENERAL OF WYOMING, 537 U. S. 842;

No. 02–1253. RIGGS ET AL. *v.* SAN JUAN COUNTY, UTAH, ET AL., *ante*, p. 902;

No. 02–1279. ASKEY ET UX. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, 538 U. S. 1013;

No. 02–1359. SCHAFLER *v.* FIELD ET AL., 538 U. S. 1034;

No. 02–1382. FISHER ET UX. *v.* NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE ET AL., 538 U. S. 1057;

No. 02–1440. MEADE *v.* DECISIONS OF THE ORPHANS COURT FOR ANNE ARUNDEL COUNTY ET AL., *ante*, p. 903;

No. 02–1455. SHARPENTER *v.* ILLINOIS, 538 U. S. 1035;

No. 02–1539. BESTOR *v.* UNITED STATES, *ante*, p. 904;
No. 02–5276. YOUNG *v.* WEIL-MCLAIN, 537 U. S. 905;
No. 02–5552. MCCARRIN *v.* UNITED STATES, 537 U. S. 1195;
No. 02–6775. MERRIWEATHER *v.* HOFBAUER, WARDEN, ET AL., 537 U. S. 1074;
No. 02–7517. EVANS *v.* MERIT SYSTEMS PROTECTION BOARD, 538 U. S. 980;
No. 02–8668. SORRI *v.* BELL ATLANTIC, 538 U. S. 932;
No. 02–8719. HOLDER *v.* UNITED STATES, *ante*, p. 916;
No. 02–9225. THOMPSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 538 U. S. 1003;
No. 02–9258. CHILTON *v.* VIRGINIA, 538 U. S. 1004;
No. 02–9315. IN RE MENDEZ, 538 U. S. 1012;
No. 02–9325. LANZY *v.* HARRISON, WARDEN, ET AL., 538 U. S. 1015;
No. 02–9420. DUBOSE *v.* ANDREWS ET AL., 538 U. S. 1036;
No. 02–9436. BURR *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 538 U. S. 1036;
No. 02–9440. GROSS *v.* OHIO, 538 U. S. 1037;
No. 02–9510. GIVANS *v.* UNITED STATES, 538 U. S. 992;
No. 02–9569. BRYSON ET AL. *v.* JOHNSTON, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY, ET AL., 538 U. S. 1039;
No. 02–9573. IN RE LOVE, 538 U. S. 1030;
No. 02–9577. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 538 U. S. 1040;
No. 02–9597. JONES *v.* UNITED STATES, 538 U. S. 1007;
No. 02–9669. GREEN *v.* UNITED STATES, 538 U. S. 1008;
No. 02–9683. HALL *v.* FLORIDA, 538 U. S. 1059;
No. 02–9764. IN RE MILLER, 538 U. S. 1055;
No. 02–9810. NGHIEM *v.* AGHA ET AL., *ante*, p. 905;
No. 02–9831. RAMIREZ *v.* UNITED STATES, 538 U. S. 1023;
No. 02–9834. PALMER *v.* UNITED STATES JUDICIAL BRANCH ET AL., 538 U. S. 1042;
No. 02–9845. IN RE CALLAHAN, 538 U. S. 976;
No. 02–9851. WAGENER *v.* VIRGINIA, 538 U. S. 1062;
No. 02–9861. DEDEAUX *v.* MISSISSIPPI, *ante*, p. 906;
No. 02–9865. JONES *v.* MICHIGAN, *ante*, p. 906;

No. 02–9888. LAWRENCE *v.* YOUNG, WARDEN, 538 U. S. 1043;
No. 02–9898. IN RE MCBRIDE, 538 U. S. 997;
No. 02–9910. MORRIS *v.* COURT OF APPEALS OF NORTH CAROLINA ET AL., 538 U. S. 1044;
No. 02–9920. DAVIES *v.* GOMEZ, WARDEN, 538 U. S. 1044;
No. 02–9938. CONTRERAS *v.* COLLINS ET AL., *ante*, p. 917;
No. 02–9953. IN RE CRANFORD, 538 U. S. 997;
No. 02–9956. STEPHENS *v.* UNITED STATES, 538 U. S. 1044;
No. 02–10009. PAYNE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 918;
No. 02–10020. DUNCAN *v.* MIRO, WARDEN, ET AL., 538 U. S. 1063;
No. 02–10036. RUIZ *v.* UNITED STATES, 538 U. S. 1046;
No. 02–10044. CALDWELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 538 U. S. 1064;
No. 02–10047. ATAMIAN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 538 U. S. 1064;
No. 02–10066. VEGA FLEITES *v.* UNITED STATES, 538 U. S. 1047;
No. 02–10073. CHENG *v.* CALIFORNIA, *ante*, p. 929;
No. 02–10134. HOLT *v.* UNITED STATES, 538 U. S. 1049;
No. 02–10164. TAYLOR *v.* UNITED STATES, 538 U. S. 1050;
No. 02–10195. BROCK *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, 538 U. S. 1051;
No. 02–10197. VALOIS *v.* UNITED STATES, 538 U. S. 1051; and
No. 02–10345. MALDONADO *v.* UNITED STATES, 538 U. S. 1067. Petitions for rehearing denied.

