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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2009

JUNE 21 THROUGH SEPTEMBER 30, 2010

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.[1]
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.[2]

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ERIC H. HOLDER, JR., ATTORNEY GENERAL.
ELENA KAGAN, SOLICITOR GENERAL.[3]
NEAL KUMAR KATYAL, ACTING SOLICITOR GENERAL.
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.[4]
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] JUSTICE STEVENS retired effective June 29, 2010. See *post*, p. IX.

[2] The Honorable Elena Kagan, of Massachusetts, Solicitor General of the United States, was nominated by President Obama on May 10, 2010, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 6, 2010; she was commissioned on the same date; and she took the oaths and her seat on August 7, 2010. She was presented to the Court on October 1, 2010. See *post*, p. XVII.

[3] Ms. Kagan resigned as Solicitor General effective August 6, 2010.

[4] Mr. Wagner retired as Reporter of Decisions on September 30, 2010. See *post*, p. XIII.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective August 17, 2009, viz.:

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

For the First Circuit, STEPHEN BREYER, Associate Justice.

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

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

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

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

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

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

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

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

For the Tenth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

August 17, 2009.

(For next previous allotment, see 557 U. S., p. VI.)
(For next subsequent allotment, see *post*, p. VI.)

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective June 29, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Clarence Thomas, Associate Justice.

For the Seventh Circuit, Stephen Breyer, Associate Justice.

For the Eighth Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

June 29, 2010.

(For next previous allotment, see 557 U. S., p. vii.)
(For next subsequent allotment, see *post*, p. vii.)

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 28, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

For the Eighth Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

September 28, 2010.

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

RETIREMENT OF JUSTICE STEVENS

Supreme Court of the United States

MONDAY, JUNE 28, 2010

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

The Chief Justice said:

And now I must regrettably note for the record that this is the last session at which our friend and colleague, Justice John Paul Stevens, will be on the Bench with us. Justice Stevens has served on this court with great distinction since December 1975. We wish him the best in his well-deserved retirement. On this occasion, we have sent Justice Stevens a letter that I will now read.

Supreme Court of the United States,
Chambers of The Chief Justice,
Washington, D. C., June 28, 2010.

Dear John:

The Supreme Court convened for the first time in 1790. You have served on its bench for nearly one-sixth of its existence. For the past thirty-four years, this Court has drawn strength from your presence. Whether in majority, separate concurrence, or dissent, you have brought rigor and integrity to the resolution of the most difficult issues. Through it all, you have alloyed genuine collegiality with independent judgment.

Your decision to retire saddens each of us in distinct ways. We will miss your wisdom, your perceptive insights and vast life experience, your unaffected decency and resolute commitment to justice. But we also know that your presence will endure through your contributions to the Court's work. You have enriched us through your inspiring example of public service. The bonds of friendship that we have forged extend beyond our common endeavor.

We wish you and Maryan great happiness in the years ahead.

Affectionately,
JOHN G. ROBERTS, JR.
ANTONIN SCALIA
ANTHONY M. KENNEDY
CLARENCE THOMAS
RUTH BADER GINSBURG
STEPHEN BREYER
SAMUEL A. ALITO, JR.
SONIA SOTOMAYOR
SANDRA DAY O'CONNOR
DAVID H. SOUTER

THE CHIEF JUSTICE said:

Justice Stevens, we will allow you time for rebuttal.

JUSTICE STEVENS said:

Well Chief, I have addressed a response that's addressed 'Dear Colleagues', and it occurred to me sitting here that if I had written this letter when I joined the Court, it would have been addressed 'Dear Brethren' but 'Dear Colleagues' suits today's composition of the Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JOHN PAUL STEVENS,
Washington, D. C., June 28, 2010.

Dear Colleagues,

Collegiality and independence characterize our common endeavor. I thank you for your kind words.

Far more importantly, Maryan and I thank each of you and each of your spouses—present and departed—for your warm and enduring friendship.

It has been an honor and a privilege to share custodial responsibility for a great institution with the eight of you and with ten of your predecessors. I have enjoyed working with each of you and with every member of the Supreme Court workforce that has always taken such excellent care of the Justices. If I have overstayed my welcome, it is because this is such a unique and wonderful job.

I wish you all the best.

Most sincerely,

John

RETIREMENT OF REPORTER OF DECISIONS

Supreme Court of the United States

MONDAY, JUNE 28, 2010

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

The Chief Justice said:

Before we rise for the summer, I would like to take the opportunity to note that our Reporter of Decisions, Frank D. Wagner, has announced his retirement, effective September 30th of this year. Few outside this Court are aware of the Reporter's important role. He is responsible for the preparation of the decisions of this Court for publication in the official United States Reports. Among many other things, the Reporter is responsible for preparing the syllabus and resolving issues of formatting style, punctuation, spelling, and citation form. Mr. Wagner has served as reporter for more than 23 years. He has overseen the publication of 82 volumes of the Supreme Court Reports, more than any previous reporter, going back 220 years. Mr. Wagner, we thank you for your service, which you have performed with exemplary diligence and skill.

DEATH OF MR. GINSBURG

Supreme Court of the United States

MONDAY, JUNE 28, 2010

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

The Chief Justice said:

It is my very sad duty to announce that Martin David Ginsburg, husband of our colleague, Justice Ruth Bader Ginsburg, died yesterday, June 27, 2010, at home in Washington, D. C.

Martin Ginsburg was born in Brooklyn, New York, on June 10, 1932. He earned an A. B. from Cornell University in 1953 and a J. D. *magna cum laude* from Harvard Law School in 1958.

Martin Ginsburg and Ruth Bader Ginsburg met at Cornell on a blind date in 1951 and were married on June 23, 1954, at his parents' home on Long Island.

Martin Ginsburg served in the United States Army from 1954 until 1956 and was stationed at Fort Sill, Oklahoma, where he taught in the artillery school. He had a distinguished career in the law, first in private practice, and later as a renowned law professor known not only for his academic contributions, but also his sharp wit and engaging charm. He began his career as a tax professor at New York University Law School and continued at Columbia Law School. When Ruth Bader Ginsburg was appointed to the United

States Court of Appeals for the District of Columbia Circuit in 1980, Martin Ginsburg joined the faculty of the Georgetown University Law Center. He was a visiting professor at Stanford Law School, Harvard Law School, University of Chicago Law School, and New York University Law School. He served on many advisory boards and deservedly won numerous academic accolades and awards. He was a member of the Bar of this Court. He was also a gourmet cook.

Martin Ginsburg was as loving as he was gifted. He was a devoted husband, father, and grandfather, and he was a dear friend to everyone here at the Court. As a mark of our sorrow and affection for Martin, Justice Ginsburg, and their family, the journal of the court will note that the adjournment of this Court today is in honor of Professor Martin David Ginsburg.

APPOINTMENT OF JUSTICE KAGAN

Supreme Court of the United States

FRIDAY, OCTOBER 1, 2010

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

The Chief Justice said:

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

We are pleased to have with us today the President of the United States. On behalf of the Court Mr. President, welcome. You are always welcome here.

On behalf of all of us, I am also delighted to welcome back our distinguished colleagues, Justice Stevens, Justice O'Connor, and Justice Souter. Welcome back.

The Court now recognizes the Attorney General of the United States, Eric Holder.

Attorney General Holder said:

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

THE CHIEF JUSTICE said:

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

The Clerk read the Commission:

BARACK OBAMA,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

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

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

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

[SEAL] BARACK OBAMA

By the President:

ERIC H. HOLDER,
Attorney General

THE CHIEF JUSTICE said:

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

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Kagan said:

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

ELENA KAGAN

Subscribed and sworn to before me this first day of October, 2010.

JOHN G. ROBERTS, JR.
Chief Justice

THE CHIEF JUSTICE said:

Congratulations. JUSTICE KAGAN, on behalf of all the members of the Court, it is my pleasure to extend to you a very warm welcome as the 100th Associate Justice of the Supreme Court of the United States. We wish for you a long and happy career in our common calling.

JUSTICE KAGAN said:

Thank you.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2009

HOLDER, ATTORNEY GENERAL, ET AL. *v.* HUMANITARIAN LAW PROJECT ET AL.

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

No. 08–1498. Argued February 23, 2010—Decided June 21, 2010*

It is a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." 18 U. S. C. § 2339B(a)(1). The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State, and is subject to judicial review. "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." § 2339A(b)(1). Over the years, § 2339B and the definition of "material support or resources" have been amended, *inter alia*, to clarify that a violation requires knowledge of the foreign group's designation as a terrorist organization or its commission of terrorist acts, § 2339B(a)(1); and to define the terms "training," § 2339A(b)(2), "expert advice or assistance," § 2339A(b)(3), and "personnel," § 2339B(h).

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*Together with No. 09–89, *Humanitarian Law Project et al.* v. *Holder, Attorney General, et al.*, also on certiorari to the same court.

Syllabus

Among the entities the Secretary of State has designated "foreign terrorist organization[s]" are the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which aim to establish independent states for, respectively, Kurds in Turkey and Tamils in Sri Lanka. Although both groups engage in political and humanitarian activities, each has also committed numerous terrorist attacks, some of which have harmed American citizens. Claiming they wish to support those groups' lawful, nonviolent activities, two U. S. citizens and six domestic organizations (hereinafter plaintiffs) initiated this constitutional challenge to the material-support statute. The litigation has had a complicated 12-year history. Ultimately, the District Court partially enjoined the enforcement of the material-support statute against plaintiffs. After the Ninth Circuit affirmed, plaintiffs and the Government cross-petitioned for certiorari. The Court granted both petitions.

As the litigation now stands, plaintiffs challenge § 2339B's prohibition on providing four types of material support—"training," "expert advice or assistance," "service," and "personnel"—asserting violations of the Fifth Amendment's Due Process Clause on the ground that the statutory terms are impermissibly vague, and violations of their First Amendment rights to freedom of speech and association. They claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities, including training PKK members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.

Held: The material-support statute, § 2339B, is constitutional as applied to the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations. Pp. 14–40.

(a) This preenforcement challenge to § 2339B is a justiciable Article III case or controversy. Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298. Pp. 15–16.

(b) The Court cannot avoid the constitutional issues in this litigation by accepting plaintiffs' argument that the material-support statute, when applied to speech, should be interpreted to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That reading is inconsistent with § 2339B's text, which prohibits "knowingly" providing material support and demonstrates that Congress chose knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities, as the

necessary mental state for a violation. Plaintiffs' reading is also untenable in light of the sections immediately surrounding § 2339B, which—unlike § 2339B—do refer to intent to further terrorist activity. See §§ 2339A(a), 2339C(a)(1). Finally, there is no textual basis for plaintiffs' argument that the same language in § 2339B should be read to require specific intent with regard to speech, but not with regard to other forms of material support. Pp. 16–18.

(c) As applied to plaintiffs, the material-support statute is not unconstitutionally vague. The Ninth Circuit improperly merged plaintiffs' vagueness challenge with their First Amendment claims, holding that "training," "service," and a portion of "expert advice or assistance" were impermissibly vague because they applied to protected speech—regardless of whether those applications were clear. The Court of Appeals also contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495.

The material-support statute, in its application to plaintiffs, "provide[s] a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U. S. 285, 304. The statutory terms at issue here—"training," "expert advice or assistance," "service," and "personnel"—are quite different from the sorts of terms, like "'annoying'" and "'indecent,'" that the Court has struck down for requiring "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.*, at 306. Congress has increased the clarity of § 2339B's terms by adding narrowing definitions, and § 2339B's knowledge requirement further reduces any potential for vagueness, see *Hill* v. *Colorado*, 530 U. S. 703, 732.

Although the statute may not be clear in every application, the dispositive point is that its terms are clear in their application to plaintiffs' proposed conduct. Most of the activities in which plaintiffs seek to engage readily fall within the scope of "training" and "expert advice or assistance." In fact, plaintiffs themselves have repeatedly used those terms to describe their own proposed activities. Plaintiffs' resort to hypothetical situations testing the limits of "training" and "expert advice or assistance" is beside the point because this litigation does not concern such situations. See *Scales* v. *United States*, 367 U. S. 203, 223. *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1049–1051, distinguished. Plaintiffs' further contention, that the statute is vague in its application to the political advocacy they wish to undertake, runs afoul of § 2339B(h), which makes clear that "personnel" does not cover advocacy by those acting entirely independently of a foreign terrorist organization, and the ordinary meaning of "service," which refers to con-

certed activity, not independent advocacy. Context confirms that meaning: Independently advocating for a cause is different from the prohibited act of providing a service "to a foreign terrorist organization." § 2339B(a)(1).

Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization. Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a "service." Because plaintiffs have not provided any specific articulation of the degree to which *they* seek to coordinate their advocacy with the PKK and LTTE, however, they cannot prevail in their preenforcement challenge. See *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 454. Pp. 18–25.

(d) As applied to plaintiffs, the material-support statute does not violate the freedom of speech guaranteed by the First Amendment. Pp. 25–39.

(1) Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their pure political speech. That claim is unfounded because, under the material-support statute, they may say anything they wish on any topic. Section 2339B does not prohibit independent advocacy or membership in the PKK and LTTE. Rather, Congress has prohibited "material support," which most often does not take the form of speech. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. On the other hand, the Government errs in arguing that the only thing actually at issue here is conduct, not speech, and that the correct standard of review is intermediate scrutiny, as set out in *United States* v. *O'Brien*, 391 U. S. 367, 377. That standard is not used to review a content-based regulation of speech, and § 2339B regulates plaintiffs' speech to the PKK and LTTE on the basis of its content. Even if the material-support statute generally functions as a regulation of conduct, as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. Thus, the Court "must [apply] a more demanding standard" than the one described in *O'Brien*. *Texas* v. *Johnson*, 491 U. S. 397, 403. Pp. 25–28.

(2) The parties agree that the Government's interest in combating terrorism is an urgent objective of the highest order, but plaintiffs argue that this objective does not justify prohibiting their speech, which they

say will advance only the legitimate activities of the PKK and LTTE. Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. Congress rejected plaintiffs' position on that question when it enacted § 2339B, finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." § 301(a)(7), 110 Stat. 1247, note following § 2339B. The record confirms that Congress was justified in rejecting plaintiffs' view. The PKK and LTTE are deadly groups. It is not difficult to conclude, as Congress did, that the taint of their violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means. Moreover, material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways. The record shows that designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks. Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups. Pp. 28–33.

(3) The Court does not rely exclusively on its own factual inferences drawn from the record evidence, but considers the Executive Branch's stated view that the experience and analysis of Government agencies charged with combating terrorism strongly support Congress's finding that all contributions to foreign terrorist organizations—even those for seemingly benign purposes—further those groups' terrorist activities. That evaluation of the facts, like Congress's assessment, is entitled to deference, given the sensitive national security and foreign relations interests at stake. The Court does not defer to the Government's reading of the First Amendment. But respect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on informed judgment rather than concrete evidence. The Court also finds it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. Most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or con-

trolled by foreign terrorist groups. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that prohibiting material support in the form of training, expert advice, personnel, and services to foreign terrorist groups serves the Government's interest in preventing terrorism, even if those providing the support mean to promote only the groups' nonviolent ends.

As to the particular speech plaintiffs propose to undertake, it is wholly foreseeable that directly training the PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt. Teaching the PKK to petition international bodies for relief also could help the PKK obtain funding it would redirect to its violent activities. Plaintiffs' proposals to engage in political advocacy on behalf of Kurds and Tamils, in turn, are phrased so generally that they cannot prevail in this preenforcement challenge. The Court does not decide whether any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It simply holds that § 2339B does not violate the freedom of speech as applied to the particular types of support these plaintiffs seek to provide. Pp. 33–39.

(e) Nor does the material-support statute violate plaintiffs' First Amendment freedom of association. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and LTTE, and thereby runs afoul of this Court's precedents. The Ninth Circuit correctly rejected this claim because § 2339B does not penalize mere association, but prohibits the act of giving foreign terrorist groups material support. Any burden on plaintiffs' freedom of association caused by preventing them from supporting designated foreign terrorist organizations, but not other groups, is justified for the same reasons the Court rejects their free speech challenge. Pp. 39–40.

552 F. 3d 916, affirmed in part, reversed in part, and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 40.

David D. Cole argued the cause for petitioners in No. 09–89 and respondents in No. 08–1498. With him on the briefs were *Shayana Kadidal*, *Jules Lobel*, *Richard G.*

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CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress has prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. 18 U. S. C. §2339B(a)(1). That prohibition is based on a finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (Findings and Purpose). The plaintiffs in this litigation

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†Briefs of *amici curiae* urging reversal in No. 08–1498 were filed for the Anti-Defamation League by *David M. Raim*, *Steven M. Freeman*, *Michael Lieberman*, and *Steven C. Sheinberg;* for the Center on the Administration of Criminal Law by *Michael Y. Scudder, Jr.*, and *Anthony S. Barkow;* and for the Center for Constitutional Jurisprudence et al. by *John C. Eastman*, *Edwin Meese III*, and *David B. Rivkin, Jr.*

Briefs of *amici curiae* urging reversal in No. 08–1498 and affirmance in No. 09–89 were filed for Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues by *Bradford A. Berenson* and *Peter Margulies;* and for Major General John D. Altenburg, U. S. Army (Ret.) et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance in No. 08–1498 and reversal in No. 09–89 were filed for the Carter Center et al. by *Melissa Goodman*, *Steven R. Shapiro*, and *Jameel Jaffer;* and for Victims of the McCarthy Era by *John A. Freedman*, *Sara K. Pildis*, and *Stephen F. Rohde.*

Briefs of *amici curiae* were filed in both cases for Academic Researchers et al. by *Burt Neuborne*, *Elizabeth Goitein*, *David Udell*, and *Sidney S. Rosdeitcher;* and for the Constitution Project et al. by *David M. Gossett*, *Sharon Bradford Franklin*, and *John W. Whitehead.*

seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

I

This litigation concerns 18 U. S. C. § 2339B, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[1] Congress has amended the definition of "material support or resources" periodically, but at present it is defined as follows:

> "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities,

[1] In full, 18 U. S. C. § 2339B(a)(1) provides: "UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . ." The terms "terrorist activity" and "terrorism" are defined in 8 U. S. C. § 1182(a)(3)(B)(iii) and 22 U. S. C. § 2656f(d)(2), respectively.

> weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." § 2339A(b)(1); see also § 2339B(g)(4).

The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State. 8 U. S. C. §§ 1189(a)(1), (d)(4). She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States." §§ 1189(a)(1), (d)(4). "'[N]ational security' means the national defense, foreign relations, or economic interests of the United States." § 1189(d)(2). An entity designated a foreign terrorist organization may seek review of that designation before the D. C. Circuit within 30 days of that designation. § 1189(c)(1).

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed. Reg. 52650. Two of those groups are the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176, 1180–1181 (CD Cal. 1998); Brief for Petitioners in No. 08–1498, p. 6 (hereinafter Brief for Government). The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. 9 F. Supp. 2d, at 1182; Brief for Government 6. The District Court in this action found that the PKK and LTTE engage in political and humanitarian activities. See 9 F. Supp. 2d, at 1180–1182. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. See App. 128–133. The LTTE sought judicial review of its designation as a for-

eign terrorist organization; the D. C. Circuit upheld that designation. See *People's Mojahedin Organization of Iran* v. *Department of State*, 182 F. 3d 17, 18–19, 25 (1999). The PKK did not challenge its designation. 9 F. Supp. 2d, at 1180.

Plaintiffs in this litigation are two U. S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP's president, and a retired Administrative Law Judge); Nagalingam Jeyalingam (a Tamil physician, born in Sri Lanka and a naturalized U. S. citizen); and five nonprofit groups dedicated to the interests of persons of Tamil descent. Brief for Petitioners in No. 09–89, pp. ii, 10 (hereinafter Brief for Plaintiffs); App. 48. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, § 2339B. Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B. 9 F. Supp. 2d, at 1180–1184.[2]

As relevant here, plaintiffs claimed that the material-support statute was unconstitutional on two grounds: First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their

[2] At the time plaintiffs first filed suit, 18 U. S. C. § 2339B(a) (2000 ed.) provided: "Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both." See *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1205, 1207 (CD Cal. 1998). And 18 U. S. C. § 2339A(b) (2000 ed.) defined "material support or resources" to mean "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."

provision of material support to the PKK and LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. *Id.*, at 1184. Second, plaintiffs argued that the statute was unconstitutionally vague. *Id.*, at 1184–1185.

Plaintiffs moved for a preliminary injunction, which the District Court granted in part. The District Court held that plaintiffs had not established a probability of success on their First Amendment speech and association claims. See *id.*, at 1196–1197. But the court held that plaintiffs had established a probability of success on their claim that, as applied to them, the statutory terms "personnel" and "training" in the definition of "material support" were impermissibly vague. See *id.*, at 1204.

The Court of Appeals affirmed. 205 F. 3d 1130, 1138 (CA9 2000). The court rejected plaintiffs' speech and association claims, including their claim that § 2339B violated the First Amendment in barring them from contributing money to the PKK and LTTE. See *id.*, at 1133–1136. But the Court of Appeals agreed with the District Court that the terms "personnel" and "training" were vague because it was "easy to imagine protected expression that falls within the bounds" of those terms. *Id.*, at 1138; see *id.*, at 1137.

With the preliminary injunction issue decided, the action returned to the District Court, and the parties moved for summary judgment on the merits. The District Court entered a permanent injunction against applying to plaintiffs the bans on "personnel" and "training" support. See No. CV–98–1971 ABC (BQRx), 2001 WL 36105333 (CD Cal., Oct. 2, 2001). The Court of Appeals affirmed. 352 F. 3d 382 (CA9 2003).

Meanwhile, in 2001, Congress amended the definition of "material support or resources" to add the term "expert advice or assistance." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT),

§ 805(a)(2)(B), 115 Stat. 377. In 2003, plaintiffs filed a second action challenging the constitutionality of that term as applied to them. 309 F. Supp. 2d 1185, 1192 (CD Cal. 2004).

In that action, the Government argued that plaintiffs lacked standing and that their preenforcement claims were not ripe. *Id.*, at 1194. The District Court held that plaintiffs' claims were justiciable because plaintiffs had sufficiently demonstrated a "genuine threat of imminent prosecution," *id.*, at 1195 (internal quotation marks omitted), and because § 2339B had the potential to chill plaintiffs' protected expression, see *id.*, at 1197–1198. On the merits, the District Court held that the term "expert advice or assistance" was impermissibly vague. *Id.*, at 1201. The District Court rejected, however, plaintiffs' First Amendment claims that the new term was substantially overbroad and criminalized associational speech. See *id.*, at 1202, 1203.

The parties cross-appealed. While the cross-appeals were pending, the Ninth Circuit granted en banc rehearing of the panel's 2003 decision in plaintiffs' first action (involving the terms "personnel" and "training"). See 382 F. 3d 1154, 1155 (2004). The en banc court heard reargument on December 14, 2004. See 380 F. Supp. 2d 1134, 1138 (CD Cal. 2005). Three days later, Congress again amended § 2339B and the definition of "material support or resources." Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), § 6603, 118 Stat. 3762–3764.

In IRTPA, Congress clarified the mental state necessary to violate § 2339B, requiring knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts. § 2339B(a)(1). Congress also added the term "service" to the definition of "material support or resources," § 2339A(b)(1), and defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," § 2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other special-

ized knowledge." §2339A(b)(3). Finally, IRTPA clarified the scope of the term "personnel" by providing:

> "No person may be prosecuted under [§2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." §2339B(h).

Shortly after Congress enacted IRTPA, the en banc Court of Appeals issued an order in plaintiffs' first action. 393 F. 3d 902, 903 (CA9 2004). The en banc court affirmed the rejection of plaintiffs' First Amendment claims for the reasons set out in the Ninth Circuit's panel decision in 2000. See *ibid.* In light of IRTPA, however, the en banc court vacated the panel's 2003 judgment with respect to vagueness, and remanded to the District Court for further proceedings. *Ibid.* The Ninth Circuit panel assigned to the cross-appeals in plaintiffs' second action (relating to "expert advice or assistance") also remanded in light of IRTPA. See 380 F. Supp. 2d, at 1139.

The District Court consolidated the two actions on remand. See *ibid.* The court also allowed plaintiffs to challenge the new term "service." See *id.*, at 1151, n. 24. The parties moved for summary judgment, and the District Court granted partial relief to plaintiffs on vagueness grounds. See *id.*, at 1156.

The Court of Appeals affirmed once more. 552 F. 3d 916, 933 (CA9 2009). The court first rejected plaintiffs' claim that the material-support statute would violate due process

unless it were read to require a specific intent to further the illegal ends of a foreign terrorist organization. See *id.*, at 926–927. The Ninth Circuit also held that the statute was not overbroad in violation of the First Amendment. See *id.*, at 931–932. As for vagueness, the Court of Appeals noted that plaintiffs had not raised a "facial vagueness challenge." *Id.*, at 929, n. 6. The court held that, as applied to plaintiffs, the terms "training," "expert advice or assistance" (when derived from "other specialized knowledge"), and "service" were vague because they "continue[d] to cover constitutionally protected advocacy," but the term "personnel" was not vague because it "no longer criminalize[d] pure speech protected by the First Amendment." *Id.*, at 929–931.

The Government petitioned for certiorari, and plaintiffs filed a conditional cross-petition. We granted both petitions. 557 U. S. 966 (2009).

II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge § 2339B's prohibition on four types of material support—"training," "expert advice or assistance," "service," and "personnel." They raise three constitutional claims. First, plaintiffs claim that § 2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that § 2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that § 2339B violates their First Amendment freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities. See Brief for Plaintiffs 16–17, n. 10. With respect to the HLP and Judge Fertig, those activities are: (1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag[ing] in political advocacy on behalf of

Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief." 552 F. 3d, at 921, n. 1; see 380 F. Supp. 2d, at 1136. With respect to the other plaintiffs, those activities are: (1) "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; (2) "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government"; and (3) "engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka." 552 F. 3d, at 921, n. 1; see 380 F. Supp. 2d, at 1137.

Plaintiffs also state that "the LTTE was recently defeated militarily in Sri Lanka," so "[m]uch of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot." Brief for Plaintiffs 11, n. 5. Plaintiffs thus seek only to support the LTTE "as a political organization outside Sri Lanka advocating for the rights of Tamils." *Ibid.* Counsel for plaintiffs specifically stated at oral argument that plaintiffs no longer seek to teach the LTTE how to present claims for tsunami-related aid, because the LTTE now "has no role in Sri Lanka." Tr. of Oral Arg. 63. For that reason, helping the LTTE negotiate a peace agreement with Sri Lanka appears to be moot as well. Thus, we do not consider the application of § 2339B to those activities here.

One last point. Plaintiffs seek preenforcement review of a criminal statute. Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III. We conclude that it is: Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979) (internal quotation marks omitted). See also *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 128–129 (2007).

Plaintiffs claim that they provided support to the PKK and LTTE before the enactment of § 2339B and that they would provide similar support again if the statute's allegedly un-

constitutional bar were lifted. See 309 F. Supp. 2d, at 1197. The Government tells us that it has charged about 150 persons with violating §2339B, and that several of those prosecutions involved the enforcement of the statutory terms at issue here. See Brief for Government 5. The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do. Cf. Tr. of Oral Arg. 57–58. See *Babbitt*, *supra*, at 302. See also *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 234, 248–249 (2010) (considering an as-applied preenforcement challenge brought under the First Amendment). Based on these considerations, we conclude that plaintiffs' claims are suitable for judicial review (as one might hope after 12 years of litigation).

III

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That interpretation, they say, would end the litigation because plaintiffs' proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or LTTE.

We reject plaintiffs' interpretation of §2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits "knowingly" providing material support. It then specifically describes the type of knowledge that is required: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . ." *Ibid.* Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization's

connection to terrorism, not specific intent to further the organization's terrorist activities.

Plaintiffs' interpretation is also untenable in light of the sections immediately surrounding § 2339B, both of which do refer to intent to further terrorist activity. See § 2339A(a) (establishing criminal penalties for one who "provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of" statutes prohibiting violent terrorist acts); § 2339C(a)(1) (setting criminal penalties for one who "unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out" other unlawful acts). Congress enacted § 2339A in 1994 and § 2339C in 2002. See § 120005(a), 108 Stat. 2022 (§ 2339A); § 202(a), 116 Stat. 724 (§ 2339C). Yet Congress did not import the intent language of those provisions into § 2339B, either when it enacted § 2339B in 1996, or when it clarified § 2339B's knowledge requirement in 2004.

Finally, plaintiffs give the game away when they argue that a specific intent requirement should apply only when the material-support statute applies to speech. There is no basis whatever in the text of § 2339B to read the same provisions in that statute as requiring intent in some circumstances but not others. It is therefore clear that plaintiffs are asking us not to interpret § 2339B, but to revise it. "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." *Scales* v. *United States*, 367 U. S. 203, 211 (1961).

Scales is the case on which plaintiffs most heavily rely, but it is readily distinguishable. That case involved the Smith Act, which prohibited membership in a group advocating the violent overthrow of the government. The Court held that a person could not be convicted under the statute unless he had knowledge of the group's illegal advocacy and a specific

intent to bring about violent overthrow. *Id.*, at 220–222, 229. This action is different: Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing "material support" to such a group. See *infra*, at 26, 39. Nothing about *Scales* suggests the need for a specific intent requirement in such a case. The Court in *Scales*, moreover, relied on both statutory text and precedent that had interpreted closely related provisions of the Smith Act to require specific intent. 367 U. S., at 209, 221–222. Plaintiffs point to nothing similar here.

We cannot avoid the constitutional issues in this litigation through plaintiffs' proposed interpretation of § 2339B.[3]

IV

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U. S. 285, 304 (2008). We consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages

[3] The dissent would interpret the statute along the same lines as the plaintiffs, to prohibit speech and association "only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions." *Post*, at 56 (opinion of BREYER, J.). According to the dissent, this interpretation is "fairly possible" and adopting it would avoid constitutional concerns. *Ibid.* (internal quotation marks omitted). The dissent's interpretation of § 2339B fails for essentially the same reasons as plaintiffs'. Congress explained what "knowingly" means in § 2339B, and it did not choose the dissent's interpretation of that term. In fact, the dissent proposes a mental-state requirement indistinguishable from the one Congress adopted in §§ 2339A and 2339C, even though Congress used markedly different language in § 2339B.

in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495 (1982). We have said that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.*, at 499. "But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Williams*, *supra*, at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 794 (1989)).

The Court of Appeals did not adhere to these principles. Instead, the lower court merged plaintiffs' vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech—regardless of whether those applications were clear. The court stated that, even if persons of ordinary intelligence understood the scope of the term "training," that term would "remai[n] impermissibly vague" because it could "be read to encompass speech and advocacy protected by the First Amendment." 552 F. 3d, at 929. It also found "service" and a portion of "expert advice or assistance" to be vague because those terms covered protected speech. *Id.*, at 929–930.

Further, in spite of its own statement that it was not addressing a "facial vagueness challenge," *id.*, at 929, n. 6, the Court of Appeals considered the statute's application to facts not before it. Specifically, the Ninth Circuit relied on the Government's statement that §2339B would bar filing an *amicus* brief in support of a foreign terrorist organization—which plaintiffs have not told us they wish to do, and which the Ninth Circuit did not say plaintiffs wished to do—to conclude that the statute barred protected advocacy and was therefore vague. See *id.*, at 930. By deciding how the statute applied in hypothetical circumstances, the Court of Appeals' discussion of vagueness seemed to incorporate elements of First Amendment overbreadth doctrine. See *id.*,

at 929–930 (finding it "easy to imagine" protected expression that would be barred by § 2339B (internal quotation marks omitted)); *id.*, at 930 (referring to both vagueness and overbreadth).

In both of these respects, the Court of Appeals contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, *supra*, at 495. That rule makes no exception for conduct in the form of speech. See *Parker* v. *Levy*, 417 U. S. 733, 755–757 (1974). Thus, even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. Such a plaintiff may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. See *Williams*, *supra*, at 304; *Hoffman Estates*, *supra*, at 494–495, 497. Otherwise the doctrines would be substantially redundant.

Under a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U. S., at 304.

As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.*, at 306; see also *Papachristou* v. *Jacksonville*, 405 U. S. 156, n. 1 (1972) (hold-

ing vague an ordinance that punished "vagrants," defined to include "[r]ogues and vagabonds," "persons who use juggling," and "common night walkers" (internal quotation marks omitted)). Applying the statutory terms in this action—"training," "expert advice or assistance," "service," and "personnel"—does not require similarly untethered, subjective judgments.

Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms. See § 2339A(b)(2) ("'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge"); § 2339A(b)(3) ("'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge"); § 2339B(h) (clarifying the scope of "personnel"). And the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement. See *Hill* v. *Colorado*, 530 U. S. 703, 732 (2000); *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 523, 526 (1994); see also *Hoffman Estates*, *supra*, at 499.

Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail. Even assuming that a heightened standard applies because the material-support statute potentially implicates speech, the statutory terms are not vague as applied to plaintiffs. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 114–115 (1972) (rejecting a vagueness challenge to a criminal law that implicated First Amendment activities); *Scales*, 367 U. S., at 223 (same).

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms "training" and "expert advice or assistance." Plaintiffs want to "train members of [the] PKK on how to use humanitarian and interna-

tional law to peacefully resolve disputes," and "teach PKK members how to petition various representative bodies such as the United Nations for relief." 552 F. 3d, at 921, n. 1. A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute's definition of "training" because it imparts a "specific skill," not "general knowledge." § 2339A(b)(2). Plaintiffs' activities also fall comfortably within the scope of "expert advice or assistance": A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, "specialized knowledge." § 2339A(b)(3). In fact, plaintiffs themselves have repeatedly used the terms "training" and "expert advice" throughout this litigation to describe their own proposed activities, demonstrating that these common terms readily and naturally cover plaintiffs' conduct. See, *e. g.*, Brief for Plaintiffs 10, 11; App. 56, 58, 59, 61, 62, 63, 80, 81, 98, 99, 106, 107, 117.

Plaintiffs respond by pointing to hypothetical situations designed to test the limits of "training" and "expert advice or assistance." They argue that the statutory definitions of these terms use words of degree—like "specific," "general," and "specialized"—and that it is difficult to apply those definitions in particular cases. See Brief for Plaintiffs 27 (debating whether teaching a course on geography would constitute training); *id.*, at 29. And they cite *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030 (1991), in which we found vague a state bar rule providing that a lawyer in a criminal case, when speaking to the press, "may state without elaboration . . . the general nature of the . . . defense." *Id.*, at 1048 (internal quotation marks omitted).

Whatever force these arguments might have in the abstract, they are beside the point here. Plaintiffs do not propose to teach a course on geography, and cannot seek refuge in imaginary cases that straddle the boundary between "spe-

cific skills" and "general knowledge." See *Parker* v. *Levy*, 417 U. S., at 756. We emphasized this point in *Scales*, holding that even if there might be theoretical doubts regarding the distinction between "active" and "nominal" membership in an organization—also terms of degree—the defendant's vagueness challenge failed because his "case present[ed] no such problem." 367 U. S., at 223.

Gentile was different. There the asserted vagueness in a state bar rule was directly implicated by the facts before the Court: Counsel had reason to suppose that his particular statements to the press would not violate the rule, yet he was disciplined nonetheless. See 501 U. S., at 1049–1051. We did not suggest that counsel could escape discipline on vagueness grounds if his own speech were plainly prohibited.

Plaintiffs also contend that they want to engage in "political advocacy" on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. 552 F. 3d, at 921, n. 1. They are concerned that such advocacy might be regarded as "material support" in the form of providing "personnel" or "service[s]," and assert that the statute is unconstitutionally vague because they cannot tell.

As for "personnel," Congress enacted a limiting definition in IRTPA that answers plaintiffs' vagueness concerns. Providing material support that constitutes "personnel" is defined as knowingly providing a person "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." §2339B(h). The statute makes clear that "personnel" does not cover *independent* advocacy: "Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." *Ibid.*

"[S]ervice" similarly refers to concerted activity, not independent advocacy. See Webster's Third New International Dictionary 2075 (1993) (defining "service" to mean "the

performance of work commanded or paid for by another: a servant's duty: attendance on a superior"; or "an act done for the benefit or at the command of another"). Context confirms that ordinary meaning here. The statute prohibits providing a service "*to* a foreign terrorist organization." § 2339B(a)(1) (emphasis added). The use of the word "to" indicates a connection between the service and the foreign group. We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.

Moreover, if independent activity in support of a terrorist group could be characterized as a "service," the statute's specific exclusion of independent activity in the definition of "personnel" would not make sense. Congress would not have prohibited under "service" what it specifically exempted from prohibition under "personnel." The other types of material support listed in the statute, including "lodging," "weapons," "explosives," and "transportation," § 2339A(b)(1), are not forms of support that could be provided independently of a foreign terrorist organization. We interpret "service" along the same lines. Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.

Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a "service." See Reply Brief for Petitioners in No. 09–89, p. 14 (hereinafter Reply Brief for Plaintiffs) ("Would any communication with any member be sufficient? With a leader? Must the 'relationship' have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?"). The problem with these

questions is that they are entirely hypothetical. Plaintiffs have not provided any specific articulation of the degree to which *they* seek to coordinate their advocacy with the PKK and LTTE. They have instead described the form of their intended advocacy only in the most general terms. See, *e. g.*, Brief for Plaintiffs 10–11 (plaintiffs "would like, among other things, to offer their services to advocate on behalf of the rights of the Kurdish people and the PKK before the United Nations and the United States Congress" (internal quotation marks and alteration omitted)); App. 59 (plaintiffs would like to "write and distribute publications supportive of the PKK and the cause of Kurdish liberation" and "advocate for the freedom of political prisoners in Turkey").

Deciding whether activities described at such a level of generality would constitute prohibited "service[s]" under the statute would require "sheer speculation"—which means that plaintiffs cannot prevail in their preenforcement challenge. See *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 454 (2008). It is apparent with respect to these claims that "gradations of fact or charge would make a difference as to criminal liability," and so "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Zemel* v. *Rusk*, 381 U. S. 1, 20 (1965).

V

A

We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their "pure political speech." *E. g.*, Brief for Plaintiffs 2, 25, 43. It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write

freely about the PKK and LTTE, the Governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Brief for Government 13. Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." *Id.*, at 60. Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[4]

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs' interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States* v. *O'Brien*, 391 U. S. 367 (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O'Brien had burned his card in protest against the draft. See *id.*, at 370, 376, 382. In so doing, we applied what we have since called "intermediate scrutiny," under which a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental

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[4] The dissent also analyzes the statute as if it prohibited "[p]eaceful political advocacy" or "pure speech and association," without more. *Post*, at 48, 56. Section 2339B does not do that, and we do not address the constitutionality of any such prohibitions. The dissent's claim that our decision is inconsistent with this Court's cases analyzing those sorts of restrictions, *post*, at 50–51, is accordingly unfounded.

interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 189 (1997) (citing *O'Brien*, *supra*, at 377).

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review.[5] *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385–386 (1992); *Texas* v. *Johnson*, 491 U. S. 397, 403, 406–407 (1989), and § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. See Brief for Government 33–34. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge. See *id.*, at 32.

The Government argues that § 2339B should nonetheless receive intermediate scrutiny because it *generally* functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen*

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[5] The Government suggests in passing that, to the extent plaintiffs' activities constitute speech, that speech is wholly unprotected by the First Amendment. The Government briefly analogizes speech coordinated with foreign terrorist organizations to speech effecting a crime, like the words that constitute a conspiracy. Brief for Government 46; Reply Brief for Government 31–32, and n. 8. See, *e. g.*, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498, 502 (1949). We do not consider any such argument because the Government does not develop it: The Government's submission is that applying § 2339B to plaintiffs triggers intermediate First Amendment scrutiny—not that it triggers no First Amendment scrutiny at all.

v. *California*, 403 U. S. 15 (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. See *id.*, at 16. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. See 403 U. S., at 16, 18. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction. See *id.*, at 18–19, 26.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas* v. *Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard." 491 U. S., at 403 (citation omitted).

B

The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. See Brief for Plaintiffs 51. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." *Ibid.* The objec-

tive of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism. *Id.*, at 51–52.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. See AEDPA §§ 301(a)(1)–(7), 110 Stat. 1247, note following 18 U. S. C. § 2339B (Findings and Purpose). One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." § 301(a)(7) (emphasis added).

Plaintiffs argue that the reference to "any contribution" in this finding meant only monetary support. There is no reason to read the finding to be so limited, particularly because Congress expressly prohibited so much more than monetary support in § 2339B. Congress's use of the term "contribution" is best read to reflect a determination that any form of material support furnished "to" a foreign terrorist organization should be barred, which is precisely what the material-support statute does. Indeed, when Congress enacted § 2339B, Congress simultaneously removed an exception that had existed in § 2339A(a) (1994 ed.) for the provision of material support in the form of "humanitarian assistance to persons not directly involved in" terrorist activity. AEDPA § 323, 110 Stat. 1255; 205 F. 3d, at 1136. That repeal demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. The PKK and LTTE are deadly groups. "The

PKK's insurgency has claimed more than 22,000 lives." Declaration of Kenneth R. McKune, App. 128, ¶ 5 (hereinafter McKune Affidavit). The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. *Id.*, at 130–132; Brief for Government 6–7. "On January 31, 1996, the LTTE exploded a truck bomb filled with an estimated 1,000 pounds of explosives at the Central Bank in Colombo, killing 100 people and injuring more than 1,400. This bombing was the most deadly terrorist incident in the world in 1996." McKune Affidavit, App. 131, ¶ 6.h. It is not difficult to conclude as Congress did that the "tain[t]" of such violent activities is so great that working in coordination with or at the command of the PKK and LTTE serves to legitimize and further their terrorist means. AEDPA § 301(a)(7), 110 Stat. 1247.

Material support meant to "promot[e] peaceable, lawful conduct," Brief for Plaintiffs 51, can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain *organizational* 'firewalls' that would prevent or deter . . . sharing and commingling of support and benefits." McKune Affidavit, App. 135, ¶ 11. "[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts." M. Levitt, Hamas: Politics, Charity, and Terrorism in the Service of Jihad 2–3 (2006). "Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry

out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations." McKune Affidavit, App. 135, ¶ 11; Levitt, *supra,* at 2 ("Muddying the waters between its political activism, good works, and terrorist attacks, Hamas is able to use its overt political and charitable organizations as a financial and logistical support network for its terrorist operations").

Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put." McKune Affidavit, App. 134, ¶ 9. But "there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Id.*, at 135, ¶ 12. Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." *Id.*, at 134, ¶ 10. See also Brief for Anti-Defamation League as *Amicus Curiae* 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas); *Regan* v. *Wald,* 468 U. S. 222, 243 (1984) (upholding President's decision to impose travel ban to Cuba "to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism"). There is evidence that the PKK and LTTE, in particular, have not "respected the line between humanitarian and violent activities." McKune Affidavit, App. 135, ¶ 13 (discussing PKK); see *id.*, at 134 (LTTE).

The dissent argues that there is "no natural stopping place" for the proposition that aiding a foreign terrorist organization's lawful activity promotes the terrorist organization as a whole. *Post,* at 49. But Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent

advocacy that might be viewed as promoting the group's legitimacy is not covered. See *supra*, at 25–28.[6]

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage." AEDPA § 301(a)(5), 110 Stat. 1247, note following 18 U. S. C. § 2339B (Findings and Purpose). The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad: "A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten [the] social, economic and political stability" of such governments. McKune Affidavit, App. 137, ¶ 16. "[O]ther foreign terrorist organizations attack our NATO allies, thereby implicating important and sensitive multilateral security arrangements." *Ibid.*

For example, the Republic of Turkey—a fellow member of NATO—is defending itself against a violent insurgency

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[6] The dissent also contends that the particular sort of material support plaintiffs seek to provide cannot be diverted to terrorist activities, in the same direct way as funds or goods. *Post*, at 47–48. This contention misses the point. Both common sense and the evidence submitted by the Government make clear that material support of a terrorist group's lawful activities facilitates the group's ability to attract "funds," "financing," and "goods" that will further its terrorist acts. See McKune Affidavit, App. 134–136.

waged by the PKK. Brief for Government 6; App. 128. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups' "legitimate" activities. From Turkey's perspective, there likely are no such activities. See 352 F. 3d, at 389 (observing that Turkey prohibits membership in the PKK and prosecutes those who provide support to that group, regardless of whether the support is directed to lawful activities).

C

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question. The State Department informs us that "[t]he experience and analysis of the U. S. government agencies charged with combating terrorism strongly suppor[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism. McKune Affidavit, App. 133, ¶ 8. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24–25 (2008) (looking to similar affidavits to support according weight to national security claims). In the Executive's view: "Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." McKune Affidavit, App. 133, ¶ 8.

That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national secu-

rity and foreign affairs. The PKK and LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies. See *id.*, at 128–133, 137. We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene* v. *Bush*, 553 U. S. 723, 797 (2008). It is vital in this context "not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker* v. *Goldberg*, 453 U. S. 57, 68 (1981). See *Wald*, 468 U. S., at 242; *Haig* v. *Agee*, 453 U. S. 280, 292 (1981).

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Post*, at 61. But when it comes to collecting evidence and drawing factual inferences in this area, "the lack of competence on the part of the courts is marked," *Rostker*, *supra*, at 65, and respect for the Government's conclusions is appropriate.

One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof—with "detail," "specific facts," and "specific evidence"—that plaintiffs' proposed activities will support terrorist attacks. See *post*, at 48, 55, 62. That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than

concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions. See *Zemel*, 381 U. S., at 17 ("[B]ecause of the changeable and explosive nature of contemporary international relations, . . . Congress . . . must of necessity paint with a brush broader than that it customarily wields in domestic areas").

This context is different from that in decisions like *Cohen*. In that case, the application of the statute turned on the offensiveness of the speech at issue. Observing that "one man's vulgarity is another's lyric," we invalidated Cohen's conviction in part because we concluded that "governmental officials cannot make principled distinctions in this area." 403 U. S., at 25. In this litigation, by contrast, Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, § 2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, see, *e. g.*, 74 Fed. Reg. 29742 (2009); 62 Fed. Reg. 52650 (1997), and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts' holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms "training," "personnel," and "expert advice or assistance," as well as an explanation

of the knowledge required to violate § 2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, see § 2339B(i), Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. See § 2339A(b)(1). In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress." *Rostker*, *supra*, at 68. Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.

At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." 552 F. 3d, at 921, n. 1. Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to

impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. See generally A. Marcus, Blood and Belief: The PKK and the Kurdish Fight for Independence 286–295 (2007) (describing the PKK's suspension of armed struggle and subsequent return to violence). A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." 552 F. 3d, at 921, n. 1. The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. See Brief for Plaintiffs 10–11, 16–17, n. 10; App. 58–59, 80–81. Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE "to present claims for tsunami-related aid to mediators and international bodies," 552 F. 3d, at 921, n. 1, which naturally included monetary relief. Money is fungible, *supra*, at 31, and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities.

Finally, plaintiffs propose to "engage in political advocacy on behalf of Kurds who live in Turkey," and "engage in political advocacy on behalf of Tamils who live in Sri Lanka." 552 F. 3d, at 921, n. 1. As explained above, *supra*, at 25, plaintiffs do not specify their expected level of coordination with the PKK or LTTE or suggest what exactly their "advocacy" would consist of. Plaintiffs' proposals are phrased at such a high level of generality that they cannot prevail in this

preenforcement challenge. See *supra*, at 25; *Grange*, 552 U. S., at 454; *Zemel*, 381 U. S., at 20.

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs' proposed activities in the abstract. See *post*, at 52–54. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA §301(a)(7). One in which, for example, "the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its 'neutral and humanitarian nature.'" McKune Affidavit, App. 135–136, ¶13. Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.

If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II. It would, under the dissent's reasoning, have been contrary to our commitment to resolving disputes through "'deliberative forces,'" *post*, at 52 (quoting *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring)), for Congress to conclude that assisting Japan on that front might facilitate its war effort more generally. That view is not one the First Amendment requires us to embrace.