No. 02–7080. PAGE *v.* DEMORALES, WARDEN, 537 U. S. 1119; and
No. 02–8856. KADYEBO *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 538 U. S. 963. Motions for leave to file petitions for rehearing denied.

AUGUST 5, 2003

Dismissal Under Rule 46

No. 02–888. HCA, INC., FKA COLUMBIA/HCA HEALTHCARE CORP. *v.* TENNESSEE LABORERS HEALTH AND WELFARE FUND ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 293 F. 3d 289.

August 6, 2003

Miscellaneous Order

No. 03–5710 (03A114). In re Rivera. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 03–5700 (03A111). Rivera *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 7, 2003

Certiorari Denied

No. 03–5709 (03A113). Fortenberry *v.* Alabama. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Certiorari denied.

August 8, 2003

Dismissal Under Rule 46

No. 02–340. Christie's International PLC et al. *v.* Kruman et al. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 284 F. 3d 384.

August 11, 2003

Appointment Order

It is ordered that Judith Ann Gaskell be appointed Librarian of the Court to succeed Shelley Dowling, effective at the commencement of business August 11, 2003, and that she take the oath of office as required by statute.

Miscellaneous Orders

No. 02A1001. Nevarez-Diaz *v.* United States. Application for certificate of appealability, addressed to Justice Kennedy and referred to the Court, denied.

No. 02A1048 (03–133). Ferro *v.* United States. C. A. 8th Cir. Application for stay of mandate pending disposition of the

petition for writ of certiorari, addressed to JUSTICE BREYER and referred to the Court, denied.

AUGUST 15, 2003

Certiorari Denied

No. 02–1766 (02A1067). ROBERTSON *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: 325 F. 3d 243.

AUGUST 18, 2003

Dismissal Under Rule 46

No. 02–9493. BACA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari dismissed under this Court's Rule 46.

AUGUST 19, 2003

Miscellaneous Order

No. 02–1674. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1675. NATIONAL RIFLE ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1676. FEDERAL ELECTION COMMISSION ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1702. MCCAIN, UNITED STATES SENATOR, ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1727. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1733. NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1734. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1740. ADAMS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1747. PAUL, UNITED STATES CONGRESSMAN, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1753. California Democratic Party et al. *v.* Federal Election Commission et al.;

No. 02–1755. American Federation of Labor and Congress of Industrial Organizations et al. *v.* Federal Election Commission et al.; and

No. 02–1756. Chamber of Commerce of the United States et al. *v.* Federal Election Commission et al. D. C. D. C. [Probable jurisdiction noted, *ante,* p. 911.] Motions of the National Rifle Association and the Paul plaintiffs for reconsideration of the August 4, 2003, order [*ante,* p. 974] concerning divided argument denied.

August 20, 2003

Miscellaneous Order

No. 03A143 (03–258). In re Moore. D. C. M. D. Ala. Application to recall mandate and to stay enforcement of final judgment, presented to Justice Kennedy, and by him referred to the Court, denied.

August 21, 2003

Certiorari Denied

No. 03–5943 (03A142). Jones *v.* North Carolina. Sup. Ct. N. C. 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: 357 N. C. 465, 584 S. E. 2d 296.

August 25, 2003

Miscellaneous Orders

No. 02–682. Verizon Communications Inc. *v.* Law Offices of Curtis V. Trinko, LLP. C. A. 2d Cir. [Certiorari granted, 538 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–809. Maryland *v.* Pringle. Ct. App. Md. [Certiorari granted, 538 U. S. 921.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–819. Kontrick *v.* Ryan. C. A. 7th Cir. [Certiorari granted, 538 U. S. 998.] Motion of the Solicitor General for leave

to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–1060. ILLINOIS *v.* LIDSTER. Sup. Ct. Ill. [Certiorari granted, 538 U. S. 1012.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–954. OFFICE OF INDEPENDENT COUNSEL *v.* FAVISH. C. A. 9th Cir. [Certiorari granted, 538 U. S. 1012.] Motion of the Solicitor General for divided argument granted. Motion of Teresa Earnhardt for leave to file a brief as *amicus curiae* granted.