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.

VI

Plaintiffs' final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and LTTE, thereby running afoul of decisions like *De Jonge* v. *Oregon*, 299 U. S. 353 (1937), and cases in which we have overturned sanctions for joining the Communist Party, see, *e. g.*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967); *United States* v. *Robel*, 389 U. S. 258 (1967).

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . . ." 205 F. 3d, at 1133. Plaintiffs want to do the latter. Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite. See, *e. g.*, *Robel*, *supra*, at 262 ("It is precisely because th[e] statute sweeps indiscriminately across all types of association with Communist-action groups, without regard

to the quality and degree of membership, that it runs afoul of the First Amendment"); *De Jonge*, *supra*, at 362.

Plaintiffs also argue that the material-support statute burdens their freedom of association because it prevents them from providing support to designated foreign terrorist organizations, but not to other groups. See Brief for Plaintiffs 56; Reply Brief for Plaintiffs 37–38. Any burden on plaintiffs' freedom of association in this regard is justified for the same reasons that we have denied plaintiffs' free speech challenge. It would be strange if the Constitution permitted Congress to prohibit certain forms of speech that constitute material support, but did not permit Congress to prohibit that support only to particularly dangerous and lawless foreign organizations. Congress is not required to ban material support to every group or none at all.

* * *

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." The Federalist No. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But

I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope. See *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring).

I

The statute before us forbids "knowingly provid[ing]" "a foreign terrorist organization" with "material support or resources," defined to include, among other things, "training," "expert advice or assistance," "personnel," and "service." 18 U. S. C. §§2339B(a)(1), (g)(4); §2339A(b)(1). The Secretary of State has designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as "foreign terrorist organizations"—a designation authorized where the organization is "foreign," threatens the security of the United States or its nationals, and engages in "terrorist activity," defined to include "any" of such activities as "highjacking" and "assassination," or the "use of any . . . weapon or dangerous device . . . with intent to endanger, directly or indirectly, the safety of one or more individuals." 62 Fed. Reg. 52650 (1997); 8 U. S. C. §1182(a)(3)(B)(iii); 18 U. S. C. §2339B(a)(1).

The plaintiffs, all United States citizens or associations, now seek an injunction and declaration providing that, without violating the statute, they can (1) "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engage in political advocacy

on behalf of Kurds who live in Turkey"; (3) "teach PKK members how to petition various representative bodies such as the United Nations for relief"; and (4) "engage in political advocacy on behalf of Tamils who live in Sri Lanka." *Humanitarian Law Project* v. *Mukasey*, 552 F. 3d 916, 921, n. 1 (CA9 2009); *ante*, at 14–15. All these activities are of a kind that the First Amendment ordinarily protects.

In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach—using international law to resolve disputes peacefully or petitioning the United Nations, for instance—concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in *this* country directed to *our* government and *its* policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress. App. 58–59.

That this speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964) (The First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting *Roth* v. *United States*, 354 U. S. 476, 484 (1957)); *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938) (rejecting licensing scheme for distribution of "pamphlets and leaflets," "historic weapons in the defense of liberty"); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 422 (1992) (STEVENS, J., concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the

constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position"); *Hill* v. *Colorado*, 530 U. S. 703, 787 (2000) (KENNEDY, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against"); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech").

Although in the Court's view the statute applies only where the PKK helps to coordinate a defendant's activities, *ante*, at 26, the simple fact of "coordination" alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 911 (1982) (The First Amendment's protections "of speech, assembly, association, and petition, 'though not identical, are inseparable'" (quoting *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945))); *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937) (describing the "right of peaceable assembly" as "a right cognate to those of free speech and free press and . . . equally fundamental"); see also *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). "Coordination" with a political group, like membership, involves association.

"Coordination" with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment's protection under any traditional "categorical" exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity. Cf. *United States* v. *Stevens*, 559 U. S. 460, 468–469 (2010) (describing "categories" of unprotected speech). And the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not

"directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)* (emphasis added). Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.

Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the First Amendment's protection for freedom of association. See *Scales* v. *United States*, 367 U. S. 203, 229 (1961) ("[Q]uasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose"); see also *NAACP*, *supra*, at 908 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected"). Rather, the Court has pointed out in respect to associating with a group advocating overthrow of the Government through force and violence: "If the persons assembling have committed crimes elsewhere . . . , they may be prosecuted for their . . . violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *De Jonge*, *supra*, at 365 (striking down conviction for attending and assisting at Communist Party meeting because "[n]otwithstanding [the party's] objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose").

Not even the "serious and deadly problem" of international terrorism can require *automatic* forfeiture of First Amendment rights. §301(a)(1), 110 Stat. 1247, note following 18

U. S. C. § 2339B (Findings and Purpose). Cf. § 2339B(i) (instructing courts not to "constru[e] or appl[y the statute] so as to abridge the exercise of rights guaranteed under the First Amendment"). After all, this Court has recognized that not "'[e]ven the war power . . . remove[s] constitutional limitations safeguarding essential liberties.'" *United States* v. *Robel*, 389 U. S. 258, 264 (1967) (quoting *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426 (1934)). See also *Abrams* v. *United States*, 250 U. S. 616, 628 (1919) (Holmes, J., dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same"). Thus, there is no general First Amendment exception that applies here. If the statute is constitutional in this context, it would have to come with a strong justification attached.

It is not surprising that the majority, in determining the constitutionality of criminally prohibiting the plaintiffs' proposed activities, would apply, not the kind of intermediate First Amendment standard that applies to conduct, but "'a more demanding standard.'" *Ante*, at 28 (quoting *Texas* v. *Johnson*, 491 U. S. 397, 403 (1989)). Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications "strictly"—to determine whether the prohibition is justified by a "compelling" need that cannot be "less restrictively" accommodated. See *Houston* v. *Hill*, 482 U. S. 451, 459 (1987) (criminal penalties); *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (content-based); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991) (same); *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 540 (1980) (strict scrutiny); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978) (same).

But, even if we assume for argument's sake that "strict scrutiny" does not apply, no one can deny that we must at

the very least "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." *Robel*, *supra*, at 268, n. 20 (describing constitutional task where the Court is faced "with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights"). And here I need go no further, for I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard. See, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 189 (1997) (describing intermediate scrutiny). Cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring) (examining whether a statute worked speech-related harm "out of proportion to the statute's salutary effects upon" other interests).

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us *help achieve* that important security-related end? See *Simon & Schuster*, *supra*, at 118 (requiring that "narrowly drawn" means further a "compelling state interest" by the least restrictive means (internal quotation marks omitted)); *Turner*, *supra*, at 189 (requiring "advance[ment of] important governmental interests unrelated to the suppression of free speech" without "burden[ing] substantially more speech than necessary to further those interests"); *Robel*, *supra*, at 268, n. 20 (requiring measurement of the "means adopted by Congress against . . . the [security] goal it has sought to achieve"). See also *Nixon*, *supra*, at 402 (BREYER, J., con-

curring); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 478 (2007) (opinion of ROBERTS, C. J.) ("A court . . . must ensure that [the interest justifying a statutory restriction] supports *each application* of [the] statute").

The Government makes two efforts to answer this question. *First*, the Government says that the plaintiffs' support for these organizations is "fungible" in the same sense as other forms of banned support. Being fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends. Brief for Respondents in No. 09–89, pp. 54–56 (hereinafter Government Brief).

The proposition that the two very different kinds of "support" are "fungible," however, is not *obviously* true. There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, toward terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the "fungible" nature in general of resources, predominately money and material goods. It points to a congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct." §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (emphasis added). It also points

to a House Report's statement that "supply[ing] *funds, goods,* or *services*" would "hel[p] defray the cost to the terrorist organization of running the ostensibly legitimate activities," and "in turn fre[e] an equal sum that can then be spent on terrorist activities." H. R. Rep. No. 104–383, p. 81 (1995) (emphasis added). Finally, the Government refers to a State Department official's affidavit describing how ostensibly charitable contributions have either been "redirected" to terrorist ends or, even if spent charitably, have "unencumber[ed] *funds* raised from other sources for use in facilitating violent, terrorist activities and gaining political support for these activities." Declaration of Kenneth R. McKune, App. 134, 136 (emphasis added).

The most one can say in the Government's favor about these statements is that they *might* be read as offering highly general support for its argument. The statements do not, however, explain in any detail how the plaintiffs' political-advocacy-related activities might actually be "fungible" and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with "support" of this kind. The affidavit refers to "funds," "financing," and "goods"—none of which encompasses the plaintiffs' activities. *Ibid.* The statutory statement and the House Report use broad terms like "contributions" and "services" that *might* be construed as encompassing the plaintiffs' activities. But in context, those terms are more naturally understood as referring to contributions of goods, money, or training and other services (say, computer programming) that could be diverted to, or free funding for, terrorist ends. See *infra,* at 55. Peaceful political advocacy does not obviously fall into these categories. And the statute itself suggests that Congress did not intend to curtail freedom of speech or association. See § 2339B(i) ("Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment"); see also *infra,* at 58.

Second, the Government says that the plaintiffs' proposed activities will "bolste[r] a terrorist organization's efficacy and strength in a community" and "undermin[e] this nation's efforts to *delegitimize and weaken* these groups." Government Brief 56 (emphasis added). In the Court's view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with "legitimacy." *Ante*, at 30. The Court suggests that, armed with this greater "legitimacy," these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban—money, arms, lodging, and the like. See *ibid.*

Yet the Government does not claim that the statute forbids *any* speech "legitimating" a terrorist group. Rather, it reads the statute as permitting (1) membership in terrorist organizations, (2) "peaceably assembling with members of the PKK and LTTE for lawful discussion," or (3) "independent advocacy" on behalf of these organizations. Government Brief 66, 61, 13. The Court, too, emphasizes that activities not "*coordinated with*" the terrorist groups are not banned. See *ante*, at 26, 31, 36 (emphasis added). And it argues that speaking, writing, and teaching aimed at furthering a terrorist organization's peaceful political ends could "mak[e] it easier for those groups to persist, to recruit members, and to raise funds." *Ante*, at 30.

But this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "inde-

pendent" as to "coordinated" advocacy. But see *ante,* at 31–32. That fact is reflected in part in the Government's claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an *amicus* brief before the United Nations or even before this Court. See Tr. of Oral Arg. 47–49, 53.

That fact is also reflected in the difficulty of drawing a line designed to accept the legitimacy argument in some instances but not in others. It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to "legitimacy" to increased support for the group to an increased supply of material goods that support its terrorist activities. Even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, "chill" protected speech beyond its boundary. In short, the justification, put forward simply in abstract terms and without limitation, must *always,* or it will *never,* be sufficient. Given the nature of the plaintiffs' activities, "always" cannot possibly be the First Amendment's answer.

Regardless, the "legitimacy" justification itself is inconsistent with critically important First Amendment case law. Consider the cases involving the protection the First Amendment offered those who joined the Communist Party intending only to further its peaceful activities. In those cases, this Court took account of congressional findings that the Communist Party not only advocated theoretically but also sought to put into practice the overthrow of our Government through force and violence. The Court had previously accepted Congress' determinations that the American Communist Party was a "Communist action organizatio[n]" which (1) acted under the "control, direction, and discipline" of the world Communist movement, a movement that sought to employ "espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dic-

tatorship," and (2) "endeavor[ed]" to bring about "the overthrow of existing governments by . . . force if necessary." *Communist Party of United States* v. *Subversive Activities Control Bd.*, 367 U. S. 1, 5–6 (1961) (internal quotation marks omitted).

Nonetheless, the Court held that the First Amendment protected an American's right to belong to that party—despite whatever "legitimating" effect membership might have had—as long as the person did not share the party's unlawful purposes. See, *e. g.*, *De Jonge*, 299 U. S. 353; *Scales*, 367 U. S., at 228–230; *Elfbrandt* v. *Russell*, 384 U. S. 11, 17 (1966); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–610 (1967); *Robel*, 389 U. S. 258 (holding that national security interests did not justify overbroad criminal prohibition on members of Communist-affiliated organizations working in any defense-related facility). As I have pointed out, those cases draw further support from other cases permitting pure advocacy of even the most unlawful activity—as long as that advocacy is not "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg*, 395 U. S., at 447. The Government's "legitimating" theory would seem to apply to these cases with equal justifying force; and, if recognized, it would have led this Court to conclusions other than those it reached.

Nor can the Government overcome these considerations simply by narrowing the covered activities to those that involve *coordinated*, rather than *independent*, advocacy. Conversations, discussions, or logistical arrangements might well prove necessary to carry out the speech-related activities here at issue (just as conversations and discussions are a necessary part of *membership* in any organization). The Government does not distinguish this kind of "coordination" from any other. I am not aware of any form of words that might be used to describe "coordination" that would not, at a minimum, seriously chill not only the kind of activities the

plaintiffs raise before us, but also the "independent advocacy" the Government purports to permit. And, as for the Government's willingness to distinguish *independent* advocacy from *coordinated* advocacy, the former is *more* likely, not *less* likely, to confer legitimacy than the latter. Thus, other things being equal, the distinction "coordination" makes is arbitrary in respect to furthering the statute's purposes. And a rule of law that finds the "legitimacy" argument adequate in respect to the latter would have a hard time distinguishing a statute that sought to attack the former.

Consider the majority's development of the Government's themes. First, the majority discusses the plaintiffs' proposal to "'train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes.'" *Ante*, at 36 (quoting 552 F. 3d, at 921, n. 1). The majority justifies the criminalization of this activity in significant part on the ground that "peaceful negotiation[s]" might just "bu[y] time . . . , lulling opponents into complacency." *Ante*, at 37. And the PKK might use its new information about "the structures of the international legal system . . . to threaten, manipulate, and disrupt." *Ibid.*

What is one to say about these arguments—arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about "the international legal system" is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try? What might be said of these claims by those who live, as we do, in a nation committed to the resolution of disputes through "deliberative forces"? *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

In my own view, the majority's arguments stretch the concept of "fungibility" beyond constitutional limits. Neither Congress nor the Government advanced these particular hy-

pothetical claims. I am not aware of any case in this Court—not *Gitlow* v. *New York*, 268 U. S. 652 (1925), not *Schenck* v. *United States*, 249 U. S. 47 (1919), not *Abrams*, 250 U. S. 616, not the later Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e. g.*, buy negotiating time for an opponent who would put that time to bad use.

Moreover, the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment. The Constitution does not allow all such conflicts to be decided in the Government's favor.

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity *as long as it is not "coordinated."* That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without *"coordination."* Nor can the majority limit the scope of its argument by pointing to some special limiting circumstance present here. That is because the only evidence the majority offers to support its general claim consists of a single reference to a book about terrorism, which the Government did not mention, and which apparently says no more than that at one time the PKK suspended its armed struggle and then returned to it.

Second, the majority discusses the plaintiffs' proposal to "'teach PKK members how to petition various representative bodies such as the United Nations *for relief*.'" *Ante*,

at 37 (quoting 552 F. 3d, at 921, n. 1; emphasis added). The majority's only argument with respect to this proposal is that the relief obtained "could readily include monetary aid," which the PKK might use to buy guns. *Ante*, at 37. The majority misunderstands the word "relief." In *this* context, as the record makes clear, the word "relief" does not refer to "money." It refers to recognition under the Geneva Conventions. See App. 57–58 (2003 Complaint); *id.*, at 79–80 (1998 Complaint); *id.*, at 113 (Fertig Declaration); see also Tr. of Oral Arg. 63 (plaintiffs' counsel denying that plaintiffs seek to teach about obtaining relief in the form of money).

Throughout, the majority emphasizes that it would defer strongly to Congress' "informed judgment." See, *e. g.*, *ante*, at 34. But here, there is no evidence that Congress has made such a judgment regarding the specific activities at issue in these cases. See *infra*, at 59–60. In any event, "[w]henever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open [for judicial determination] whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney*, *supra*, at 378–379 (Brandeis, J., concurring). In such circumstances, the "judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 844 (1978). Hence, a legislative declaration "does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution." *Whitney*, *supra*, at 378; see also *Landmark*, *supra*, at 843 ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

I concede that the Government's expertise in foreign affairs may warrant deference in respect to many matters, *e. g.*, our relations with Turkey. Cf. *ante*, at 32–33. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day.

Finally, I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some *special way* or confer some *special* legitimacy upon the PKK. Rather, their arguments in this respect are general and speculative. Those arguments would apply to virtually all speech-related support for a dual-purpose group's peaceful activities (irrespective of whether the speech-related activity is coordinated). Both First Amendment logic and First Amendment case law prevent us from "sacrific[ing] First Amendment protections for so speculative a gain." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 127 (1973); see also *Consolidated Edison Co.*, 447 U. S., at 543 (rejecting proffered state interest not supported in record because "[m]ere speculation of harm does not constitute a compelling state interest").

II

For the reasons I have set forth, I believe application of the statute as the Government interprets it would gravely and without adequate justification injure interests of the kind the First Amendment protects. Thus, there is "a serious doubt" as to the statute's constitutionality. *Crowell*, 285 U. S., at 62. And where that is so, we must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ibid.;* see also *Ashwander*, 297 U. S., at 346–348 (Brandeis, J., concurring); *Zadvydas* v. *Davis*, 533 U. S. 678, 689 (2001); *United States*

v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994); *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916).

I believe that a construction that would avoid the constitutional problem is "fairly possible." In particular, I would read the statute as criminalizing First Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

A person acts with the requisite knowledge if he is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization's terrorist ends. See *Allen* v. *United States*, 164 U. S. 492, 496 (1896); cf. ALI, Model Penal Code § 2.02(2)(b)(ii) (1962). See also *United States* v. *Santos*, 553 U. S. 507, 521 (2008) (plurality opinion); cf. Model Penal Code § 2.02(7) (willful blindness); S. Rep. No. 95–605, pt. 1, pp. 59–60 (1977). A person also acts with the requisite intent if it is his "conscious objective" (or purpose) to further those same terrorist ends. See *United States* v. *Bailey*, 444 U. S. 394, 408 (1980); Model Penal Code §§ 2.02(2)(a) and 2.02(5) ("When acting knowingly suffices to establish an element, such element also is established if a person acts purposely"). On the other hand, for the reasons I have set out, see *supra*, at 49–52, knowledge or intent that this assistance (aimed at lawful activities) could or would help further terrorism simply by helping to legitimate the organization is not sufficient.

This reading of the statute protects those who engage in pure speech and association ordinarily protected by the First Amendment. But it does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism.

Where the activity fits into these categories of purposefully or knowingly supporting terrorist ends, the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that, in my view, it likely can be prohibited notwithstanding any First Amendment interest. Cf. *Brandenburg*, 395 U. S. 444. At the same time, this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough. See *Bailey*, *supra*, at 405 (defining specific intent).

This reading is consistent with the statute's text. The statute prohibits "*knowingly* provid[ing] *material* support or resources to a foreign terrorist organization." § 2339B(a)(1) (emphasis added). Normally we read a criminal statute as applying a *mens rea* requirement to all of the subsequently listed elements of the crime. See *Flores-Figueroa* v. *United States*, 556 U. S. 646, 652 (2009). So read, the defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support *to a foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.

This fourth requirement flows directly from the statute's use of the word "material." That word can mean being of a physical or worldly nature, but it also can mean "being of real importance or great consequence." Webster's Third New International Dictionary 1392 (1961). Here, it must mean the latter, for otherwise the statute, applying only to physical aid, would not apply to speech at all. See also § 2339A(b)(1) (defining "'material support or resources'" as "any property, *tangible or intangible*" (emphasis added)). And if the statute applies only to support that would likely be of real importance or great consequence, it must have importance or consequence in respect to the organization's

terrorist activities. That is because support that is not significantly likely to help terrorist activities, for purposes of this statute, neither has "importance" nor is of "great consequence."

The statutory definition of "material support" poses no problem. The statute defines "material support" through reference to a list of terms, including those at issue here—"training," "expert advice or assistance," "personnel," and "service." § 2339B(g)(4); § 2339A(b)(1). Since these latter terms all fall under the definition of the term "*material* support," these activities fall within the statute's scope only when they too are "material." Cf. *Stevens*, 559 U. S., at 474 (definitional phrase may take meaning from the term to be defined (citing *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004))).

Thus, textually speaking, a statutory requirement that the defendant *knew* the support was material can be read to require the Government to show that the defendant knew that the consequences of his acts had a significant likelihood of furthering the organization's terrorist, not just its lawful, aims.

I need not decide whether this is the only possible reading of the statute in cases where "material support" takes the form of "currency," "property," "monetary instruments," "financial securities," "financial services," "lodging," "safehouses," "false documentation or identification," "weapons," "lethal substances," or "explosives," and the like. § 2339A(b)(1). Those kinds of aid are inherently more likely to help an organization's terrorist activities, either directly or because they are fungible in nature. Thus, to show that an individual has provided support of those kinds will normally prove sufficient for conviction (assuming the statute's other requirements are met). But where support consists of pure speech or association, I would indulge in no such presumption. Rather, the Government would have to prove that the defendant knew he was providing support significantly likely to help the organization pursue its unlawful ter-

rorist aims (or, alternatively, that the defendant intended the support to be so used).

The statute's history strongly supports this reading. That history makes clear that Congress primarily sought to end assistance that takes the form of fungible donations of money or goods. See, *e. g.*, H. R. Rep. No. 104–383, at 38, 43–45, 81; *supra*, at 47–48. It shows that Congress, when referring to "expert services and assistance," for example, had in mind training that was sufficiently fungible to further terrorism directly, such as an aviation expert's giving "advice" that "facilitate[s] an aircraft hijacking" or an accountant's giving "advice" that will "facilitate the concealment of funds used to support terrorist activities." Hearing on Administration's Draft Anti-Terrorism Act of 2001 before the House Committee on the Judiciary, 107th Cong., 1st Sess., 61 (2001).

And the Chairman of the Senate Committee on the Judiciary, when reporting the relevant bill from Committee, told the Senate:

> "This bill also includes provisions making it a crime to knowingly provide material support *to the terrorist functions of* foreign groups designated by a Presidential finding to be engaged in terrorist activities." 142 Cong. Rec. 7550 (1996) (statement of Sen. Hatch) (emphasis added).

He then added:

> "I am convinced we have crafted a narrow but effective designation provision which meets these obligations *while safeguarding the freedom to associate*, which none of us would willingly give up." *Id.*, at 7557 (emphasis added).

Consistent with this view, the statute itself says:

> "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under

> the First Amendment to the Constitution of the United States." § 2339B(i).

In any event, the principle of constitutional avoidance demands this interpretation. As Part II makes clear, there is a "serious" doubt—indeed, a "grave" doubt—about the constitutionality of the statute insofar as it is read to criminalize the activities before us. *Crowell*, 285 U. S., at 62; see also *Ashwander*, 297 U. S., at 346–348 (Brandeis, J., concurring); *Jin Fuey Moy*, 241 U. S., at 401. We therefore must "read the statute to eliminate" that constitutional "doub[t] so long as such a reading is not plainly contrary to the intent of Congress." *X-Citement Video, Inc.*, 513 U. S., at 78.

For this reason, the majority's statutory claim that Congress did not use the word "knowingly" as I would use it, *ante*, at 16–18, and n. 3, is beside the point. Our consequent reading is consistent with the statute's text; it is consistent with Congress' basic intent; it interprets but does not significantly add to what the statute otherwise contains. Cf., *e. g.*, *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 373–374 (1971) (constitutionally compelled to add requirement that "forfeiture proceedings be commenced within 14 days and completed within 60 days" despite absence of any statutory time limits); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 507 (1979) (constitutionally compelled to interpret "employer" as implicitly excluding "church-operated schools" despite silence and eight other different but explicit exceptions). We should adopt it.

III

Having interpreted the statute to impose the *mens rea* requirement just described, I would remand the cases so that the lower courts could consider more specifically the precise activities in which the plaintiffs still wish to engage and determine whether and to what extent a grant of declaratory and injunctive relief were warranted. I do not see why the majority does not also remand the cases for consideration

of the plaintiffs' activities relating to "advocating" for the organizations' peaceful causes. See *ante*, at 24–25, 37–38.

The majority does not remand, apparently because it believes the plaintiffs lose automatically in that these "advocacy" claims are too general. It adds that the plaintiffs did not "suggest what exactly their 'advocacy' would consist of." *Ante*, at 37. But the majority is wrong about the lack of specificity. The record contains complaints and affidavits, which describe in detail the forms of advocacy these groups have previously engaged in and in which they would like to continue to engage. See App. 56–63, 78–87, 95–99, 110–123.

Moreover, the majority properly rejects the Government's argument that the plaintiffs' speech-related activities amount to "conduct" and should be reviewed as such. Government Brief 44–57. Hence, I should think the majority would wish the lower courts to reconsider this aspect of the cases, applying a proper standard of review. See, *e. g.*, *Philip Morris USA* v. *Williams*, 549 U. S. 346, 357–358 (2007); *Johnson* v. *California*, 543 U. S. 499, 515 (2005); cf. *Ricci* v. *DeStefano*, 557 U. S. 557, 631 (2009) (GINSBURG, J., dissenting) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance").

IV

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals. Cf. *Hamdi* v. *Rumsfeld*,

542 U. S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check . . . when it comes to the rights of th[is] Nation's citizens"). In these cases, for the reasons I have stated, I believe the Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

That is why, with respect, I dissent.

Syllabus

RENT-A-CENTER, WEST, INC. *v.* JACKSON

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

No. 09–497. Argued April 26, 2010—Decided June 21, 2010

Respondent Jackson filed an employment-discrimination suit against petitioner Rent-A-Center, his former employer, in the Nevada Federal District Court. Rent-A-Center filed a motion, under the Federal Arbitration Act (FAA), to dismiss or stay the proceedings, 9 U. S. C. § 3, and to compel arbitration, § 4, based on the arbitration agreement (Agreement) Jackson signed as a condition of his employment. Jackson opposed the motion on the ground that the Agreement was unenforceable in that it was unconscionable under Nevada law. The District Court granted Rent-A-Center's motion. The Ninth Circuit reversed in relevant part.

Held: Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator. Pp. 67–76.

(a) Section 2 of the FAA places arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443, and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478, "save upon such grounds as exist at law or in equity for the revocation of any contract," § 2. Here, the Agreement included two relevant arbitration provisions: It provided for arbitration of all disputes arising out of Jackson's employment, including discrimination claims, and it gave the "Arbitrator . . . exclusive authority to resolve any dispute relating to the [Agreement's] enforceability . . . including . . . any claim that all or any part of this Agreement is void or voidable." Rent-A-Center seeks enforcement of the second provision, which delegates to the arbitrator the "gateway" question of enforceability. See, *e. g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83–85. The court must enforce the delegation provision under §§ 3 and 4 unless it is unenforceable under § 2. Pp. 67–70.

(b) There are two types of validity challenges under § 2: One "challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole," *Buckeye, supra*, at 444. Only the first is relevant to a court's determination of an arbitration agree-

ment's enforceability, see, *e. g.*, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403–404, because under § 2 "an arbitration provision is severable from the remainder of the contract," *Buckeye*, *supra*, at 445. That does not mean that agreements to arbitrate are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with the agreement under § 4. That is no less true when the precise agreement to arbitrate is itself part of a larger arbitration agreement. Because here the agreement to arbitrate enforceability (the delegation provision) is severable from the remainder of the Agreement, unless Jackson challenged the delegation provision specifically, it must be treated as valid under § 2 and enforced under §§ 3 and 4. Pp. 70–72.

(c) The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole. In his brief to this Court he raised a challenge to the delegation provision for the first time, but that is too late and will not be considered. See *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 273–274. Pp. 72–76.

581 F. 3d 912, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 76.

Robert F. Friedman argued the cause for petitioner. With him on the briefs were *Edward F. Berbarie*, *Henry D. Lederman*, *Carter G. Phillips*, *Michael T. Garone*, *Ronald D. DeMoss*, *Andrew Trusevich*, and *Mary Harokopus*.

Ian E. Silverberg argued the cause for respondent. With him on the brief were *Del Hardy*, *Scott L. Nelson*, *Deepak Gupta*, *F. Paul Bland, Jr.*, *Matthew Wessler*, *Amy Radon*, *Arthur H. Bryant*, *Leslie A. Bailey*, and *Leslie A. Brueckner*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Donald M. Falk*, *Archis A. Parasharami*, *Robin S. Conrad*, and *Shane Brennan Kawka;* for the Equal Employment Advisory Council by *Rae T. Vann* and *Ann Elizabeth*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether, under the Federal Arbitration Act (FAA or Act), 9 U. S. C. §§ 1–16, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.

I

On February 1, 2007, the respondent here, Antonio Jackson, filed an employment-discrimination suit under Rev. Stat. § 1977, 42 U. S. C. § 1981, against his former employer in the United States District Court for the District of Nevada. The defendant and petitioner here, Rent-A-Center, West, Inc., filed a motion under the FAA to dismiss or stay the proceedings, 9 U. S. C. § 3, and to compel arbitration, § 4. Rent-A-Center argued that the Mutual Agreement to Arbitrate Claims (Agreement), which Jackson signed on February 24, 2003, as a condition of his employment there, precluded Jackson from pursuing his claims in court. The Agreement provided for arbitration of all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center, including "claims for discrimination" and

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Reesman; and for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Timothy Sandefur.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice et al. by *Jeffrey R. White* and *Julie Nepveu;* for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Laurence S. Gold;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael L. Foreman*, *Sarah C. Crawford*, *Vincent A. Eng*, *Elizabeth B. Wydra*, and *Dina Lassow;* for the National Association of Consumer Advocates by *Michael J. Quirk* and *Ira Rheingold;* for the National Consumer Law Center et al. by *Stuart T. Rossman* and *Patricia T. Sturdevant;* for Professional Arbitrator Roger I. Abrams et al. by *Kevin K. Russell;* and for the Service Employees International Union et al. by *Michael Rubin*, *Shelley A. Gregory*, *Rebecca M. Hamburg*, *Cliff Palefsky*, *Catherine Ruckelshaus*, and *Terisa E. Chaw.*

"claims for violation of any federal . . . law." App. 29–30. It also provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.*, at 34.

Jackson opposed the motion on the ground that "the arbitration agreement in question is clearly unenforceable in that it is unconscionable" under Nevada law. *Id.*, at 40. Rent-A-Center responded that Jackson's unconscionability claim was not properly before the court because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the Agreement. It also disputed the merits of Jackson's unconscionability claims.

The District Court granted Rent-A-Center's motion to dismiss the proceedings and to compel arbitration. The court found that the Agreement "'"clearly and unmistakenly *[sic]*"'" gives the arbitrator exclusive authority to decide whether the Agreement is enforceable, App. to Pet. for Cert. 4a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002)), and, because Jackson challenged the validity of the Agreement *as a whole*, the issue was for the arbitrator, App. to Pet. for Cert. 4a (citing *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 444–445 (2006)). The court noted that even if it were to examine the merits of Jackson's unconscionability claims, it would have rejected the claim that the agreement to split arbitration fees was substantively unconscionable under Nevada law. It did not address Jackson's procedural or other substantive unconscionability arguments.

Without oral argument, a divided panel of the Court of Appeals for the Ninth Circuit reversed in part, affirmed in part, and remanded. 581 F. 3d 912 (2009). The court reversed on the question of who (the court or arbitrator) had

the authority to decide whether the Agreement is enforceable. It noted that "Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator," but held that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." *Id.*, at 917. The Ninth Circuit affirmed the District Court's alternative conclusion that the fee-sharing provision was not substantively unconscionable and remanded for consideration of Jackson's other unconscionability arguments. *Id.*, at 919–921, and n. 3. Judge Hall dissented on the ground that "the question of the arbitration agreement's validity should have gone to the arbitrator, as the parties 'clearly and unmistakably provide[d]' in their agreement." *Id.*, at 921.

We granted certiorari, 558 U. S. 1142 (2010).

II

A

The FAA reflects the fundamental principle that arbitration is a matter of contract. Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983), provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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.

The FAA thereby places arbitration agreements on an equal footing with other contracts, *Buckeye*, *supra*, at 443, and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Le-*

land Stanford Junior Univ., 489 U. S. 468, 478 (1989). Like other contracts, however, they may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996).

The Act also establishes procedures by which federal courts implement § 2's substantive rule. Under § 3, a party may apply to a federal court for a stay of the trial of an action "upon any issue referable to arbitration under an agreement in writing for such arbitration." Under § 4, a party "aggrieved" by the failure of another party "to arbitrate under a written agreement for arbitration" may petition a federal court "for an order directing that such arbitration proceed in the manner provided for in such agreement." The court "shall" order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Ibid.*

The Agreement here contains multiple "written provision[s]" to "settle by arbitration a controversy," § 2. Two are relevant to our discussion. First, the section titled "Claims Covered By The Agreement" provides for arbitration of all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center. App. 29. Second, the section titled "Arbitration Procedures" provides that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.*, at 32, 34. The current "controversy" between the parties is whether the Agreement is unconscionable. It is the second provision, which delegates resolution of that controversy to the arbitrator, that Rent-A-Center seeks to enforce. Adopting the terminology used by the parties, we will refer to it as the delegation provision.

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gate-

way" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. See, *e. g.*, *Howsam*, 537 U. S., at 83–85; *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion). This line of cases merely reflects the principle that arbitration is a matter of contract.[1] See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938,

[1] There is one caveat. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995), held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." The parties agree the heightened standard applies here. See Brief for Petitioner 21; Brief for Respondent 54. The District Court concluded the "Agreement to Arbitrate clearly and unmistakenly *[sic]* provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." App. to Pet. for Cert. 4a. The Ninth Circuit noted that Jackson did not dispute that the text of the Agreement was clear and unmistakable on this point. 581 F. 3d 912, 917 (2009). He also does not dispute it here. What he argues now, however, is that it is not "clear and unmistakable" that his *agreement* to that text was valid, because of the unconscionability claims he raises. See Brief for Respondent 54–55. The dissent makes the same argument. See *post*, at 80–82 (opinion of STEVENS, J.).

This mistakes the subject of the *First Options* "clear and unmistakable" requirement. It pertains to the parties' *manifestation of intent*, not the agreement's *validity*. As explained in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), it is an "interpretive rule," based on an assumption about the parties' expectations. In "circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter," *ibid.*, we assume that is what they agreed to. Thus, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986).

The *validity* of a written agreement to arbitrate (whether it is legally binding, as opposed to whether it was in fact agreed to—including, of course, whether it was void for unconscionability) is governed by § 2's provision that it shall be valid "save upon such grounds as exist at law or in equity for the revocation of any contract." Those grounds do not include, of course, any requirement that its lack of unconscionability must be "clear and unmistakable." And they are not grounds that *First Options* added for agreements to arbitrate gateway issues; § 2 applies to all written agreements to arbitrate.

943 (1995). An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract," and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4. The question before us, then, is whether the delegation provision is valid under § 2.

B

There are two types of validity challenges under § 2: "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e. g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye*, 546 U. S., at 444. In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable.[2] See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403–404 (1967); *Buckeye*, *supra*, at 444–446; *Preston* v. *Ferrer*, 552 U. S. 346, 353–354 (2008). That is because § 2 states that a "written provision" "to settle by arbitration a controversy" is "valid, irrevocable, and enforceable" *without mention* of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. "[A]s a matter of substantive fed-

[2] The issue of the agreement's "validity" is different from the issue whether any agreement between the parties "was ever concluded," and, as in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440 (2006), we address only the former. *Id.*, at 444, n. 1.

eral arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye*, 546 U. S., at 445; see also *id.*, at 447 (the severability rule is based on § 2).

But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. 388 U. S., at 403–404. "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract," *id.*, at 404, n. 12. In some cases the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case—as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

Here, the "written provision . . . to settle by arbitration a controversy," 9 U. S. C. § 2, that Rent-A-Center asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement," App. 34. The "remainder of the contract," *Buckeye*, *supra*, at 445, is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center. To be sure this case differs from *Prima Paint*, *Buckeye*, and *Pres-*

ton, in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration—contracts for consulting services, see *Prima Paint*, *supra*, at 397, check-cashing services, see *Buckeye*, *supra*, at 442, and "personal management" or "talent agent" services, see *Preston*, *supra*, at 352. In this case, the underlying contract is itself an arbitration agreement. But that makes no difference.[3] Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific "written provision" to "settle by arbitration a controversy" that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

C

The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole. Nowhere in his opposition to Rent-A-Center's motion to compel arbitration did he even mention the delegation provision. See App. 39–47. Rent-A-Center noted this fact in its reply:

[3] The dissent calls this a "breezy assertion," *post*, at 77, but it seems to us self-evident. When the dissent comes to discussing the point, *post*, at 85–86, it gives no logical reason why an agreement to arbitrate one controversy (an employment-discrimination claim) is not severable from an agreement to arbitrate a different controversy (enforceability). There is none. Since the dissent accepts that the invalidity of one provision *within an arbitration agreement* does not necessarily invalidate its other provisions, *post*, at 81–82, n. 7, it cannot believe in some sort of magic bond between arbitration provisions that prevents them from being severed from each other. According to the dissent, it is fine to sever an invalid provision within an arbitration agreement when severability is a matter of state law, but severability is not allowed when it comes to applying *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967).

"[Jackson's response] fails to rebut or otherwise address in any way [Rent-A-Center's] argument that the Arbitrator must decide [Jackson's] challenge to the enforceability of the Agreement. *Thus, [Rent-A-Center's] argument is uncontested.*" *Id.*, at 50 (emphasis in original).

The arguments Jackson made in his response to Rent-A-Center's motion to compel arbitration support this conclusion. Jackson stated that "the *entire agreement* seems drawn to provide [Rent-A-Center] with undue advantages should an employment-related dispute arise." *Id.*, at 44 (emphasis added). At one point, he argued that the limitations on discovery "further suppor[t] [his] contention that the *arbitration agreement as a whole* is substantively unconscionable." *Ibid.* (emphasis added). And before this Court, Jackson describes his challenge in the District Court as follows: He "opposed the motion to compel on the ground that the *entire arbitration agreement*, including the delegation clause, was unconscionable." Brief for Respondent 55 (emphasis added). That is an accurate description of his filings.

As required to make out a claim of unconscionability under Nevada law, see 581 F. 3d, at 919, he contended that the Agreement was both procedurally and substantively unconscionable. It was procedurally unconscionable, he argued, because it "was imposed as a condition of employment and was non-negotiable." App. 41. But we need not consider that claim because none of Jackson's substantive unconscionability challenges was specific to the delegation provision. First, he argued that the Agreement's coverage was one sided in that it required arbitration of claims an employee was likely to bring—contract, tort, discrimination, and statutory claims—but did not require arbitration of claims Rent-A-Center was likely to bring—intellectual property, unfair competition, and trade secrets claims. *Id.*, at 42–43. This one-sided-coverage argument clearly did not go to the validity of the delegation provision.

Jackson's other two substantive unconscionability arguments assailed arbitration procedures called for by the contract—the fee-splitting arrangement and the limitations on discovery—procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court. To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination. Jackson, however, did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery procedures rendered the *entire* Agreement invalid.

Jackson's appeal to the Ninth Circuit confirms that he did not contest the validity of the delegation provision in particular. His brief noted the existence of the delegation provision, Brief for Appellant in No. 07–16164, p. 3, but his unconscionability arguments made no mention of it, *id.*, at 3–7. He also repeated the arguments he had made before the District Court, see *supra*, at 73, that the "entire agreement" favors Rent-A-Center and that the limitations on discovery further his "contention that the arbitration agreement as a whole is substantively unconscionable," Brief for Appellant

7–8. Finally, he repeated the argument made in his District Court filings, that under state law the unconscionable clauses could not be severed from the arbitration agreement, see *id.*, at 8–9.[4] The point of this argument, of course, is that the Agreement *as a whole* is unconscionable under state law.

Jackson repeated that argument before this Court. At oral argument, counsel stated: "There are certain elements of the arbitration agreement that are unconscionable and, under Nevada law, which would render the *entire arbitration agreement* unconscionable." Tr. of Oral Arg. 43 (emphasis added). And again, he stated, "we've got both certain provisions that are unconscionable, that under Nevada law render the *entire agreement* unconscionable . . . , and that's what the Court is to rely on." *Id.*, at 43–44 (emphasis added).

In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable because the *quid pro quo* he was supposed to receive for it—that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review"—was eliminated by the Court's subsequent holding in *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576 (2008), that the nonplenary grounds for judicial review in § 10 of the FAA are exclusive. Brief for Respondent 59–60. He brought this challenge to the delegation provision too late,

[4] Jackson's argument fails. The severability rule is a "matter of substantive federal arbitration law," and we have repeatedly "rejected the view that the question of 'severability' was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court." *Buckeye*, 546 U. S., at 445 (citing *Prima Paint*, 388 U. S., at 400, 402–403; *Southland Corp.* v. *Keating*, 465 U. S. 1, 10–14 (1984); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 270–273 (1995)). For the same reason, the Agreement's statement that its provisions are severable, see App. 37, does not affect our analysis.

and we will not consider it.[5] See *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 273–274 (2009).

* * *

We reverse the judgment of the Court of Appeals for the Ninth Circuit.

It is so ordered.

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

Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called "delegation clause."

The Court asserts that its holding flows logically from *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), in which the Court held that consideration of a contract revocation defense is generally a matter for the arbitrator, unless the defense is specifically directed at the arbitration clause, *id.*, at 404. We have treated this holding as a severability rule: When a party challenges a contract, "but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 446 (2006). The Court's decision today goes beyond *Prima*

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[5] *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576 (2008), was decided after Jackson submitted his brief to the Ninth Circuit, but that does not change our conclusion that he forfeited the argument. Jackson could have submitted a supplemental brief during the *year and a half* between this Court's decision of *Hall Street* on March 25, 2008, and the Ninth Circuit's judgment on September 9, 2009. Moreover, *Hall Street* affirmed a rule that had been in place in the Ninth Circuit since 2003. *Id.*, at 583–584, and n. 5.

Paint. Its breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more—"makes no difference," *ante,* at 72, is simply wrong. This written arbitration agreement is but one part of a broader employment agreement between the parties, just as the arbitration clause in *Prima Paint* was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes *all* the difference in the *Prima Paint* analysis.

I

Under the Federal Arbitration Act (FAA), 9 U. S. C. §§ 1–16, parties generally have substantial leeway to define the terms and scope of their agreement to settle disputes in an arbitral forum. "[A]rbitration is," after all, "simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.* v. *Kaplan,* 514 U. S. 938, 943 (1995). The FAA, therefore, envisions a limited role for courts asked to stay litigation and refer disputes to arbitration.

Certain issues—the kind that "contracting parties would likely have expected a court to have decided"—remain within the province of judicial review. *Howsam* v. *Dean Witter Reynolds, Inc.,* 537 U. S. 79, 83 (2002); see also *Green Tree Financial Corp.* v. *Bazzle,* 539 U. S. 444, 452 (2003) (plurality opinion); *AT&T Technologies, Inc.* v. *Communications Workers,* 475 U. S. 643, 649 (1986). These issues are "gateway matter[s]" because they are necessary antecedents to enforcement of an arbitration agreement; they raise questions the parties "are not likely to have thought that they had agreed that an arbitrator would" decide. *Howsam,* 537 U. S., at 83. Quintessential gateway matters include "whether the parties have a valid arbitration agreement at all," *Bazzle,* 539 U. S., at 452 (plurality opinion); "whether the parties are bound by a given arbitration clause," *How-*

sam, 537 U. S., at 84; and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," *ibid.* It would be bizarre to send these types of gateway matters to the arbitrator as a matter of course, because they raise a "'question of arbitrability.'"[1] See, *e. g.*, *ibid.*; *First Options*, 514 U. S., at 947.

"[Q]uestion[s] of arbitrability" thus include questions regarding the existence of a legally binding and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement. In this case we are concerned with the first of these categories: whether the parties have a valid arbitration agreement. This is an issue the FAA assigns to the courts.[2] Section 2 of the FAA dictates that covered arbitration agreements "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. "[S]uch grounds," which relate to contract validity and formation, include the claim at issue in this case, unconscionability. See *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996).

Two different lines of cases bear on the issue of *who* decides a question of arbitrability respecting validity, such as whether an arbitration agreement is unconscionable. Although this issue, as a gateway matter, is typically for the court, we have explained that such an issue can be delegated to the arbitrator in some circumstances. When the parties have purportedly done so, courts must examine two distinct rules to decide whether the delegation is valid.

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[1] Although it is not clear from our precedents, I understand "gateway matters" and "questions of arbitrability" to be roughly synonymous, if not exactly so. At the very least, the former includes all of the latter.

[2] Gateway issues involving the scope of an otherwise valid arbitration agreement also have a statutory origin. Section 3 of the FAA provides that "upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement," a court "shall . . . stay the trial of the action until such arbitration has been had." 9 U. S. C. §3.

The first line of cases looks to the parties' intent. In *AT&T Technologies*, we stated that "question[s] of arbitrability" may be delegated to the arbitrator, so long as the delegation is clear and unmistakable. 475 U. S., at 649. We reaffirmed this rule, and added some nuance, in *First Options*. Against the background presumption that questions of arbitrability go to the court, we stated that federal courts should "generally" apply "ordinary state-law principles that govern the formation of contracts" to assess "whether the parties agreed to arbitrate a certain matter (including arbitrability)." 514 U. S., at 944. But, we added, a more rigorous standard applies when the inquiry is whether the parties have "agreed to arbitrate arbitrability": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."[3] *Ibid.* (internal quotation marks and brackets omitted). JUSTICE BREYER's unanimous opinion for the Court described this standard as a type of "revers[e]" "presumption"[4]—one in favor of a judicial, rather than an arbitral, forum. *Id.*, at 945. Clear and unmistakable "evidence" of agreement to arbitrate arbitrability might include, as was urged in *First Options*, a course of conduct demonstrating assent,[5] *id.*, at 946, or, as is urged in this case, an express

[3] We have not expressly decided whether the *First Options* delegation principle would apply to questions of arbitrability that implicate §2 concerns, *i. e.*, grounds for contract revocation. I do not need to weigh in on this issue in order to resolve the present case.

[4] It is a "revers[e]" presumption because it is counter to the presumption we usually apply in favor of arbitration when the question concerns whether a particular dispute falls within the scope of a concededly binding arbitration agreement. *First Options*, 514 U. S., at 944–945.

[5] In *First Options* we found no clear and unmistakable assent to delegate to the arbitrator questions of arbitrability, given the parties' conduct. Respondents in that case had participated in the arbitration, but only to object to proceeding in arbitration and to challenge the arbitrators' jurisdiction. That kind of participation—in protest, to preserve legal claims—did not constitute unmistakable assent to be bound by the result. *Id.*, at 946–947.

agreement to do so. In any event, whether such evidence exists is a matter for the court to determine.

The second line of cases bearing on who decides the validity of an arbitration agreement, as the Court explains, involves the *Prima Paint* rule. See *ante*, at 71. That rule recognizes two types of validity challenges. One type challenges the validity of the arbitration agreement itself, on a ground arising from an infirmity in that agreement. The other challenges the validity of the arbitration agreement tangentially—via a claim that the entire contract (of which the arbitration agreement is but a part) is invalid for some reason. See *Buckeye*, 546 U. S., at 444. Under *Prima Paint*, a challenge of the first type goes to the court; a challenge of the second type goes to the arbitrator. See 388 U. S., at 403–404; see also *Buckeye*, 546 U. S., at 444–445. The *Prima Paint* rule is akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement must expressly say so in order to get his dispute into court.

In sum, questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. But questions of arbitrability may go to the arbitrator in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part.