No. 02–1238. NIXON, ATTORNEY GENERAL OF MISSOURI *v.* MISSOURI MUNICIPAL LEAGUE ET AL.;

No. 02–1386. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* MISSOURI MUNICIPAL LEAGUE ET AL.; and

No. 02–1405. SOUTHWESTERN BELL TELEPHONE, L. P., FKA SOUTHWESTERN BELL TELEPHONE CO. *v.* MISSOURI MUNICIPAL LEAGUE ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 941.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 02–1674. MCCONNELL, UNITED STATES SENATOR, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1675. NATIONAL RIFLE ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1676. FEDERAL ELECTION COMMISSION ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1702. MCCAIN, UNITED STATES SENATOR, ET AL. *v.* MCCONNELL, UNITED STATES SENATOR, ET AL.;

No. 02–1727. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1733. NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1734. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1740. ADAMS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1747. PAUL, UNITED STATES CONGRESSMAN, ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.;

No. 02–1753. California Democratic Party et al. *v.* Federal Election Commission et al.;

No. 02–1755. American Federation of Labor and Congress of Industrial Organizations et al. *v.* Federal Election Commission et al.; and

No. 02–1756. Chamber of Commerce of the United States et al. *v.* Federal Election Commission et al. D. C. D. C. [Probable jurisdiction noted, *ante,* p. 911.] Motion of plaintiffs Senator Mitch McConnell et al. to file volume VI of the joint appendix under seal granted. Motion of the intervenor-defendants to file their brief under seal with redacted copies for the public record granted.

No. 02–9410. Crawford *v.* Washington. Sup. Ct. Wash. [Certiorari granted, *ante,* p. 914.] Motions of National Association of Criminal Defense Lawyers et al. and Sherman J. Clark et al. for leave to file briefs as *amici curiae* granted.

Rehearing Denied

No. 01–10249. Simmons *v.* City of Shreveport Code Enforcement Bureau, 537 U. S. 839;

No. 02–94. Overton, Director, Michigan Department of Corrections, et al. *v.* Bazzetta et al., *ante,* p. 126;

No. 02–241. Grutter *v.* Bollinger et al., *ante,* p. 306;

No. 02–722. American Insurance Assn. et al. *v.* Garamendi, Insurance Commissioner, State of California, *ante,* p. 396;

No. 02–1121. Sandstad *v.* CB Richards Ellis, Inc., *ante,* p. 926;

No. 02–1518. Sanders *v.* May Department Stores Co., *ante,* p. 942;

No. 02–1562. Madigan *v.* Nabisco Brands, Inc./RJ Reynolds Co., Inc., *ante,* p. 959;

No. 02–1575. Snyder-Falkinham et al. *v.* Stockburger et al., *ante,* p. 959;

No. 02–1592. Mills et al. *v.* Davis, Governor of California, et al., *ante,* p. 959;

No. 02–1601. Ratcliff *v.* ExxonMobil Corp., *ante,* p. 943;

No. 02–5068. Simmons *v.* Twin City Towing Co., 537 U. S. 892;

No. 02–8866. Searles *v.* Town of West Hartford Board of Education, 538 U. S. 963;

No. 02–9508. HEDRICK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 538 U. S. 1038;

No. 02–9517. HAWTHORNE *v.* CAIN, WARDEN, 538 U. S. 1038;

No. 02–9620. LANCASTER *v.* FINN, WARDEN, ET AL., 538 U. S. 1040;

No. 02–9857. DORSEY *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL., *ante*, p. 906;

No. 02–9899. BUI PHU XUAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 906;

No. 02–9989. PARNELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 918;

No. 02–10033. SMITH *v.* ENGLISH ET AL., 538 U. S. 1064;

No. 02–10035. SANDERS *v.* NEUMAN, 538 U. S. 1064;

No. 02–10051. BACH *v.* FLORIDA, 538 U. S. 1064;

No. 02–10063. GARBUSH *v.* WORKERS' COMPENSATION APPEAL BOARD OF PENNSYLVANIA, *ante*, p. 929;