II

We might have resolved this case by simply applying the *First Options* rule: Does the arbitration agreement at issue "clearly and unmistakably" evince petitioner's and respondent's intent to submit questions of arbitrability to the arbitrator?[6] The answer to that question is no. Respondent's

[6] Respondent has challenged whether he "meaningfully agreed to the terms of the form Agreement to Arbitrate, which he contends is procedur-

claim that the arbitration agreement is unconscionable undermines any suggestion that he "clearly" and "unmistakably" assented to submit questions of arbitrability to the arbitrator. See Restatement (Second) of Contracts § 208, Comment *d* (1979) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms"); *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219, 249 (1995) (O'Connor, J., concurring in judgment and dissenting in part) ("[A] determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract").[7] The

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ally and substantively unconscionable." 581 F. 3d 912, 917 (CA9 2009). Even if *First Options* relates only to "manifestation of intent," as the Court states, see *ante*, at 69, n. 1 (emphasis deleted), whether there has been meaningful agreement surely bears some relation to whether one party has manifested intent to be bound to an agreement.

[7] The question of unconscionability in this case is one of state law. See, *e. g.*, *Perry* v. *Thomas*, 482 U. S. 483, 492, n. 9 (1987). Under Nevada law, unconscionability requires a showing of "'both procedural and substantive unconscionability,'" but "less evidence of substantive unconscionability is required in cases involving great procedural unconscionability." *D. R. Horton, Inc.* v. *Green*, 120 Nev. 549, 553–554, 96 P. 3d 1159, 1162 (2004) *(per curiam)*. I understand respondent to have claimed, in accord with Nevada law, that the arbitration agreement contained substantively unconscionable provisions, and was also the product of procedural unconscionability as a whole. See Brief for Respondent 3 ("[Respondent] argued that the clause is procedurally unconscionable because he was in a position of unequal bargaining power when it was imposed as a condition of employment"); *id.*, at 3–4 (identifying three distinct provisions of the agreement that were substantively unconscionable); accord, 581 F. 3d, at 917.

Some of respondent's arguments, however, could be understood as attacks not on the enforceability of the agreement as a whole but merely on the fairness of individual contract terms. Such term-specific challenges

fact that the agreement's "delegation" provision suggests assent is beside the point, because the gravamen of respondent's claim is that he never consented to the terms in his agreement.

In other words, when a party raises a good-faith validity challenge to the arbitration agreement itself, that issue must be resolved before a court can say that he clearly and unmistakably intended to *arbitrate* that very validity question. This case well illustrates the point: If respondent's unconscionability claim is correct—*i. e.*, if the terms of the agreement are so one-sided and the process of its making so unfair—it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate. Accordingly, it is necessary for the court to resolve the merits of respondent's unconscionability claim in order to decide whether the parties have a valid arbitration agreement under § 2. Otherwise, that section's preservation of revocation issues for the Court would be meaningless.

This is, in essence, how I understand the Court of Appeals to have decided the issue below. See 581 F. 3d 912, 917 (CA9 2009) ("[W]e hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court"). I would therefore affirm its judgment, leaving, as it did, the merits of respondent's unconscionability claim for the District Court to resolve on remand.

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would generally be for the arbitrator to resolve (at least so long as they do not go to the identity of the arbitrator or the ability of a party to initiate arbitration). Cf. Restatement (Second) of Contracts § 208 (1979) (providing that "a contract or term thereof [may be] unconscionable" and that in the latter case "the remainder of the contract without the unconscionable term" may be enforced).

III

Rather than apply *First Options*, the Court takes us down a different path, one neither briefed by the parties nor relied upon by the Court of Appeals. In applying *Prima Paint*, the Court has unwisely extended a "fantastic" and likely erroneous decision. 388 U. S., at 407 (Black, J., dissenting).[8]

As explained at the outset, see *supra*, at 78–82, this case lies at a seeming crossroads in our arbitration jurisprudence. It implicates cases such as *First Options*, which address whether the parties intended to delegate questions of arbitrability, and also those cases, such as *Prima Paint*, which address the severability of a presumptively valid arbitration agreement from a potentially invalid contract. The question of "Who decides?"—arbitrator or court—animates both lines of cases, but they are driven by different concerns. In cases like *First Options*, we are concerned with the parties' intentions. In cases like *Prima Paint*, we are concerned with *how* the parties challenge the validity of the agreement.

Under the *Prima Paint* inquiry, recall, we consider whether the parties are actually challenging the validity of the arbitration agreement, or whether they are challenging, more generally, the contract within which an arbitration clause is nested. In the latter circumstance, we assume there is no infirmity *per se* with the arbitration agreement, *i. e.*, there are no grounds for revocation of the arbitration agreement itself under §2 of the FAA. Accordingly, we

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[8] Justice Black quite reasonably characterized the Court's holding in *Prima Paint* as "fantastic," 388 U. S., at 407 (dissenting opinion), because the holding was, in his view, inconsistent with the text of §2 of the FAA, *id.*, at 412, as well as the intent of the draftsmen of the legislation, *id.*, at 413–416. Nevertheless, the narrow holding in that case has been followed numerous times, see *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440 (2006), and *Preston* v. *Ferrer*, 552 U. S. 346 (2008), and, as the Court correctly notes today, neither party has asked us to revisit those cases, *ante*, at 70.

commit the parties' general contract dispute to the arbitrator, as agreed.

The claim in *Prima Paint* was that one party would not have agreed to contract with the other for services had it known the second party was insolvent (a fact known but not disclosed at the time of contracting). 388 U. S., at 398. There was, therefore, allegedly fraud in the inducement of the contract—a contract which also delegated disputes to an arbitrator. Despite the fact that the claim raised would have, if successful, rendered the embedded arbitration clause void, the Court held that the merits of the dispute were for the arbitrator, so long as the claim of "fraud in the inducement" did not go to validity of "*the arbitration clause* itself." *Id.*, at 403 (emphasis added). Because, in *Prima Paint*, "no claim ha[d] been advanced by Prima Paint that [respondent] fraudulently induced it to enter into the agreement to arbitrate," and because the arbitration agreement was broad enough to cover the dispute, the arbitration agreement was enforceable with respect to the controversy at hand. *Id.*, at 406.

The *Prima Paint* rule has been denominated as one related to severability. Our opinion in *Buckeye* set out these guidelines:

> "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." 546 U. S., at 445–446.

Whether the general contract defense renders the entire agreement void or voidable is irrelevant. *Id.*, at 446. All that matters is whether the party seeking to present the issue to a court has brought a "discrete challenge," *Preston* v. *Ferrer*, 552 U. S. 346, 354 (2008), "to the validity of the . . . arbitration clause." *Buckeye*, 546 U. S., at 449.

Prima Paint and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*. Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator. See *ante*, at 71–72. I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far.

In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the "'making'" of the arbitration agreement itself, *Prima Paint*, 388 U. S., at 403, and therefore, under *Prima Paint*, must be decided by the court. A claim of procedural unconscionability aims to undermine the formation of the arbitration agreement, much like a claim of unconscionability aims to undermine the clear-and-unmistakable-intent requirement necessary for a valid delegation of a "discrete" challenge to the validity of the arbitration agreement itself, *Preston*, 552 U. S., at 354. Moreover, because we are dealing in this case with a challenge to an independently executed arbitration agreement—rather than a clause contained in a contract related to another subject matter—any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement.[9] They are one and the same.

The Court, however, reads the delegation clause as a distinct mini-arbitration agreement divisible from the contract in which it resides—which just so happens also to be an arbitration agreement. *Ante*, at 71–72. Although the Court

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[9] As respondent asserted in his opposition to petitioner's motion to compel arbitration, "the lack of mutuality regarding the type of claims that must be arbitrated, the fee provision, and the discovery provision, so permeate the Defendant's arbitration agreement that it would be impossible to sever the offending provisions." App. 45.

simply declares that it "makes no difference" that the underlying subject matter of the agreement is itself an arbitration agreement, *ante*, at 72, that proposition does not follow from—rather it is at odds with—*Prima Paint*'s severability rule.

Had the parties in this case executed only one contract, on two sheets of paper—one sheet with employment terms, and a second with arbitration terms—the contract would look much like the one in *Buckeye*. There would be some substantive terms, followed by some arbitration terms, including what we now call a delegation clause—*i. e.*, a sentence or two assigning to the arbitrator any disputes related to the validity of the arbitration provision. See *Buckeye*, 546 U. S., at 442. If respondent then came into court claiming that the contract was illegal as a whole for some reason unrelated to the arbitration provision, the *Prima Paint* rule would apply, and such a general challenge to the subject matter of the contract would go to the arbitrator. Such a challenge would not call into question the making of the arbitration agreement or its invalidity *per se*.

Before today, however, if respondent instead raised a challenge specific to "the validity of the agreement to arbitrate"—for example, that the agreement to arbitrate was void under state law—the challenge would have gone to the court. That is what *Buckeye* says. See 546 U. S., at 444. But the Court now declares that *Prima Paint*'s pleading rule requires more: A party must lodge a challenge with even greater specificity than what would have satisfied the *Prima Paint* Court. A claim that an *entire* arbitration agreement is invalid will not go to the court unless the party challenges the *particular sentences* that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences. See *ante*, at 71–73.

It would seem the Court reads *Prima Paint* to require, as a matter of course, infinite layers of severability: We must always pluck from an arbitration agreement the specific dele-

gation mechanism that would—but for present judicial review—commend the matter to arbitration, even if this delegation clause is but one sentence within one paragraph within a standalone agreement. And, most importantly, the party must identify this one sentence and lodge a specific challenge to its validity. Otherwise, he will be bound to pursue his validity claim in arbitration.

Even if limited to separately executed arbitration agreements, however, such an infinite severability rule is divorced from the underlying rationale of *Prima Paint.* The notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for any lawyer—or any person—to accept, but this is the law of *Prima Paint.* It reflects a judgment that the "'national policy favoring arbitration,'" *Preston*, 552 U. S., at 353, outweighs the interest in preserving a judicial forum for questions of arbitrability—*but only when questions of arbitrability are bound up in an underlying dispute. Prima Paint*, 388 U. S., at 404. When the two are so bound up, there is actually no gateway matter at all: The question "Who decides" is the entire ball game. Were a court to decide the fraudulent inducement question in *Prima Paint*, in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underlying dispute. Same, too, for the question of illegality in *Buckeye;* on its way to deciding the arbitration agreement's validity, the court would have to decide whether the contract was illegal, and in so doing, it would decide the merits of the entire dispute.

In this case, however, resolution of the unconscionability question will have no bearing on the merits of the underlying employment dispute. It will only, as a preliminary matter, resolve who should decide the merits of that dispute. Resolution of the unconscionability question will, however, decide whether the arbitration agreement *itself* is "valid" under "such grounds as exist at law or in equity for the revocation

of any contract." 9 U. S. C. §2. As *Prima Paint* recognizes, the FAA commits those gateway matters, specific to the arbitration agreement, to the court. 388 U. S., at 403–404. Indeed, it is clear that the present controversy over whether the arbitration agreement is unconscionable is *itself severable* from the merits of the underlying dispute, which involves a claim of employment discrimination. This is true for all gateway matters, and for this reason *Prima Paint* has no application in this case.

IV

While I may have to accept the "fantastic" holding in *Prima Paint*, *id.*, at 407 (Black, J., dissenting), I most certainly do not accept the Court's even more fantastic reasoning today. I would affirm the judgment of the Court of Appeals, and therefore respectfully dissent.

Syllabus

KAWASAKI KISEN KAISHA LTD. ET AL. *v.* REGAL-BELOIT CORP. ET AL.

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

No. 08–1553. Argued March 24, 2010—Decided June 21, 2010*

Respondents (cargo owners) delivered to petitioners in No. 08–1553 ("K" Line) goods for shipping from China to inland United States destinations. "K" Line issued them four through bills of lading, *i. e.*, bills of lading covering both the ocean and inland portions of transport in a single document. As relevant here, the bills contain a "Himalaya Clause," which extends the bills' defenses and liability limitations to subcontractors; permit "K" Line to subcontract to complete the journey; provide that the entire journey is governed by the Carriage of Goods by Sea Act (COGSA), which regulates bills of lading issued by ocean carriers engaged in foreign trade; and designate a Tokyo court as the venue for any dispute. "K" Line arranged the journey, subcontracting with petitioner in No. 08–1554 (Union Pacific) for rail shipment in the United States. The cargo was shipped in "K" Line vessels to California and then loaded onto a Union Pacific train. A derailment along the inland route allegedly destroyed the cargo. Ultimately, the Federal District Court granted the motion of Union Pacific and "K" Line to dismiss the cargo owners' suits against them based on the parties' Tokyo forum-selection clause. The Ninth Circuit reversed, concluding that that clause was trumped by the Carmack Amendment governing bills of lading issued by domestic rail carriers, which applied to the inland portion of the shipment.

Held: Because the Carmack Amendment does not apply to a shipment originating overseas under a single through bill of lading, the parties' agreement to litigate these cases in Tokyo is binding. Pp. 96–112.

(a) COGSA, which "K" Line and Union Pacific contend governs these cases, requires a carrier to issue to the cargo owner a bill containing specified terms. It does not limit the parties' ability to adopt forum-selection clauses. It only applies to shipments from United States ports to foreign ports and vice versa, but permits parties to extend certain of its terms "by contract" to cover "the entire period in which [the goods] would be under [a carrier's] responsibility, including [a] pe-

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*Together with No. 08–1554, *Union Pacific Railroad Co.* v. *Regal-Beloit Corp. et al.*, also on certiorari to the same Court.

riod of inland . . . transport." *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 29. The Carmack Amendment, on which respondents rely, requires a domestic rail carrier that "receives [property] for transportation under this part" to issue a bill of lading. 49 U. S. C. § 11706(a). "[T]his part" refers to the Surface Transportation Board's (STB's) jurisdiction over domestic rail transportation. See § 10501(b). Carmack assigns liability for damage on the rail route to "receiving rail carrier[s]" and "delivering rail carrier[s]," regardless of which carrier caused the damage. § 11706(a). Its purpose is to relieve cargo owners "of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." *Reider* v. *Thompson*, 339 U. S. 113, 119. Thus, it constrains carriers' ability to limit liability by contract, § 11706(c), and limits the parties' choice of venue to federal and state courts, § 11706(d)(1). Pp. 96–99.

(b) In *Kirby*, as in these cases, an ocean shipping company issued a through bill of lading that extended COGSA's terms to the inland segment, and the property was damaged during the inland rail portion. This Court held that the through bill's terms governed under federal maritime law, notwithstanding contrary state laws, 543 U. S., at 23–27, explaining that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce," *id.*, at 27, and adding that "[a]pplying state law . . . would undermine the uniformity of general maritime law," *id.*, at 28, and defeat COGSA's apparent purpose "to facilitate efficient contracting in contracts for carriage by sea," *ibid.* Here, as in *Kirby*, "K" Line issued through bills under COGSA, in maritime commerce, and extended its terms to the journey's inland domestic segment. Pp. 99–100.

(c) The Carmack Amendment's text, history, and purposes make clear that it does not require a different result. Pp. 100–111.

(1) Carmack divides the realm of rail carriers into receiving, delivering, and connecting rail carriers. Its first sentence requires a compliant bill of lading (1) if a "rail carrier provid[es] transportation or service subject to the [STB's] jurisdiction" and (2) if that carrier "receives" the property "for transportation . . . ." §11706(a). It thus requires the receiving rail carrier—but not the delivering or connecting rail carrier—to issue a bill of lading. This conclusion is consistent with the statute's text and this Court's precedent. See *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 595, 604. A receiving rail carrier is the initial carrier, which "receives" the property for domestic rail transportation at the journey's point of origin. If the Carmack's bill of lading requirement referred not to the initial carrier, but to any carrier "receiving" the property from another carrier, then every carrier during

the shipment would have to issue its own separate bill. This would be contrary to Carmack's purpose of making the receiving and delivering carriers liable under a single, initial bill for damage caused by any carrier within a single course of shipment. This conclusion is consistent with *Mexican Light & Power Co.* v. *Texas Mexican R. Co.*, 331 U. S. 731, where the Court held that a bill of lading issued by a subsequent rail carrier when the "initial carrier" has issued a through bill is "void" unless it "represents the initiation of a new shipment," *id.*, at 733–734. And *Reider*, *supra*, is not to the contrary. There, absent a through bill of lading, the original journey from Argentina terminated at the port of New Orleans, and the first rail carrier in the United States was the receiving rail carrier for Carmack purposes. *Id.*, at 117. Carmack's second sentence establishes that it applies only to transport of property for which a receiving carrier is required to issue a bill of lading, regardless of whether that carrier actually issues such a bill. See § 11706(a). Thus, Carmack applies only if the journey begins with a receiving rail carrier that had to issue a compliant bill of lading, not if the property is received at an overseas location under a through bill that covers transport into an inland location in this country. The initial carrier in that instance receives the property at the shipment's point of origin for overseas multimodal import transport, not domestic rail transport. Carmack did not require "K" Line to issue bills of lading because "K" Line was not a receiving rail carrier. That it chose to use rail transport to complete one segment of the journey under its "essentially maritime" contracts, *Kirby*, *supra*, at 24, does not put it within Carmack's reach. Union Pacific, which the cargo owners concede was a mere delivering carrier that did not have to issue its own Carmack bill of lading, was also not a receiving rail carrier under Carmack. Because the Ninth Circuit ignored Carmack's "receive[d] . . . for transportation" limitation, it reached the wrong conclusion. Its conclusion is also an awkward fit with Carmack's venue provisions, which presume that the receiving carrier obtains the property in a judicial district within the United States. If "K" Line were a receiving carrier in a case with a "point of origin" in China, there would be no place under Carmack to sue "K" Line, since China is not within a judicial district "of the United States or in a State Court." § 11706(d)(1). Pp. 100–106.

(2) Carmack's statutory history supports this conclusion. None of its legislative versions—the original 1906 statute or the amended 1915, 1978, or 1995 ones—have applied to the inland domestic rail segment of an import shipment from overseas under a through bill. Pp. 106–108.

(3) This interpretation also attains the most consistency between Carmack and COGSA. Applying Carmack to the inland segment of an international carriage originating overseas under a through bill would

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undermine Carmack's purposes, which are premised on the view that a shipment has a single bill of lading and any damage is the responsibility of both receiving and delivering carriers. Under the Ninth Circuit's interpretation, there might be no venue in which to sue the receiving carrier. That interpretation would also undermine COGSA and international, container-based multimodal transport: COGSA's liability and venue rules would apply when cargo is damaged at sea and Carmack's rules almost always would apply when the damage occurs on land. Moreover, applying Carmack to international import shipping transport would undermine COGSA's purpose "to facilitate efficient contracting in contracts for carriage by sea." *Kirby, supra*, at 29. The cargo owners' contrary policy arguments are unavailing. Pp. 108–111.

557 F. 3d 985, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 112.

J. Scott Ballenger argued the cause for petitioners in both cases. On the briefs in No. 08–1553 were *Kathleen M. Sullivan*, *Daniel H. Bromberg*, *John P. Meade*, and *Alan Nakazawa*. With *Mr. Ballenger* on the briefs in No. 08–1554 were *Maureen E. Mahoney*, *Lori Alvino McGill*, *J. Michael Hemmer*, and *Leslie McMurray*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, and *Michael Jay Singer*.

David C. Frederick argued the cause for respondents in both cases. With him on the brief were *Brendan J. Crimmins*, *Dennis A. Cammarano*, and *Erin Glenn Busby*.†

†Briefs of *amici curiae* urging reversal in both cases were filed for the Association of American Railroads by *Daniel Saphire;* for the International Group of Protection and Indemnity Clubs et al. by *Chester Douglas Hooper* and *William P. Byrne;* and for the World Shipping Council by *Marc J. Fink* and *John W. Butler*.

David T. Maloof filed a brief in both cases for the Transportation & Logistics Council, Inc., et al. as *amici curiae*.

JUSTICE KENNEDY delivered the opinion of the Court.

These cases concern through bills of lading covering cargo for the entire course of shipment, beginning in a foreign, overseas country and continuing to a final, inland destination in the United States. The voyage here included ocean transit followed by transfer to a rail carrier in this country. The Court addressed similar factual circumstances in *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14 (2004). In that case the terms of a through bill were controlled by federal maritime law and by a federal statute known as the Carriage of Goods by Sea Act (COGSA), note following 46 U. S. C. § 30701. *Kirby* held that bill of lading provisions permissible under COGSA can be invoked by a domestic rail carrier, despite contrary state law.

The instant cases present a question neither raised nor addressed in *Kirby*. It is whether the terms of a through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier, despite prohibitions or limitations in another federal statute. That statute is known as the Carmack Amendment and it governs the terms of bills of lading issued by domestic rail carriers. 49 U. S. C. § 11706(a).

I

Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Company Ltd., and Royal & Sun Alliance Insurance Company Ltd. are cargo owners or insurance firms that paid losses to cargo owners and succeeded to their rights, all referred to as "cargo owners." To ship their goods from China to inland destinations in the Midwestern United States, the cargo owners delivered the goods in China to petitioners in No. 08–1553, Kawasaki Kisen Kaisha Ltd., and its agent "K" Line America, Inc., both referred to as "K" Line. All agree the relevant contract terms governing the shipment are contained in four

through bills of lading "K" Line issued to the cargo owners. The bills of lading covered the entire course of shipment.

The bills required "K" Line to arrange delivery of the goods from China to their final destinations in the United States, by any mode of transportation of "K" Line's choosing. A bill of lading "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Kirby*, 543 U. S., at 18–19. A through bill of lading covers both the ocean and inland portions of the transport in a single document. *Id.*, at 25–26.

"K" Line's through bills contain five relevant provisions. First, they include a so-called "Himalaya Clause," which extends the bills' defenses and limitations on liability to parties that sign subcontracts to perform services contemplated by the bills. See *id.*, at 20, and n. 2. Second, the bills permit "K" Line "to sub-contract on any terms whatsoever" for the completion of the journey. App. 145. Third, the bills provide that COGSA's terms govern the entire journey. Fourth, the bills require that any dispute will be governed by Japanese law. Fifth, the bills state that any action relating to the carriage must be brought in "Tokyo District Court in Japan." *Id.*, at 144. The forum-selection provision in the last clause gives rise to the dispute here.

"K" Line, pursuant to the bills of lading, arranged for the entire journey. It subcontracted with petitioner in No. 08–1554, Union Pacific Railroad Company, for rail shipment in the United States. The goods were to be shipped in a "K" Line vessel to a port in Long Beach, California, and then transferred to Union Pacific for rail carriage to the final destinations.

In March and April 2005, the cargo owners brought four different container shipments to "K" Line vessels in Chinese ports. All parties seem to assume that "K" Line safely transported the cargo across the Pacific Ocean to California.

The containers were then loaded onto a Union Pacific train and that train, or some other train operated by Union Pacific, derailed in Tyrone, Oklahoma, allegedly destroying the cargo.

The cargo owners filed four separate lawsuits in the Superior Court of California, County of Los Angeles. The suits named "K" Line and Union Pacific as defendants. Union Pacific removed the suits to the United States District Court for the Central District of California. Union Pacific and "K" Line then moved to dismiss based on the parties' Tokyo forum-selection clause. The District Court granted the motion to dismiss. It decided that the forum-selection clause was reasonable and applied to Union Pacific pursuant to the Himalaya Clause in "K" Line's bills of lading. 462 F. Supp. 2d 1098, 1102–1103 (2006).

The United States Court of Appeals for the Ninth Circuit reversed and remanded. 557 F. 3d 985 (2009). The court concluded that the Carmack Amendment applied to the inland portion of an international shipment under a through bill of lading and thus trumped the parties' forum-selection clause. *Id.*, at 994–995. The court noted that this view was consistent with the position taken by the Court of Appeals for the Second Circuit, see *id.*, at 994 (citing *Sompo Japan Ins. Co. of Am.* v. *Union Pacific R. Co.*, 456 F. 3d 54 (2006)), but inconsistent with the views of the Courts of Appeals for the Fourth, Sixth, Seventh, and Eleventh Circuits, see 557 F. 3d, at 994 (citing *Shao* v. *Link Cargo (Taiwan) Ltd.*, 986 F. 2d 700 (CA4 1993); *American Road Serv. Co.* v. *Consolidated Rail Corporation*, 348 F. 3d 565 (CA6 2003); *Capitol Converting Equip., Inc.* v. *LEP Transp., Inc.*, 965 F. 2d 391 (CA7 1992); *Altadis USA, Inc., ex rel. Fireman's Fund Ins. Co.* v. *Sea Star Line, LLC*, 458 F. 3d 1288 (CA11 2006)). This Court granted certiorari to address whether Carmack applies to the inland segment of an overseas import shipment under a through bill of lading. 558 U. S. 969 (2009).

II

A

Before turning to Carmack, a brief description of COGSA is in order; for "K" Line's and Union Pacific's primary contention is that COGSA, not Carmack, controls. COGSA governs the terms of bills of lading issued by ocean carriers engaged in foreign trade. 49 Stat. 1207, as amended, note following 46 U. S. C. § 30701, p. 1178. It requires each carrier to issue to the cargo owner a bill that contains certain terms. §§ 3(3)–(8), at 1178–1179. Although COGSA imposes some limitations on the parties' authority to adjust liability, it does not limit the parties' ability to adopt forum-selection clauses. See *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 537–539 (1995). By its terms, COGSA only applies to shipments from United States ports to ports of foreign countries and vice versa. §§ 1(e), 13, at 1178, 1180. The statute, however, allows parties "the option of extending [certain COGSA terms] by contract" to cover "the entire period in which [the goods] would be under [a carrier's] responsibility, including [a] period of . . . inland transport." *Kirby*, 543 U. S., at 29 (citing COGSA § 7, at 1180). Ocean carriers, which often must issue COGSA bills of lading, are regulated by the Federal Maritime Commission (Maritime Commission), which is responsible for oversight over "common carriage of goods by water in . . . foreign commerce." 46 U. S. C. § 40101(1).

B

The next statute to consider is the Carmack Amendment, § 7, 34 Stat. 595, which governs the terms of bills of lading issued by domestic rail carriers. Carmack was first enacted in 1906 as an amendment to the Interstate Commerce Act, 24 Stat. 379. The Carmack Amendment has been altered and recodified over the last century. It now provides, in relevant part, as follows:

> "(a) A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation Board (STB)] under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the [STB] under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—
>
> "(1) the receiving rail carrier;
>
> "(2) the delivering rail carrier; or
>
> "(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
>
> "Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier." 49 U. S. C. § 11706; see also § 14706(a) (motor carriers).

The Carmack Amendment thus requires a rail carrier that "receives [property] for transportation under this part" to issue a bill of lading. § 11706(a). The provision "this part" refers to is the STB's jurisdiction over rail transportation within the United States. See § 10501 (2006 ed. and Supp. II). The STB is the successor to the Interstate Commerce Commission. The STB has "exclusive" jurisdiction to regulate "transportation by rail carrier[s]" between places in the United States as well as between a place in "the United States and a place in a foreign country." §§ 10501(a)(1), (a)(2)(F), (b) (2006 ed.). Regulated rail carriers must provide transportation subject to STB rail carrier jurisdiction "on reasonable request," § 11101(a), at reasonable rates, §§ 10702, 10707(b), 11101(a), (e).

In cases where it applies, Carmack imposes upon "receiving rail carrier[s]" and "delivering rail carrier[s]" liability for damage caused during the rail route under the bill of lading, regardless of which carrier caused the damage. § 11706(a). Carmack's purpose is to relieve cargo owners "of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." *Reider* v. *Thompson*, 339 U. S. 113, 119 (1950). To help achieve this goal, Carmack constrains carriers' ability to limit liability by contract. § 11706(c).

Carmack also limits the parties' ability to choose the venue of their suit:

> "(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.
>
> "(2)(A) A civil action under this section may only be brought—
>
> "(i) against the originating rail carrier, in the judicial district in which the point of origin is located;
>
> "(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
>
> "(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred." § 11706.

For purposes of these cases, it can be assumed that if Carmack's terms apply to the bills of lading here, the cargo owners would have a substantial argument that the Tokyo forum-selection clause in the bills is pre-empted by Carmack's venue provisions. The parties argue about whether

they may contract out of Carmack's venue provisions and other requirements, see §§ 10502, 10709; but in light of the disposition and ruling to follow, those matters need not be discussed or further explored.

III

In *Kirby*, an ocean shipping company issued a through bill of lading, agreeing to deliver cargo from Australia to Alabama. Like the through bills in the present cases, the *Kirby* bill extended COGSA's terms to the inland segment under a Himalaya Clause. There, as here, the property was damaged by a domestic rail carrier during the inland rail portion. 543 U. S., at 19–20.

Kirby held that the through bill's terms governed under federal maritime law, notwithstanding contrary state laws. *Id.*, at 23–27. *Kirby* explained that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce." *Id.*, at 27. The Court added that "[a]pplying state law to cases like this one would undermine the uniformity of general maritime law." *Id.*, at 28. "Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." *Id.*, at 29. The Court noted that its conclusion "reinforce[d] the liability regime Congress established in COGSA," and explained that COGSA allows parties to extend its terms to an inland portion of a journey under a through bill of lading. *Ibid.* Finally, the Court concluded that a contrary holding would defeat "the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea." *Ibid.*

Much of what the Court said in *Kirby* applies to the present cases. "K" Line issued the through bills under COGSA, in maritime commerce. Congress considered such international through bills and decided to permit parties to extend COGSA's terms to the inland domestic segment of the journey. The cargo owners and "K" Line did exactly that in

these cases, agreeing in the through bills to require that any suit be brought in Tokyo.

IV

The cargo owners argue that the Carmack Amendment, which has its own venue provisions and was not discussed in *Kirby*, requires a different result. In particular they argue that Carmack applies to the domestic inland segment of the carriage here, so the Tokyo forum-selection clause is inapplicable. For the reasons set forth below, this contention must be rejected. Instructed by the text, history, and purposes of Carmack, the Court now holds that the amendment does not apply to a shipment originating overseas under a single through bill of lading. As in *Kirby*, the terms of the bill govern the parties' rights.

A

The text of the statute charts the analytic course. Carmack divides the realm of rail carriers into three parts: (1) receiving rail carriers; (2) delivering rail carriers; and (3) connecting rail carriers. A "receiving rail carrier" is one that "provid[es] transportation or service . . . for property it receives for transportation under this part." § 11706(a); see § 11706(a)(1). The provision "this part" refers to is the STB's jurisdiction over rail transportation within the United States. See § 10501. A "delivering rail carrier" "delivers the property and is providing transportation or service subject to the jurisdiction of the [STB] under this part." § 11706(a); see § 11706(a)(2). A connecting rail carrier is "another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." § 11706(a)(3).

A rail carrier's obligation to issue a Carmack-compliant bill of lading is determined by Carmack's first sentence:

> "A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part

> shall issue a receipt or bill of lading for property it receives for transportation under this part." § 11706(a).

This critical first sentence requires a Carmack-compliant bill of lading if two conditions are satisfied. First, the rail carrier must "provid[e] transportation or service subject to the jurisdiction of the [STB]." Second, that carrier must "receiv[e]" the property "for transportation under this part," where "this part" is the STB's jurisdiction over domestic rail transport. Carmack thus requires the receiving rail carrier—but not the delivering or connecting rail carrier—to issue a bill of lading. As explained below, ascertaining the shipment's point of origin is critical to deciding whether the shipment includes a receiving rail carrier.

The conclusion that Carmack's bill of lading requirement only applies to the receiving rail carrier is dictated by the text and is consistent with this Court's precedent. See *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 604 (1917) (explaining that Carmack "requires the receiving carrier to issue a through bill of lading"). A receiving rail carrier is the initial carrier, which "receives" the property for domestic rail transportation at the journey's point of origin. § 11706(a). If Carmack's bill of lading requirement did not refer to the initial carrier, but rather to any rail carrier that in the colloquial sense "received" the property from another carrier, then every carrier during the shipment would have to issue its own separate bill. This would be altogether contrary to Carmack's purpose of making the receiving and delivering carriers liable under a single, initial bill of lading for damage caused by any carrier within a single course of shipment.

This Court's decision in *Mexican Light & Power Co.* v. *Texas Mexican R. Co.*, 331 U. S. 731 (1947), supports the conclusion that only the receiving rail carrier must issue a Carmack bill of lading. There, a subsequent rail carrier in an export shipment from the United States to Mexico issued its own separate bill of lading at the U. S.-Mexico border. The

second bill differed from the through bill issued by the "initial carrier," *id.*, at 733, (that is, the receiving carrier) at the inland point of origin. The Court held that Carmack, far from requiring nonreceiving carriers to issue their separate bills of lading, makes any subsequent bill "void" unless the "so-called second bill of lading represents the initiation of a new shipment." *Id.*, at 734.

The Court's decision in *Reider*, 339 U. S. 113, is not to the contrary. That case involved goods originating in Argentina, bound for an inland location in the United States. The Court in *Reider* determined that because there was no through bill of lading, the original journey from Argentina terminated at the port of New Orleans. Thus, the first rail carrier in the United States was the receiving rail carrier and had to issue a Carmack bill of lading. *Id.*, at 117. And because that carrier had to issue a separate bill of lading, it was not liable for damage done during the ocean-based portion of the shipment. *Id.*, at 118–119. Notably, neither *Mexican Light* nor *Reider* addressed the situation in the present cases, where the shipment originates overseas under a through bill of lading. And, for this reason, neither case discussed COGSA.

The Carmack Amendment's second sentence establishes when Carmack liability applies:

> "[The receiving rail carrier referred to in the first sentence] and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the [STB] under this part are liable to the person entitled to recover under the receipt or bill of lading." § 11706(a).

Thus, the receiving and delivering rail carriers are subject to liability only when damage is done to this "property," that is to say, to property for which Carmack's first sentence requires the receiving rail carrier to issue a bill of lading. *Ibid.* Put another way, Carmack applies only to transport

of property for which Carmack requires a receiving carrier to issue a bill of lading, regardless of whether that carrier erroneously fails to issue such a bill. See *ibid.* ("Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier"). The language in some of the Courts of Appeals' decisions, which were rejected by the Court of Appeals in the opinion now under review, could be read to imply that Carmack applies only if a rail carrier actually issued a separate domestic bill of lading. See, *e. g.*, *Altadis*, 458 F. 3d, at 1291–1294; *American Road*, 348 F. 3d, at 568; *Shao*, 986 F. 2d, at 703; *Capitol Converting*, 965 F. 2d, at 394. This may have led to some confusion. The decisive question is not whether the rail carrier in fact issued a Carmack bill but rather whether that carrier was required to issue a bill by Carmack's first sentence.

The above principles establish that for Carmack's provisions to apply the journey must begin with a receiving rail carrier, which would have to issue a Carmack-compliant bill of lading. It follows that Carmack does not apply if the property is received at an overseas location under a through bill that covers the transport into an inland location in the United States. In such a case, there is no receiving rail carrier that "receives" the property "for [domestic rail] transportation," § 11706(a), and thus no carrier that must issue a Carmack-compliant bill of lading. The initial carrier in that instance receives the property at the shipment's point of origin for overseas multimodal import transport, not for domestic rail transport. (Today's decision need not address the instance where goods are received at a point in the United States for export. Nor is it necessary to decide if Carmack applies to goods initially received in Canada or Mexico, for import into the United States. See *infra*, at 107.)

The present cases illustrate the operation of these principles. Carmack did not require "K" Line to issue bills of lading because "K" Line was not a receiving rail carrier. "K" Line obtained the cargo in China for overseas transport

across an ocean and then to inland destinations in the United States. "K" Line shipped this property under COGSA-authorized through bills of lading. See *supra*, at 94–95. That "K" Line chose to use rail transport to complete one segment of the journey under these "essentially maritime" contracts, *Kirby*, 543 U. S., at 24, does not put "K" Line within Carmack's reach and thus does not require it to issue Carmack bills of lading.

As for Union Pacific, it was also not a receiving rail carrier under Carmack. The cargo owners conceded at oral argument that, even under their theory, Union Pacific was a mere delivering carrier, which did not have to issue its own Carmack bill of lading. See Tr. of Oral Arg. 29, 39. This was a necessary concession. A carrier does not become a receiving carrier simply by accepting goods for further transport from another carrier in the middle of an international shipment under a through bill. After all, Union Pacific was not the "initial carrier" for the carriage. *Mexican Light*, 331 U. S., at 733.

If a carrier like Union Pacific, which acts as a connecting or delivering carrier during an international through shipment, was, counterintuitively, a receiving carrier under Carmack, this would in effect outlaw through shipments under a single bill of lading. This is because a carriage like the one in the present case would require two bills of lading: one that the overseas carrier (here, "K" Line) issues to the cargo owners under COGSA, and a second one that the first domestic rail carrier (here, Union Pacific) issues to the overseas carrier under Carmack. *Kirby* noted "the popularity of 'through' bills of lading, in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction." 543 U. S., at 25–26. The Court sees no reason to read COGSA and Carmack to outlaw this efficient mode of international shipping by requiring these journeys to have multiple bills of lading. In addition, if Union Pacific had to issue a Carmack bill of lading to "K"

Line, it is unclear whether the cargo owners (the parties Carmack is designed to protect) would be able to sue under the terms governing that bill, especially in light of their different through bill with "K" Line. These difficulties are reason enough to reject this novel interpretation of Carmack, which was neither urged by any party nor adopted by any authority that has been called to this Court's attention.

This would be a quite different case if, as in *Reider*, the bills of lading for the overseas transport ended at this country's ports and the cargo owners then contracted with Union Pacific to complete a new journey to an inland destination in the United States. Under those circumstances, Union Pacific would have been the receiving rail carrier and would have been required to issue a separate Carmack-compliant bill of lading to the cargo owners. See *Reider*, 339 U. S., at 117 ("If the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not").

The Court of Appeals interpreted Carmack as applying to any domestic rail segment of an overseas shipment, regardless of whether Carmack required a bill of lading. The court rested on the assumption that the "[STB]'s jurisdiction . . . is coextensive with Carmack's coverage." 557 F. 3d, at 992. Yet, as explained above, Carmack applies only to shipments for which Carmack requires a bill of lading; that is to say, to shipments that start with a carrier that is both subject to the STB's jurisdiction and "receives [the property] for [domestic rail] transportation." The Court of Appeals ignored this "receive[d] . . . for transportation" limitation and so reached the wrong conclusion. See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979) (courts are "obliged to give effect, if possible, to every word Congress used").

The Court of Appeals' conclusion is also an awkward fit with Carmack's venue provisions. Under Carmack, a suit

against the "originating" (that is, receiving) rail carrier that has not actually caused the damage to the goods "may only be brought . . . in the judicial district in which the point of origin is located." §§ 11706(d)(2)(A), (A)(i). Suit against either a delivering carrier or any carrier that caused the damage, by contrast, may be brought in various other districts. See §§ 11706(d)(2)(B), (C). "[J]udicial district" refers to "district court of the United States or in a State Court." § 11706(d)(1). Carmack's venue provisions presume that the receiving carrier obtains the property in a judicial district within the United States. Here, the journey's "point of origin" was China, so Carmack's venue provisions reinforce the interpretation that Carmack does not apply to this carriage.

Indeed, if "K" Line were a receiving carrier in a case where the journey's "point of origin" was China, there would be no place under Carmack to sue "K" Line, since China is not within a judicial district "of the United States or in a State court." *Ibid.* Carmack's original premise is that the receiving carrier is liable for damage caused by the other carriers in the delivery chain. This premise would be defeated if there were no venue in which to sue the receiving rail carrier, as opposed to suing a different carrier under one of Carmack's other venue provisions and then naming the receiving carrier as a codefendant. The far more likely conclusion is that "K" Line is not a receiving rail carrier at all under Carmack, and thus Carmack, including its venue provisions, does not apply to property shipped under "K" Line's through bills. True, if the sole question were one of venue, suit could still be brought against the carrier that caused the damage or the delivering carrier. But the issue need not be explored here, for, as the Court holds, Carmack is inapplicable in these cases.

B

Carmack's statutory history supports the conclusion that it does not apply to a shipment originating overseas under a

through bill. None of Carmack's legislative versions have applied to the inland domestic rail segment of an import shipment from overseas under a through bill.

Congress enacted Carmack in 1906, as an amendment to the Interstate Commerce Act. At that time, the amendment's provisions applied only to "property for transportation from a point in one State to a point in another State." § 7, 34 Stat. 595. Congress amended Carmack in 1915, § 1, 38 Stat. 1197, and the relevant language remained unchanged until Carmack was recodified in 1978. Under the pre-1978 language, Carmack's bill of lading provisions applied not only to wholly domestic rail transport but also to cargo "receive[d] . . . for transportation" "from any point in the United States to a point in an adjacent foreign country." 49 U. S. C. § 20(11) (1976 ed.).

Even if there could be some argument that the Carmack Amendment before 1978 applied to imports from Canada and Mexico because the phrase "from . . . to" could also mean "between," cf. *Reider*, *supra*, at 118 (explicitly not deciding this issue), the Court is unaware of any authority holding that the Carmack Amendment before 1978 applied to cargo originating from nonadjacent overseas countries under a through bill. See, *e. g.*, *In re The Cummins Amendment*, 33 I. C. C. 682, 693 (1915); Brief for Respondents 8 (effectively conceding this point).

In 1978, Congress adopted the Carmack Amendment in largely its current form. § 1, 92 Stat. 1337. Congress in the statute itself stated that it was recodifying Carmack and instructed that this recodification "may not be construed as making a substantive change in the la[w]." § 3(a), *id.*, at 1466; see *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U. S. 454, 457, n. 1 (1987). By interpreting the current version of the Carmack Amendment to cover cargo originating overseas, the Court of Appeals disregarded this direction and dramatically expanded Carmack's scope beyond its historical coverage.

Finally, in 1995, Congress reenacted Carmack. But that reenactment evidenced no intent to affect the substantive change that the Court of Appeals' decision would entail. See § 102(a), 109 Stat. 847–849. There is no claim that the 1995 statute altered Carmack's text in any manner relevant here, as that reenactment merely indented subsections of Carmack for readability. Cf. *United States* v. *O'Brien*, 560 U. S. 218, 233–234 (2010) ("[C]urrent legislative drafting guidelines . . . advise drafters to break lengthy statutory provisions into separate subsections that can be read more easily").

C

Where the text permits, congressional enactments should be construed to be consistent with one another. And the interpretation of Carmack the Court now adopts attains the most consistency between Carmack and COGSA. First, applying Carmack to the inland segment of an international carriage originating overseas under a through bill would undermine Carmack's purposes. Carmack is premised on the view that the shipment has a single bill of lading and any damage during the journey is the responsibility of both the receiving and the delivering carrier. See *supra*, at 98. Yet, under the Court of Appeals' interpretation of Carmack, there would often be no venue in which to sue the receiving carrier. See *supra*, at 106.

Applying two different bill of lading regimes to the same through shipment would undermine COGSA and international, container-based multimodal transport. As *Kirby* explained, "[t]he international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.' " 543 U. S., at 25 (quoting 1 T. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004)). If Carmack applied to an inland segment of a shipment from overseas under a through bill, then one set of liability and venue rules would apply when cargo is dam-

aged at sea (COGSA) and another almost always would apply when the damage occurs on land (Carmack). Rather than making claims by cargo owners easier to resolve, a court would have to decide where the damage occurred to determine which law applied. As a practical matter, this requirement often could not be met; for damage to the content of containers can occur when the contents are damaged by rough handling, seepage, or theft, at some unknown point. See H. Kindred & M. Brooks, Multimodal Transport Rules 143 (1997). Indeed, adopting the Court of Appeals' approach would seem to require rail carriers to open containers at the port to check if damage has been done during the sea voyage. This disruption would undermine international container-based transport. The Court will not read Congress' nonsubstantive recodification of Carmack in 1978 to create such a drastic sea change in practice in this area.

Applying Carmack's provisions to international import shipping transport would also undermine the "purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea." *Kirby, supra*, at 29. These cases provide an apt illustration. The sophisticated cargo owners here agreed to maritime bills of lading that applied to the inland segment through the Himalaya Clause and authorized "K" Line to subcontract for that inland segment "on any terms whatsoever." The cargo owners thus made the decision to select "K" Line as a single company for their through transportation needs, rather than contracting for rail services themselves. The through bills provided the liability and venue rules for the foreseeable event that the cargo was damaged during carriage. Indeed, the cargo owners obtained separate insurance to protect against any excess loss. The forum-selection clause the parties agreed upon is "an indispensable element in international trade, commerce, and contracting" because it allows parties to "agre[e] in advance on a forum acceptable" to them. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 13–14 (1972). A clause of this

kind is enforced unless it imposes a venue "so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court." *Id.*, at 18. The parties sensibly agreed that because their bills were governed by Japanese law, Tokyo would be the best venue for any suit relating to the cargo.

The cargo owners' contrary policy arguments are unavailing. They assert that if Carmack does not apply, the inland segment of international shipments will be "unregulated." Brief for Respondents 2, 21, 24, 64, 91. First, any speculation that not applying Carmack to inland segments of overseas shipments will cause severe problems is refuted by the fact that Carmack even arguably did not govern the inland portion of such shipments from its enactment in 1906 until its nonsubstantive recodification in 1978. See *supra*, at 107. It is true that if the cargo owners' position were to prevail, the terms of through bills of lading made in maritime commerce would be more restricted in some circumstances. But that does not mean that the Court's holding leaves the field unregulated. Ocean-based through bills are governed by COGSA, and ocean vessels like those operated by "K" Line are overseen by the Maritime Commission. *Supra*, at 96. Rail carriers like Union Pacific, furthermore, remain subject to the STB's regulation to the extent they operate within the United States. See *supra*, at 105. It is notable that although the STB has jurisdiction to regulate the rates of such carriers, even when the carriage is not governed by the Carmack Amendment, the STB has exercised its authority to exempt from certain regulations service provided by a rail carrier "as part of a continuous intermodal freight movement," 49 CFR § 1090.2 (2009), like the journey at issue in these cases, see *ibid.* (exercising the STB's deregulation authority under 49 U. S. C. § 10502(f)).

Finally, the cargo owners miss the mark in relying on the recent United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,

which has yet to be "ratified by the President with the advice and consent of the Senate." Brief for United States as *Amicus Curiae* 11. These so-called "Rotterdam Rules" would explicitly allow the inland leg of an international shipment to be governed by a different legal regime than the ocean leg, under some circumstances. See G. A. Res. 63/122, art. 26, U. N. Doc. A/RES/63/122 (Dec. 11, 2008). Nothing in the Rotterdam Rules, however, requires every country to mandate a different regime to govern the inland rail leg of an international through shipment; and, as explained above, Congress, by enacting COGSA, has opted for allowing shipments governed by a single through bill. And if the objection is that today's decision will undermine the results of these international negotiations in some way, that concern is met by the fact that the United States Government has urged the result the Court adopts today. See Brief for United States as *Amicus Curiae* 13–29.

Congress has decided to allow parties engaged in international maritime commerce to structure their contracts, to a large extent, as they see fit. It has not imposed Carmack's regime, textually and historically limited to the carriage of goods received for domestic rail transport, onto what are "essentially maritime" contracts. *Kirby*, 543 U. S., at 24.

V

"K" Line received the goods in China, under through bills for shipment into the United States. "K" Line was thus not a receiving rail carrier under Carmack and was not required to issue bills of lading under that amendment. Union Pacific is also not a receiving carrier for this carriage and was thus not required to issue Carmack-compliant bills. Because the journey included no receiving rail carrier that had to issue bills of lading under Carmack, Carmack does not apply. The parties' agreement to litigate these cases in Tokyo is binding. The cargo owners must abide by the contracts they made.

* * *

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In my view, the Carmack Amendment to the Interstate Commerce Act (ICA or Act), § 7, 34 Stat. 595, plainly applies to the inland leg of a multimodal shipment traveling on an international through bill of lading. Unless they have permissibly contracted around Carmack's requirements, rail carriers in the United States such as petitioner Union Pacific are subject to those requirements, even though ocean carriers such as petitioner "K" Line are not. To avoid this simple conclusion, the Court contorts the statute and our cases, misreads the statutory history, and ascribes to Congress a series of policy choices that Congress manifestly did not make. Because I believe Carmack provides the default legal regime for rail transportation of cargo within the United States, regardless of whether the shipment originated abroad, I would reach the second question presented: whether Union Pacific was free to opt out of Carmack under 49 U. S. C. § 10709, or whether Union Pacific first had to offer "K" Line, its contractual counterparty, Carmack-compliant terms under § 10502. As to that question, I would hold that opt-out under § 10709 was not available and would remand to the District Court to consider in the first instance whether Union Pacific satisfied its obligations under § 10502. For these reasons, I respectfully dissent.