No. 02–10082. COOK *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., *ante*, p. 930;

No. 02–10107. HUTCHISON *v.* BELL, WARDEN, *ante*, p. 944;

No. 02–10162. NIXON *v.* ELO, WARDEN, *ante*, p. 931;

No. 02–10165. CHALFANT *v.* TEXAS, *ante*, p. 944;

No. 02–10181. CURTIS *v.* OHIO, *ante*, p. 945;

No. 02–10205. JOHNSON *v.* UNITED STATES, 538 U. S. 1051;

No. 02–10266. BYNUM *v.* SPARKMAN, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, *ante*, p. 932;

No. 02–10295. FARRIS *v.* NATIONSBANC MORTGAGE CORP. ET AL., *ante*, p. 947;

No. 02–10310. SHELTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 961;

No. 02–10325. SPIGNER *v.* AUSTIN ET AL., *ante*, p. 961;

No. 02–10351. BOWLING *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 962;

No. 02–10366. KRONCKE *v.* SALDATE ET AL., *ante*, p. 962;

No. 02–10421. SCAFF-MARTINEZ *v.* UNITED STATES, *ante*, p. 920;

No. 02–10544. SHARWELL *v.* SHARWELL ET AL., *ante*, p. 949;

No. 02–10621. LOPEZ *v.* UNITED STATES, *ante*, p. 935;

No. 02–10698. JOHNSON *v.* UNITED STATES, *ante*, p. 937;

No. 02–10706. DAVIS, AKA SWANSON *v.* UNITED STATES, *ante*, p. 937;

No. 02–10717. ZHENGXING *v.* TOMLINSON, CHAIRMAN, UNITED STATES BROADCASTING BOARD OF GOVERNORS, *ante*, p. 965;

No. 02–10733. BROWN *v.* UNITED STATES, *ante*, p. 950;

No. 02–10741. DIAZ-CLARK, AKA LNU *v.* UNITED STATES, *ante*, p. 951;

No. 02–10802. WEEKS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 967;

No. 02–10821. WHITTENBURG *v.* UNITED STATES, *ante*, p. 952; and

No. 02–10852. O'LESKA *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY, *ante*, p. 967. Petitions for rehearing denied.

No. 01–8709. ANUNKA *v.* CAMPBELL ET AL., 535 U. S. 1039. Motion for leave to file petition for rehearing denied.

SEPTEMBER 3, 2003

Miscellaneous Order

No. 03A185. HIRSH ET AL. *v.* FLORIDA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 5, 2003

Rehearing Denied

No. 02–431. LIEBEL ET AL. *v.* VISITING NURSE ASSN. ET AL., 537 U. S. 1029;

No. 02–1400. MANNING *v.* NEW YORK UNIVERSITY, 538 U. S. 1035;

No. 02–7489. ROSALES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 960;

No. 02–8282. LUKER *v.* RODERICK, 537 U. S. 1215;

No. 02–8856. KADYEBO *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 538 U. S. 963;

No. 02–9897. IN RE BREWER, *ante*, p. 902;

No. 02–9934. DEWITT *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, *ante*, p. 961;

No. 02–10148. IN RE DOCKERAY, *ante*, p. 925;

No. 02–10166. DE URIOSTE *v.* FINN, WARDEN, ET AL., *ante*, p. 919;

No. 02–10177. PIERRE *v.* FLORIDA, *ante*, p. 945;

No. 02–10211. GOMEZ *v.* VIRGINIA, *ante*, p. 945;

No. 02–10271. J. B. C. *v.* P. A. B., *ante*, p. 947;

No. 02–10422. BULLARD *v.* HEAD, WARDEN, *ante*, p. 963;

No. 02–10427. MOORE *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, *ante*, p. 963;

No. 02–10464. BANKS *v.* UNITED STATES, *ante*, p. 909; and

No. 02–10603. WOMACK *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 965. Petitions for rehearing denied.

No. 02–733. GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA ET AL. *v.* GARAMENDI, INSURANCE COMMISSIONER, STATE OF CALIFORNIA, *ante*, p. 955. Motion for leave to file petition for rehearing denied.

SEPTEMBER 10, 2003

Dismissal Under Rule 46

No. 03–41. MARYVILLE ACADEMY ET AL. *v.* WALLACE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF WALLACE, DECEASED. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46.1. Reported below: 203 Ill. 2d 441, 786 N. E. 2d 980.