I

The Court's interpretation of Carmack's scope is wrong as a matter of text, history, and policy.

A

1

I begin with the statute's text. Two provisions guide my conclusion that Carmack provides the default legal regime for the inland leg of a multimodal shipment traveling on an international through bill of lading: § 11706(a), which outlines the basic requirements for liability under Carmack, and § 10501(a), which defines the jurisdiction of the Surface Transportation Board (STB or Board), the successor to the Interstate Commerce Commission (ICC), see *ante*, at 97. Section 11706(a) states as follows:

> "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—
>
> "(1) the receiving rail carrier;
>
> "(2) the delivering rail carrier; or
>
> "(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
>
> "Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination."

With respect to the Board's jurisdiction, § 10501(a) provides as follows:

> "(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—
>
> "(A) only by railroad; or
>
> "(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.
>
> "(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—
>
> "(A) a State and a place in the same or another State as part of the interstate rail network;
>
> . . . . .
>
> "(E) the United States and another place in the United States through a foreign country; or
>
> "(F) the United States and a place in a foreign country."

"A simple, straight-forward reading of [these provisions] practically compels the conclusion that the Carmack Amendment applies in a typical multimodal carriage case with inland damage." Sturley, Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo, 40 J. Maritime L. & Comm. 1, 13 (2009) (hereinafter Train Wrecks). The first sentence of § 11706(a) sets forth the circumstances in which a receiving rail carrier must issue a bill of lading: when property is first "receive[d]" for domestic transportation. This sentence does not define the full scope of Carmack liability, however, as the penultimate sentence of § 11706(a) makes the absence of a bill of lading ultimately immaterial to the question of Carmack liability. Instead, the second sentence of § 11706(a) establishes Carmack's expansive scope, explaining which carriers are subject to Carmack liability: not only the rail carrier that receives the property, but also "any other carrier that delivers the property and is providing transportation or service sub-

ject to the jurisdiction of the Board under this part." Critically, that a rail carrier's provision of "transportation or service subject to the jurisdiction of the Board" is the criterion that establishes liability under Carmack demonstrates that Carmack's scope must be considered in tandem with the provision describing the Board's jurisdiction over rail carriage.

Under that provision, the Board has authority "over transportation by rail carrier," either when that transportation is "only by railroad" or when it is "by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." § 10501(a)(1). Board jurisdiction over transportation by rail carrier "applies only to transportation in the United States," not to transportation abroad. § 10501(a)(2). Within the United States, however, Board jurisdiction exists broadly whenever that transportation is "between," *inter alia,* "a place in . . . a State and a place in the same or another State as part of the interstate rail network," "a place in . . . the United States and another place in the United States through a foreign country," or "a place in . . . the United States and a place in a foreign country." §§ 10501(a)(2)(A), (E), (F).

With the jurisdictional framework in mind, I return to the final sentences of Carmack, § 11706. The third sentence clarifies that liability under Carmack is imposed upon (1) "the receiving rail carrier" (which, under the first sentence of § 11706(a) and the definition of the Board's jurisdiction over domestic rail carriage in § 10501(a), is the rail carrier that first receives the property for transportation in the United States); (2) "the delivering rail carrier" (which, under the last sentence of § 11706(a) and the Board's jurisdiction over domestic rail carriage in § 10501(a), is the final rail carrier providing the long-distance transportation "nearest the destination" in the United States); and (3) "another rail carrier over whose line or route the property is transported in

the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." § 11706(a). This last phrase in § 11706(a)(3) serves two functions. It ensures that, where the entire rail transportation is "[with]in the United States," any connecting rail carrier between the point at which the goods were received and the point at which the goods were delivered is liable under Carmack. It also ensures that, where the final destination of the goods is in Canada or Mexico, such that there is no domestic "delivering" carrier, a connecting carrier taking on the goods in the United States will remain subject to Carmack as it travels toward its foreign destination while still in the United States. (As noted, the jurisdictional provision, incorporated by reference in § 11706(a), is limited to "transportation in the United States," § 10501(a)(2).)

The language of Carmack thus announces an expansive intent to provide the liability regime for rail carriage of property within the United States. Once a first domestic rail carrier subject to the Board's jurisdiction receives property in the United States, Carmack attaches, regardless of where the property originated. Carmack then applies to any other rail carrier subject to the Board's jurisdiction in the chain of transportation, no matter whether the ultimate destination of the property is in the United States or elsewhere, for the period the carrier is traveling within the United States.

It seems to me plain that, under these broadly inclusive provisions, Carmack governs rail carriers such as Union Pacific for any transportation of cargo within the United States, whether or not their domestic transportation is part of a multimodal international shipment, and whether or not they actually issued a domestic bill of lading. There is no question that Union Pacific is a "rail carrier" that is "subject to the jurisdiction of the Board." § 11706(a). It "receive[d]" the cargo, *ibid.*, in California for domestic transportation to four different domestic inland locations—*i. e.*, "between a

place in . . . a State and a place in . . . another State," § 10501(a)(2)(A)—while the shipment itself was transported "between a place in . . . the United States and a place in a foreign country," § 10501(a)(2)(F). Union Pacific should have issued a bill of lading for the cargo it received, but its failure to do so does not shield it from liability, as § 11706(a) makes clear. Carmack therefore provides the legal regime governing Union Pacific's rail transportation in these cases.

Carmack does not, however, govern ocean carriers such as "K" Line, because such carriers are not "rail carrier[s] providing transportation or service subject to the jurisdiction of the Board." § 11706(a). The ICA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." § 10102(5). To resolve whether "K" Line meets this definition, I would apply the STB's well-established test and ask whether it "conduct[s] rail operations" and "'hold[s] out' that service to the public." *Association of P&C Dock Longshoremen* v. *Pittsburgh & Conneaut Dock Co.*, 8 I. C. C. 2d 280, 290 (1992).

Respondents—the owners of cargo that was allegedly damaged during Union Pacific's train derailment in Oklahoma, *ante*, at 93–95—primarily contend that "K" Line conducted rail operations by using containers to transport the cargo from China to the United States in conjunction with Union Pacific's subsequent carriage of those same containers. Brief for Respondents 82–83 (noting that the statutory definition of "railroad" includes "'intermodal equipment used [by or] in connection with a railroad,'" § 10102(6)(A)). This interpretation goes too far. Read so literally, the statute would render a truck a railroad simply because the truck transported containers during a journey in which the containers also traveled by rail. Such a reading would gut the separate provisions of the ICA governing motor carriage in Subtitle IV, Part B, of Title 49. The ICA's broad description of what the term "railroad" "includes," § 10102(6), is better read as ensuring that all services a rail carrier conducts are

regulated under the Act "to prevent overcharges and discriminations from being made under the pretext of performing such additional services." *Cleveland, C., C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, 594 (1916).

At oral argument, respondents focused on a separate argument, contending that "K" Line should be considered a rail carrier because it conducts substantial rail operations at its depot facility in Long Beach, California. Tr. of Oral Arg. 37 (describing transportation between Port of Los Angeles, where "K" Line's private chassis transport the containers on the port's train tracks to the Los Angeles train depot, where the containers are loaded onto Union Pacific trains for inland transportation). I agree with the Board, however, that "'ownership and operation of private terminal facilities, including rail yards,'" is not sufficient to bring a shipper within the definition of "'a rail carrier subject to [Board] jurisdiction'" where the "'terminal is maintained for [the ocean common carrier's] exclusive use in interchanging cargo with rail and motor carriers providing inland transportation.'" *Joint Application of CSX Corp. & Sea-Land Corp. Under 49 U. S. C. § 11321*, 3 I. C. C. 2d 512, 519 (1987).[1]

The jurisdictional provisions of the ICA and the Shipping Act of 1984, 46 U. S. C. § 40101 *et seq.*, confirm my view that "K" Line is not a rail carrier "subject to the jurisdiction of the Board," 49 U. S. C. § 11706(a), under Carmack. The STB's jurisdiction over transportation by rail carriers is "exclusive," § 10501(b), while ocean carriers are subject to the jurisdiction of the Federal Maritime Commission (FMC), 46 U. S. C. § 40102; see also 46 CFR § 520.1 (2009). In addition, the Board's jurisdiction over water carriage is limited to domestic water carriage. 49 U. S. C. § 13521(a)(3). The Board itself has concluded that ocean carriers providing intermodal

[1] Because I do not think that "K" Line conducts rail operations at all, I would not reach the question whether "K" Line holds itself out as offering rail common carriage. Compare Brief for Respondents 84–85 with Reply Brief for Petitioners in No. 08–1553, pp. 7–10.

transportation jointly with inland rail and motor carriers are subject to the FMC's jurisdiction rather than its own. See *Improvement of TOFC/COFC Regulations*, 3 I. C. C. 2d 869, 883 (1987).

For these reasons, Carmack governs Union Pacific but not "K" Line for the inland transportation at issue in these cases.

2

In finding Carmack inapplicable to the inland transportation in these cases, the majority relies on the fact that Carmack does not govern ocean carriers such as "K" Line. While I agree that "K" Line is not a rail carrier, the majority places too much weight on that determination. That the ocean carrier "K" Line is not subject to Carmack does not affect the determination that the rail carrier Union Pacific is, for the textual reasons I have explained. The majority's contrary reading of the statute reflects four fundamental errors.

First, the majority reads the term "receiving rail carrier" in § 11706(a) too narrowly. There is simply no basis in the text of the statute to support the majority's conclusion that Carmack applies only when the first rail carrier in the chain of transportation accepted the cargo at the shipment's point of origin. Cf. *ante*, at 101, 103. The two cases the majority cites for this proposition are inapposite, as neither addresses an international, multimodal shipment in which the first leg of the trip was by ocean.[2] In *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 594 (1917), the entire shipment was by rail from Arkansas to New York City. And in *Mexican Light & Power Co.* v. *Texas Mexican R. Co.*, 331 U. S. 731, 732 (1947), the entire shipment was by rail from Pennsylvania to Mexico. Given that the first rail carrier was in each case the carrier that received the goods from the shipper and

[2] The additional cases the United States cites for this proposition suffer from this same flaw. See Brief for United States as *Amicus Curiae* 27–28; Tr. of Oral Arg. 20.

issued a through bill of lading, it is unsurprising that the Court, applying Carmack, described that carrier as the "initial carrier." 243 U. S., at 595; 331 U. S., at 733. But nothing in these cases, and nothing in Carmack itself, requires that the "receiving carrier" take the goods from the shipper at the shipment's point of origin.[3]

Instead, these cases are compatible with my view that the "receiving carrier" is any rail carrier that first receives cargo for transportation in the United States. Union Pacific, which is unquestionably a "rail carrier" in the normal sense of those words, is also the "receiving carrier" subject to liability under Carmack.[4] Our opinion in *Reider* v. *Thompson*, 339 U. S. 113 (1950), further supports this reading. There we explained that the test for Carmack applicability "is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated." *Id.*, at 117. Because Carmack applies to domestic rail transport, and the domestic rail carrier's obligation in that case arose in New Orleans where the rail carrier received the goods, it did not matter that the shipment began overseas in Buenos Aires. Similarly, in the instant cases, because Union Pacific's obligations to transport by rail originated in California, it does not matter that the shipment began overseas in China.[5]

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[3] Carmack's venue provision refers to the "receiving rail carrier" as the "originating rail carrier" and states that the proper venue for a lawsuit against this carrier is "the judicial district in which the point of origin is located." § 11706(d)(2)(A)(i). Especially because the focus of Carmack is on transportation by rail, the phrase "point of origin" in this context is best read as referring to the point of origin of the "originating rail carrier['s]" transportation, not the point of origin of the shipment.

[4] The majority suggests that respondents "conceded" at oral argument that Union Pacific was not a receiving carrier but only a delivering carrier. *Ante*, at 104. Of course, this Court is not bound by a party's concession in our interpretation of a statute. See, *e. g.*, *Massachusetts* v. *United States*, 333 U. S. 611, 624–625 (1948).

[5] Contrary to Union Pacific's suggestion, Brief for Petitioner in No. 08–1554, p. 33, its obligations did not originate in China. "K" Line's bills of lading, issued in China, "entitled ["K" Line] to sub-contract on any

Second, the majority errs in suggesting that the issuance of an international through bill of lading precludes the applicability of Carmack. Cf. *ante*, at 101–102, 104–105. The cases on which the majority relies do not stand for this proposition. In *Reider*, the Court found Carmack applicable when the first domestic rail carrier issued a bill of lading from New Orleans to Boston. Although we observed in that opinion that there was no through bill of lading from Buenos Aires to Boston, 339 U. S., at 117, we did not say, and it is not a necessary corollary, that the presence of such a bill of lading would have commanded a different result. The observation is better read as indicating that no law other than Carmack could possibly have applied in that case: Because "the shipment . . . could not have moved an inch beyond New Orleans under the ocean bill," *id.*, at 118, a new domestic bill of lading for domestic transportation was required, and as to that transportation, we held, Carmack unquestionably applied.

For its part, *Mexican Light* held only that, where the first rail carrier in the chain of transportation issued a bill of lading, a subsequent bill of lading issued by a later rail carrier was void because Carmack contemplates one through bill of lading governing the entire journey by rail. 331 U. S., at 734. A subsequent bill of lading by a connecting rail carrier, however, can be void under Carmack without requiring the conclusion that an international through bill of lading involv-

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terms . . . all duties whatsoever undertaken," App. 145, and therefore did not create any obligation on the part of Union Pacific in China. In turn, the agreement between "K" Line and Union Pacific—which "K" Line made "by and through its duly authorized agent and representative in the United States, 'K' Line AMERICA, INC. . . . , a Michigan corporation," *id.*, at 120—was a multiyear contract committing "K" Line to "tender to [Union Pacific] not less than 95% of its Container traffic," *ibid.*, but did not actually commit "K" Line to deliver any particular piece of cargo to Union Pacific. As "K" Line explains, then, "the Agreement [with Union Pacific] was a 'requirements' contract, which did not become effective as to any particular container until 'K' Line delivered it" to Union Pacific in California. Brief for Petitioners in No. 08–1553, p. 12.

ing initial transportation by ocean carrier would void a subsequent bill of lading issued in the United States by the first rail carrier in the domestic chain of transportation. Because the text of Carmack expressly requires a bill of lading to be issued for property "receive[d] for transportation under this part," and Union Pacific first received the property for rail transportation in the United States, it should have issued a bill of lading. Of course, its failure to do so did not affect its liability under Carmack (or that of a subsequent connecting or delivering carrier), as § 11706(a) explicitly states.

Third, the majority errs in giving weight to the difference in scope between Carmack liability and the jurisdiction of the Board. *Ante*, at 105. I agree with the majority that Carmack's reach is narrower than the Board's jurisdiction. The Board's jurisdiction extends over transportation by rail carrier "in the United States between a place in . . . the United States and a place in a foreign country," § 10501(a)(2)(F), which indicates that it does not matter whether the movement of the transportation is from the United States to the foreign country or from the foreign country to the United States.[6] In contrast, Carmack applies only when a rail carrier first receives property in the United States, § 11706(a), and therefore would not apply to a rail carrier originating in Canada and delivering in the United

[6] The ICA's jurisdictional provision uses the term "foreign country" to describe the Board's jurisdiction, § 10501(a)(2)(F), while Carmack uses the term "adjacent foreign country" to describe the liability of connecting carriers, § 11706(a)(3). I find the difference between these terms to be of no moment. Section 10501 describes the Board's jurisdiction over rail carriers, and it is impossible to have connecting rail lines between the United States and a foreign country that is not adjacent. This reading is confirmed by § 10501(a)(2)(E), which refers to the Board's jurisdiction over transportation by railroad "in the United States between a place in . . . the United States and another place in the United States and a foreign country." No rail transportation between two places in the United States that is interrupted by rail transportation through a foreign country could be through a foreign country that is anything but adjacent.

States without transferring the property to a domestic rail carrier.[7] As long as there is a receiving rail carrier in the United States, however, Carmack attaches. Because the property at issue in these cases was received in the United States for domestic transportation by Union Pacific, Carmack governs the rail carrier's liability.

Finally, the majority misunderstands the role I believe Carmack liability plays in international shipments to the United States. My reading of the statute would not "outlaw through shipments under a single bill of lading." *Ante*, at 104. To the contrary, an overseas ocean carrier like "K" Line can still issue a through bill of lading governing the entire international trip to an American destination. That bill of lading reflects the ocean carrier's agreement with and obligations to the original shipper of the cargo. As the ocean carrier has no independent Carmack obligations of its own, the ocean carrier and the shipper are free to select whatever liability terms they wish to govern their relationship during the entire shipment. See *infra*, at 131. Carmack simply requires an American "receiving rail carrier" like Union Pacific to issue a bill of lading to the party from whom it received the goods for shipment—here, "K" Line. See *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 33 (2004) ("When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed"); *Great Northern R. Co.* v. *O'Connor*, 232 U. S. 508, 514–515 (1914) (holding that a railroad company is entitled to treat the intermediary forwarder as the shipper). As to that bill of lading, Carmack provides the legal regime and defines the relationship between the contracting parties (unless they have agreed to contract out of Carmack, see *infra*, at 134–137). The issuance of this second bill of lading, however, in no way under-

[7] This situation is consistent with historical agreements between the ICC and its Canadian counterpart. See *infra*, at 125–126.

mines the efficiency of the through bill of lading between the ocean carrier and the original shipper, nor does it require that those parties bind themselves to apply Carmack to the inland leg.[8]

B

In addition to misreading the text, the Court's opinion misapplies Carmack's statutory history. The Court states that no version of Carmack has ever applied to imports originating overseas on a through bill of lading. *Ante*, at 107. The Court further asserts that, because Congress stated that the 1978 recodification of the ICA effected no "substantive change," Carmack should be read consistently with this historical practice. *Ante*, at 108. There are three problems with this analysis.

First, if "Congress intended no substantive change" to Carmack in the 1978 recodification, "that would mean only that the present text is the best evidence of what the law

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[8] The majority seems to find it troubling that my view "would require two bills of lading." *Ante*, at 104. But international shipments frequently contain more than one bill of lading. See, *e. g.*, *Kirby*, 543 U. S., at 30–33 (interpreting the parties' obligations under two bills of lading, one between a shipper and a freight forwarding company to which the shipper originally delivered its goods, and one between the freight forwarding company and the ocean carrier to which the freight forwarder delivered the shipper's goods). The majority also suggests that an original shipper might not be able to sue Union Pacific under the terms of Union Pacific's bill with "K" Line. *Ante*, at 104–105. In *Kirby*, however, we took as a given that the shipper could sue the inland rail carrier, even though the shipper was not a party to the rail carrier's bill of lading with an intermediary. Indeed, we held that in an action against the rail carrier, the shipper was bound to the terms of the bill of lading governing the rail carrier's transportation, even though those terms were less generous than the terms in the shipper's through bill of lading with the freight forwarder with which it originally contracted. 543 U. S., at 33–34. We observed that the shipper could sue the freight forwarder to recover the difference. *Id.*, at 35. In light of this analysis, I see no reason to doubt a shipper's ability to sue an American rail carrier under Carmack, even though its bill of lading with an overseas ocean carrier is not governed by Carmack.

has always meant, and that the language of the prior version cannot be relied upon to support a different reading." *Keene Corp.* v. *United States*, 508 U. S. 200, 221 (1993) (STEVENS, J., dissenting). Because the present text of Carmack indicates that it applies to the domestic inland rail transportation of a multimodal international shipment, there is no reason to rely on Congress' statement in the recodification.

Second, there is no necessary conflict between the pre-1978 version of Carmack and my reading of the current text. The pre-1978 text referred to a carrier "receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, [or the] District of Columbia, or from any point in the United States to a point in an adjacent foreign country." 49 U. S. C. § 20(11) (1976 ed.).[9] A rail carrier, like Union Pacific, that receives property in California for transportation to locations in the American Midwest "receiv[es] property from a point in one State . . . to a point in another State," regardless of whether the property originated in California or China. The geographical restriction "from any point in the United States to a point in an adjacent foreign country" simply reflected agreements between the ICC and its Canadian counterpart to respect each other's regulation of rail carriage originating in that country. See Brief for United States as *Amicus Curiae* 17–18 (hereinafter Brief for United States). It does not indicate any rejection of Carmack's applicability to imports as a whole or exports to a nonadjacent foreign country.[10] Instead, the "adjacent foreign country" provision

[9] The pre-1978 version of Carmack referred generally to a "carrier," rather than a "rail carrier." It was not until 1995 that Congress distinguished between Carmack's applicability to rail carriers, § 11706, and motor carriers, freight forwarders, and domestic water carriers, § 14706. Pub. L. 104–88, § 102(a), 109 Stat. 804, 847–849, 907–910.

[10] The Court ignores a further reason to believe that prior to 1978, Carmack could be understood to apply to imports as well as exports. Even assuming (contrary to my view) that the relevant language in Carmack governing any international commercial exchange was the phrase "from

was expansive rather than limiting, ensuring that Carmack would apply where a shipment traveled by rail from New York City through to Montreal without stopping at the border of Canada.

Third, to the extent there are meaningful differences between the pre-1978 text of Carmack and its current text, it is the current text that we should interpret, regardless of Congress' general hortatory statement in the 1978 Public Law applicable to the entire ICA. As we have often observed, "[a] specific provision controls one of more general application." *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407 (1991). The general statement that Congress intended no change to the ICA should not require us to ignore what the current text of the specific Carmack provision says, as both Union Pacific and "K" Line explicitly ask us to do. See Brief for Petitioner in No. 08–1554, p. 20 ("The Pre-1978 Statutory Language Controls This Case"); Brief for Petitioners in No. 08–1553, pp. 41–49 (arguing for reliance on pre-1978 text). Petitioners' view of statutory interpretation

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any point in the United States to a point in an adjacent foreign country," the seemingly unidirectional "from . . . to" could reasonably have been interpreted as also encompassing "to . . . from" in light of our decision in *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U. S. 357 (1920). In that case, this Court interpreted similar "from . . . to" language in the jurisdictional section of the ICA as conferring jurisdiction on the ICC over all transportation *between* such countries. *Id.*, at 359–360 (construing "'transportation . . . from any place in the United States to an adjacent foreign country'" in former 49 U. S. C. § 1 to include "transportation . . . *from* that country to the United States"). Given the "presumption that a given term is used to mean the same thing throughout a statute," *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (citing *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427 (1932)), our construction of "from . . . to" in the ICA's jurisdictional provision could reasonably have been read to sweep imports within the scope of Carmack. I would not, however, read "from . . . to" in the current version of § 11706(a)(3) to encompass "to . . . from," as Congress specifically amended the similar language in the jurisdictional provision at § 10501(a)(2) to "between" while leaving intact the "to . . . from" in Carmack, against the background of *Woodbury*.

would give rise to an unwieldy—and unjust—system. I would have thought it beyond cavil that litigants are entitled to rely on the currently applicable version of enacted statutes to determine their rights and obligations.