SEPTEMBER 11, 2003

Certiorari Denied

No. 03–6283 (03A222). HUNT *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 357 N. C. 257, 582 S. E. 2d 593.

No. 03–6302 (03A224). HUNT *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 357 N. C. 454, 591 S. E. 2d 502.

SEPTEMBER 18, 2003

Dismissals Under Rule 46

No. 02–1826. ROARK *v.* HUMANA, INC., ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 307 F. 3d 298.

No. 03–5983. TOWERY ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari dismissed under this Court's Rule 46.1. Reported below: 204 Ariz. 386, 64 P. 3d 828.

SEPTEMBER 25, 2003

Certiorari Denied

No. 03–6551 (03A266). BATES *v.* LEE, WARDEN. Sup. Ct. N. C. 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: 357 N. C. 508, 587 S. E. 2d 423.

SEPTEMBER 30, 2003

Certiorari Granted

No. 02–1593. BEDROC LTD., LLC, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 314 F. 3d 1080.

No. 02–1606. TENNESSEE STUDENT ASSISTANCE CORPORATION *v.* HOOD. C. A. 6th Cir. Certiorari granted. Reported below: 319 F. 3d 755.

No. 02–1657. SCARBOROUGH *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari granted. Reported below: 319 F. 3d 1346.

No. 02–1684. YARBOROUGH, WARDEN *v.* ALVARADO. C. A. 9th Cir. Certiorari granted. Reported below: 316 F. 3d 841.

No. 02–1809. HIBBS, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE *v.* WINN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 307 F. 3d 1011.

No. 02–11309. SMITH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVI-

SION. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 311 F. 3d 661.

No. 03–13. REPUBLIC OF AUSTRIA ET AL. *v.* ALTMANN. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 317 F. 3d 954 and 327 F. 3d 1246.

No. 02–1541. IOWA *v.* TOVAR. Sup. Ct. Iowa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 656 N. W. 2d 112.

No. 02–1603. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BANKS. C. A. 3d Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 316 F. 3d 228.

No. 03–107. UNITED STATES *v.* LARA. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 324 F. 3d 635.

OCTOBER 2, 2003

Certiorari Denied

No. 03–6660 (03A283). HARTMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 357 N. C. 509, 588 S. E. 2d 373.

No. 03–6661 (03A284). HARTMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 357 N. C. 509, 587 S. E. 2d 424.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 987 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

PRATO *v.* VALLAS ET AL.

ON APPLICATION FOR EXTENSION OF TIME

No. 02A1042 (02–9753). Decided June 9, 2003

Petitioner's request for an extension of time to file a certiorari petition following this Court's May 19, 2003, order denying her leave to proceed *in forma pauperis* is denied because there are no grounds upon which this Court would grant certiorari.

JUSTICE STEVENS, Circuit Justice.

Petitioner filed a petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis* in this Court on December 20, 2002. On May 19, 2003, over my unpublished dissent, the Court issued an order denying petitioner leave to proceed *in forma pauperis* and giving petitioner until June 9, 2003, to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Petitioner now seeks an extension of time within which to comply with the May 19 order, explaining that she needs additional time to raise money to pay the docketing fee and printing costs. Having reviewed petitioner's petition for a writ of certiorari, I am satisfied that there are no grounds upon which this Court would grant certiorari, and I therefore deny petitioner's request for an extension of time.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 2000, 2001, AND 2002

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2000	**2001**	**2002**	**2000**	**2001**	**2002**	**2000**	**2001**	**2002**	**2000**	**2001**	**2002**
Number of cases on dockets	9	8	7	2,305	2,210	2,190	6,651	6,958	7,209	8,965	9,176	9,406
Number disposed of during term	2	1	1	1,981	1,889	1,853	5,730	6,135	6,483	7,713	8,025	8,337
Number remaining on dockets	7	7	6	324	321	337	921	823	726	1,252	1,151	1,069

	TERMS		
	2000	**2001**	**2002**
Cases argued during term	86	88	84
Number disposed of by full opinions	83	85	79
Number disposed of by per curiam opinions	[1] 4	3	5
Number set for reargument	0	0	0
Cases granted review this term	99	[2] 88	91
Cases reviewed and decided without oral argument	[1] 127	[2] 72	66
Total cases to be available for argument at outset of following term	49	47	[3] 52

[1] Includes 98–942 argued October 12, 1999.

[2] Includes 01–339.

[3] Includes 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, 02–1756 to be argued September 8, 2003.

JUNE 27, 2003

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