In the final analysis, the meaning of the pre-1978 language is murky, and Congress' instruction that the 1978 recodification effected no substantive change provides no meaningful guidance. The current text does not restrict Carmack's coverage to trade with adjacent foreign countries, and it makes no distinction between imports and exports. Carmack's ambiguous history cannot justify reading such atextual limitations into the statute.[11]

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[11] The United States, as *amicus* in support of "K" Line and Union Pacific, makes an effort to find such limitations in the current statutory text. See Brief for United States 21; see also Reply Brief for Petitioner in No. 08–1554, p. 10 (agreeing with the United States' interpretation). This argument is unpersuasive. The United States observes that § 11706(a)(3) describes the liability of "another rail carrier over whose line or route the property is transported in the United States or *from* a place in the United States *to* a place in an *adjacent foreign country* when transported under a through bill of lading." (Emphasis added.) According to the United States, "[t]hat textual limitation, when read in light of Carmack's purpose, reflects Congress's continued intent to restrict Carmack to the carriage of goods between places in the United States and for export to an adjacent foreign country." Brief for United States 21. As I have already explained, however, once a domestic rail carrier first receives property for transportation within the United States, regardless of where the property itself originated, Carmack applies. *Supra*, at 114–117. Section 11706(a)(3) simply ensures that when a connecting carrier that neither received the property in the United States nor delivered it in the United States transports the property from the United States to either Canada or Mexico, that connecting carrier remains subject to Carmack liability during the part of the transportation that is in the United States. Further, as I explain below, see *infra*, at 128–131, Carmack's purpose would be better effectuated by applying its provisions inland as the default rule. In any event, the "adjacent foreign country" provision in § 11706(a)(3) has no bearing on the rail transportation provided in these cases by Union Pacific as "receiving rail carrier," § 11706(a), from California to four locations in the American Midwest. To this transportation, Carmack plainly applies.

C

The Court's suggestion that its interpretation properly effectuates the goals of Carmack and "attains the most consistency between Carmack and [the Carriage of Goods by Sea Act (COGSA)]," *ante*, at 108, reflects its fundamental misunderstanding of these statutes and the broader legal context in which the international shipping industry functions. As the mandatory default regime governing the relationship between an American receiving rail carrier and its direct contracting partner (here an overseas ocean carrier), Carmack permits the shippers who contract for a through bill of lading with the ocean carrier to receive the benefit of Carmack through that once-removed relationship. Such a legal regime is entirely consistent with COGSA and industry practice.

As noted, the Court's position as to Carmack rests on its erroneous belief that the "receiving carrier" must receive the goods at the point of the shipment's origin. *Ante*, at 103–106. Because Carmack provides that suit against the receiving rail carrier "may only be brought . . . in the judicial district in which the point of origin is located," 49 U. S. C. § 11706(d)(2)(A)(i), and defines "judicial district" as only a federal or state court, § 11706(d)(2)(B), the Court mistakenly concludes that were Carmack to apply to inland transportation of international shipments, "there would often be no venue in which to sue the receiving carrier" because that carrier would have received the goods in a foreign country where no federal or state court exists, *ante*, at 105–106, 108. Contrary to the Court's suggestion, however, the proper venue in which to sue a receiving carrier under Carmack is the location in which the first domestic rail carrier received the goods for domestic transportation. *Supra*, at 115–116, 120.

Nor is it true that Carmack's focus is on providing a single through bill of lading for an entire shipment. *Ante*, at 108. Carmack's purpose in § 11706 is to ensure that a single bill

of lading, with a single protective liability regime, governs an entire shipment by rail carrier within the United States.[12] It does not require the rail carrier to offer Carmack-compliant terms to anyone but the party with whom the rail carrier contracts when it receives the goods. It does not place obligations on the relationship between any overseas carrier and any overseas shipper that operate under their own bill of lading. That Congress expected different liability regimes to govern ocean and rail carriers can be inferred from the different regulatory oversight provided for each type of carrier—the FMC for the former, the STB for the latter, see *supra*, at 118–119.

Moreover, that Carmack provides certain greater protections than does COGSA demonstrates that one of Carmack's purposes—beyond simply the fact of a single bill of lading governing all rail transportation—was to specify a protective liability regime for that part of the shipment only. As compared to COGSA, Carmack provides heightened liability rules for rail transportation, compare COGSA § 4, 49 Stat. 1209, note following 46 U. S. C. § 30701, p. 1179, with 49 U. S. C. §§ 11706(a)–(c); stricter venue requirements, compare *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 535 (1995), with § 11706(d); and more generous time allowances for filing suit, compare COGSA § 3(6), at 1179, with § 11706(e). Congress is evidently wary of creating broad exemptions from Carmack's regime: While Congress has given expansive authority to the STB to deregulate carriers from the requirements of the ICA, it has precluded the STB from excusing carriers from complying with Carmack. See *infra*, at 136 (discussing § 10502). By taking Carmack's protections out of the picture for goods that travel by rail in the United States whenever the goods first traveled by ocean liner, it is the Court that "undermine[s] Carmack's pur-

[12] A separate version of Carmack applies to motor and other nonrail carriers within the United States. See n. 9, *supra*.

poses," *ante,* at 108. Cf. *Reider,* 339 U. S., at 119 (applying Carmack to domestic rail transportation of goods, even where the goods originated overseas, in order to avoid "immuniz[ing] from the beneficial provisions of the [Carmack] Amendment all shipments originating in a foreign country when reshipped via the very transportation chain with which the Amendment was most concerned").

The Court's suggestion that its interpretation best comports with the goals of COGSA fares no better. The Court is correct, *ante,* at 99, that Congress has permitted parties contractually to extend COGSA, which, by its own terms, applies only to the period "from the time when the goods are loaded on to the time when they are discharged from the ship." §§ 1(e), 7, at 1178, 1180. But the Court ignores that COGSA specifically contemplates that there may be "other law" that mandatorily governs the inland leg, and makes clear that contractual extension of COGSA does not trump this law. § 12, at 1180 ("Nothing in [COGSA] shall be construed as superseding . . . any other law which would be applicable in the absence of [COGSA], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship"); see also Sturley, Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act, 4 Benedict's Maritime Bull. 201, 202 (2006) ("It is highly ironic to suggest that section 7 was intended to facilitate the extension of COGSA [inland]. The unambiguous history demonstrates that section 7 was specifically designed to accomplish exactly the opposite result"). Notably, when it wants to do so, Congress knows how to specify that a contractual extension of COGSA supersedes other law: COGSA elsewhere defines a limited circumstance—the carriage of goods by sea between ports of the United States—in which a contractual extension of COGSA has the force of law. § 13, at 1180 (providing that

such bills of lading "shall be subjected hereto as fully as if subject hereto by the express provisions of [COGSA]"). That Congress did not make the same provision for inland travel is powerful evidence that it meant for Carmack to remain the default regime on land governing the relationship between an inland rail carrier and an overseas carrier with which it directly contracted.

The Court is also wrong that its interpretation avoids the risk that two sets of rules will apply to the same shipment at different times.[13] *Ante*, at 108–109. Even under the Court's interpretation, two sets of rules may govern, because the parties need not extend COGSA to the inland leg—they may agree on any terms they choose to cover that transportation. § 7, at 1180 (permitting the parties to "ente[r] into *any agreement* . . . as to the responsibility and liability of the carrier or the ship" for the period before the goods are loaded on and after they are discharged from the ship (emphasis added)); see also Train Wrecks 23 ("[C]arriers regularly include clauses in their bills of lading to limit their liability [for inland travel] in ways that COGSA prohibits"); 1 T. Schoenbaum, Admiralty and Maritime Law § 10–4, pp. 599–600 (4th ed. 2004) (describing typical non-COGSA liability rules parties select for the inland leg). In these cases, for example, "K" Line's bills of lading include certain terms governing the inland leg that differ from the terms governing the ocean carriage. See, *e. g.*, App. 147 (providing different timeframes within which suit must be brought depending on whether the actionable conduct "occurred during other than Water Carriage").

The Court relies heavily on *Kirby* as identifying the relevant policy consideration in these cases, but it takes the

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[13] Nor would my interpretation of the statute necessarily require that two different regimes apply to each shipment, given the parties' ability to contract around Carmack as long as they follow appropriate procedures, *infra*, at 136–137, and, if they so choose, select COGSA terms.

wrong lesson from *Kirby*. In that case, we were concerned about displacing a single federal law, COGSA, with 50 varying state liability regimes.[14] 543 U. S., at 28–29. The rule the Court establishes today creates even greater practical difficulties than the regime we criticized in *Kirby* by displacing Carmack with as many liability rules as there are bills of lading. It would even permit different liability rules to apply to different lawsuits arising out of the same inland accident depending on where each piece of cargo originated. Contrary to the Court's view, then, the value of uniformity articulated in *Kirby* is best promoted by application of Carmack to the obligations of the rail carrier during the inland leg in these cases. Cf. *ante*, at 99–100, 108–109.

Finally, while purporting to effectuate the contractual choices of the parties in the international multimodal shipping industry, *ante*, at 108–111, the Court ignores the realities of the industry's operation. The industry has long been accustomed to drafting bills of lading that encompass two legal regimes, one governing ocean transportation and another governing inland transportation, given mandatory law governing road and rail carriage in most of Europe and in certain countries in Asia and North Africa. See generally Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U. N. T. S. 189; Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, App. B to the Convention Concerning International Carriage by Rail, May 9, 1980, 1397 U. N. T. S. 112, as amended by Protocol for the Modification of the Convention Concerning International Carriage of Rail of May 9, 1980, June 3, 1999. Indeed, "K" Line's own bills of lading

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[14] *Kirby* did not address the question of Carmack's applicability to the inland leg of a multimodal international shipment traveling on a through bill of lading because that question was not presented. Brief for United States as *Amicus Curiae* in *Norfolk Southern R. Co.* v. *Kirby*, O. T. 2004, No. 02–1028, pp. 11–12; *ante*, at 93.

evidence this practice, providing that, where an "applicable international convention or national law" exists, "cannot be departed from," and "would have applied" if a separate contract for inland carriage had been made between the merchant and the inland carrier, those laws govern "K" Line's liability. Brief for Respondents 53.

The recently signed United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the "Rotterdam Rules," provided an opportunity for the international community to adopt rules for multimodal shipments that would be uniform for both the ocean and inland legs. See generally Train Wrecks 36–39. Instead, the final version of the Rotterdam Rules retained the current system in which the inland leg may be governed by a different legal regime than the ocean leg. See United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G. A. Res. 63/122, art. 26, A/RES/63/122 (Dec. 11, 2008). The Association of American Railroads and the United States, among others, advocated for this outcome.[15] See Proposal of the United States of America on the Definition of "Maritime Performing Party," U. N. Doc. A/CN.9/WG.III/WP.84, ¶¶ 1–2 (Feb. 28, 2007); Proposal by the United States of America, U. N. Doc. A/CN.9/WG.III/WP.34, ¶ 7 (Aug. 7, 2003); Proposals by the International Road Transport Union (IRU), U. N. Doc. A/CN.9/WG.III/WP.90, ¶ 1 (Mar. 27, 2007); Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Compilation of Replies to a Questionnaire on Door-to-Door Transport, U. N. Doc. A/CN.9/WG.III/WP.28, pp. 32–34, 43 (Jan. 31, 2003) (comments on behalf of the Association of American Railroads and the IRU). Thus, the Court's mistaken interpretation not only upsets domestic law but also

[15] Petitioner Union Pacific is a leading member of the Association of American Railroads. Train Wrecks 37, n. 214.

disregards industry practice as evidenced by carefully calibrated international negotiations.[16]

II

Because, in my view, Carmack provides the default legal regime governing the relationship between the rail carrier and the ocean carrier during the inland leg of a multimodal shipment traveling on a through bill of lading, I would reach the second question presented by these cases: whether the parties validly contracted out of Carmack. I would hold that where, as here, the STB has exempted rail carriers from Part A of the ICA pursuant to its authority as set forth in 49 U. S. C. § 10502, such rail carriers may not use § 10709 to opt out of Carmack entirely. Instead, such rail carriers must first offer their contractual counterparties Carmack-compliant terms for liability and claims, as § 10502(e) requires. Having reached that conclusion, I would remand for consideration of whether the requirements of § 10502(e) were met in these cases. I set forth these views only briefly, as the Court's determination that Carmack does not apply at all makes resolution of these questions moot.

A

In the Staggers Rail Act of 1980, Pub. L. 96–448, 94 Stat. 1895, Congress set forth a national policy of "allow[ing], to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "minimiz[ing] the need for Federal regulatory

[16] The Court's observation that nothing in the Rotterdam Rules "requires every country to mandate a different regime to govern the inland rail leg of an international through shipment" is irrelevant. *Ante*, at 111. The Rotterdam Rules demonstrate simply that it is common practice to have different regimes for inland and ocean transportation, so giving full effect to Carmack as the default law governing the relationship between "K" Line and Union Pacific can hardly be said to "undermine COGSA and international, container-based multimodal transport," *ante*, at 108.

control" of the railroad industry. § 101, *id.*, at 1897. Consistent with these goals, 49 U. S. C. §§ 10502 and 10709 provide two options for contracting around the requirements of the ICA.

Section 10502(a) provides that when certain conditions are met, the Board "shall exempt," "to the maximum extent consistent with this part," "a person, class of persons, or a transaction or service" from either a particular provision of Part A of the ICA or the entirety of that Part. Section 10502(f) specifies that "[t]he Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." Acting pursuant to this authority, the Board has broadly exempted such transportation "from the requirements of [the ICA]." 49 CFR § 1090.2 (2009). The authority to issue broad exemptions, however, is not unlimited. Under 49 U. S. C. § 10502(e), "[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [Carmack]," although, at the same time, "[n]othing . . . shall prevent rail carriers from offering alternative terms." Section 10502(g) further limits the Board from exempting rail carriers from their obligations to comply with certain employee protections under Part A of the ICA.

In turn, under § 10709(a), "[o]ne or more rail carriers providing transportation subject to the jurisdiction of the Board . . . may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." Having signed such a contract, a rail carrier "shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." § 10709(b). Once such a contract is made, that contract, "and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on

the grounds that such contract violates a provision of [Part A of the ICA]." § 10709(c)(1).

According to Union Pacific, § 10502(e) limits only the Board's exemption ability; it does not place any affirmative obligation on rail carriers to offer Carmack-compliant terms. Rail carriers, Union Pacific contends, may opt out of Carmack entirely simply by entering into a contract under § 10709, thus escaping any duty imposed by Part A of the ICA. I disagree. I am persuaded by the Government's view that because the Board's order in 49 CFR § 1090.2 exempted intermodal rail transportation from all of Part A of the ICA, which includes 49 U. S. C. § 10709, "Union Pacific could not properly enter into a contract under Section 10709 to relieve it of its obligations under Section 10502(e)." Brief for United States 31. Those obligations require "a rail carrier providing exempt transportation [to] offer the shipper the option of contractual terms for liability and claims consistent with Carmack, presumably at a higher rate," and they permit such a rail carrier to "enter into a contract with different terms only if the shipper does not select that option." *Id.*, at 30.

Observing that the Board's exemption order relieves intermodal rail transportation from the "requirements" of Part A, Union Pacific contends that § 10709 is not a requirement but a privilege and therefore is not included within the exemption. In clarifying its order, however, the Board has described the exemption as one from "regulation" under the ICA or "application" of that Act. See, *e. g.*, *Improvement of TOFC/COFC Regulations*, 3 I. C. C. 2d, at 869–870. Especially in light of this clarification, there seems little reason to ascribe significance to the Board's use of the word "requirements," instead of the statutory term "provision," in the exemption order.

The Government aptly describes the policy concerns that justify this reading of the interplay between §§ 10502 and 10709. Brief for United States 31–32. Because a rail carri-

er's counterparty to a § 10709 contract can ordinarily require a rail carrier to comply with common carriage rates and terms under Part A (including Carmack), such counterparties possess considerable bargaining power. But rail carriers the Board has exempted from Part A under § 10502 lack any obligation to comply with that Part. If exempt carriers could escape Carmack's obligations under § 10709, their counterparties would be at a significant disadvantage as compared to counterparties to contracts with nonexempt carriers. Such a disadvantage cannot be squared with Congress' evident intent, as expressed in § 10502(e), to ensure that no carrier may be automatically exempted from Carmack.

This interpretation of §§ 10502 and 10709 imposes no unfairness on exempt rail carriers. As the Court of Appeals explained, "carriers providing exempt transportation gain the benefits of deregulation, but lose the opportunity to contract for preferable terms under § 10709 without first offering Carmack terms." 557 F. 3d 985, 1002 (CA9 2009). Given rail carriers' ability to charge higher rates for full Carmack coverage, see *New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 135 (1953), and the likelihood that some counterparties will agree to reject Carmack-compliant terms in favor of a lower price, such a tradeoff makes eminent sense.

B

Whether Union Pacific properly contracted out of Carmack under § 10502(e) requires a factual determination better suited for resolution by the District Court in the first instance. Accordingly, I would remand for consideration of that issue. Cf. 557 F. 3d, at 1003. Union Pacific also raises a related legal argument not decided by the courts below: that the forum selection clause at issue in these cases is valid because venue is not encompassed within the phrase "contractual terms for liability and claims" in § 10502(e). To the extent this argument is not waived, it would also be properly considered on remand.

* * *

In endorsing a strained reading of the text, history, and purpose of Carmack, the Court is evidently concerned with a perceived need to enforce the COGSA-based contracts that the "sophisticated cargo owners" here made with "K" Line. *Ante,* at 109. But these cases do not require the Court to interpret or examine the contract between the cargo owners and "K" Line. The Court need consider only the legal relationship between Union Pacific and "K" Line as its direct contracting party. As to that relationship, it bears emphasizing that industry actors on all sides are sophisticated and can easily adapt to a regime in which Carmack provides the default rule governing the rail carrier's liability during the inland leg of a multimodal shipment traveling on an international through bill of lading. See, *e. g.*, Train Wrecks 40 (describing how ocean and rail carriers have drafted their contracts to account for—and permissibly escape—Carmack's applicability); cf. *Kirby*, 543 U. S., at 36 (recognizing that "our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated"). In disregarding Congress' commands in both Carmack and COGSA and in discounting the practical realities reflected in the Rotterdam Rules and other international conventions governing the carriage of goods, the Court ignores what we acknowledged in *Kirby:* "It is not . . . this Court's task to structure the international shipping industry." *Ibid.* I respectfully dissent.

Syllabus

MONSANTO CO. ET AL. *v.* GEERTSON SEED FARMS ET AL.

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

No. 09–475. Argued April 27, 2010—Decided June 21, 2010

The Plant Protection Act (PPA) provides that the Secretary of the Department of Agriculture may issue regulations "to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States." 7 U. S. C. § 7711(a). Pursuant to that grant of authority, the Animal and Plant Health Inspection Service (APHIS) promulgated regulations that presume genetically engineered plants to be "plant pests"—and thus "regulated articles" under the PPA—until APHIS determines otherwise. However, any person may petition APHIS for a determination that a regulated article does not present a plant pest risk and therefore should not be subject to the applicable regulations. APHIS may grant such a petition in whole or in part.

In determining whether to grant nonregulated status to a genetically engineered plant variety, APHIS must comply with the National Environmental Policy Act of 1969 (NEPA), which requires federal agencies "to the fullest extent possible" to prepare a detailed environmental impact statement (EIS) for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C). The agency need not complete an EIS if it finds, based on a shorter statement known as an environmental assessment (EA), that the proposed action will not have a significant environmental impact.

This case involves a challenge to APHIS's decision to approve the unconditional deregulation of Roundup Ready Alfalfa (RRA), a variety of alfalfa that has been genetically engineered to tolerate the herbicide Roundup. Petitioners are the owner and the licensee of the intellectual property rights to RRA. In response to petitioners' deregulation request, APHIS prepared a draft EA and solicited public comments on its proposed course of action. Based on its EA and the comments submitted, the agency determined that the introduction of RRA would not have any significant adverse impact on the environment. Accordingly, APHIS decided to deregulate RRA unconditionally and without preparing an EIS. Respondents, conventional alfalfa growers and environmental groups, filed this action challenging that decision on the ground that it violated NEPA and other federal laws. The District Court held,

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inter alia, that APHIS violated NEPA when it deregulated RRA without first completing a detailed EIS. To remedy that violation, the court vacated the agency's decision completely deregulating RRA; enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the EIS; and entered a nationwide permanent injunction prohibiting almost all future planting of RRA during the pendency of the EIS process. Petitioners and the Government appealed, challenging the scope of the relief granted but not disputing that APHIS's deregulation decision violated NEPA. The Ninth Circuit affirmed, concluding, among other things, that the District Court had not abused its discretion in rejecting APHIS's proposed mitigation measures in favor of a broader injunction.

Held:

1. Respondents have standing to seek injunctive relief, and petitioners have standing to seek this Court's review of the Ninth Circuit's judgment affirming the entry of such relief. Pp. 149–156.

(a) Petitioners have constitutional standing to seek review here. Article III standing requires an injury that is (i) concrete, particularized, and actual or imminent, (ii) fairly traceable to the challenged action, and (iii) redressable by a favorable ruling. See *Horne* v. *Flores*, 557 U. S. 433, 445. Petitioners satisfy all three criteria. Petitioners are injured by their inability to sell or license RRA to prospective customers until APHIS completes the EIS. Because that injury is caused by the very remedial order that petitioners challenge on appeal, it would be redressed by a favorable ruling from this Court. Respondents nevertheless contend that petitioners lack standing because their complained-of injury is independently caused by a part of the District Court's order that petitioners failed to challenge, the vacatur of APHIS's deregulation decision. That argument fails for two independent reasons. First, one of the main disputes between the parties throughout this litigation has been whether the District Court should have adopted APHIS's proposed judgment, which would have *replaced* the vacated deregulation decision with an order expressly authorizing the continued sale and planting of RRA. Accordingly, if the District Court had adopted APHIS's proposed judgment, there would still be authority for the continued sale of RRA notwithstanding the District Court's vacatur, because there would, in effect, be a new deregulation decision. Second, petitioners in any case have standing to challenge the part of the District Court's order enjoining a partial deregulation. Respondents focus their argument on the part of the judgment that enjoins planting, but the judgment also states that before granting the

deregulation petition, even in part, the agency must prepare an EIS. That part of the judgment inflicts an injury not also caused by the vacatur. Pp. 149–153.

(b) Respondents have constitutional standing to seek injunctive relief from the complete deregulation order at issue here. The Court disagrees with petitioners' argument that respondents have failed to show that any of them is likely to suffer a constitutionally cognizable injury absent injunctive relief. The District Court found that respondent farmers had established a reasonable probability that their conventional alfalfa crops would be infected with the engineered Roundup Ready gene if RRA were completely deregulated. A substantial risk of such gene flow injures respondents in several ways that are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Moreover, those harms are readily attributable to APHIS's deregulation decision, which gives rise to a significant risk of gene flow to non-genetically-engineered alfalfa varieties. Finally, a judicial order prohibiting the planting or deregulation of all or some genetically engineered alfalfa would redress respondents' injuries by eliminating or minimizing the risk of gene flow to their crops. Pp. 153–156.

2. The District Court abused its discretion in enjoining APHIS from effecting a partial deregulation and in prohibiting the planting of RRA pending the agency's completion of its detailed environmental review. Pp. 156–166.

(a) Because petitioners and the Government do not argue otherwise, the Court assumes without deciding that the District Court acted lawfully in vacating the agency's decision to completely deregulate RRA. The Court therefore addresses only the injunction prohibiting APHIS from deregulating RRA pending completion of the EIS, and the nationwide injunction prohibiting almost all RRA planting during the pendency of the EIS process. P. 156.

(b) Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 391. This test fully applies in NEPA cases. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 31–33. Thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available and should be granted absent unusual circumstances. Pp. 156–158.

Syllabus

(c) None of the four factors supports the District Court's order enjoining APHIS from partially deregulating RRA during the pendency of the EIS process. Most importantly, respondents cannot show that they will suffer irreparable injury if APHIS is allowed to proceed with any partial deregulation, for at least two reasons. First, if and when APHIS pursues a partial deregulation that arguably runs afoul of NEPA, respondents may file a new suit challenging such action and seeking appropriate preliminary relief. Accordingly, a permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm. Second, a partial deregulation need not cause respondents any injury at all; if its scope is sufficiently limited, the risk of gene flow could be virtually nonexistent. Indeed, the broad injunction entered below essentially pre-empts the very procedure by which APHIS could determine, independently of the pending EIS process for assessing the effects of a *complete* deregulation, that a *limited* deregulation would not pose any appreciable risk of environmental harm. Pp. 158–164.

(d) The District Court also erred in entering the nationwide injunction against planting RRA, for two independent reasons. First, because it was inappropriate for the District Court to foreclose even the possibility of a partial and temporary deregulation, it follows that it was inappropriate to enjoin planting in accordance with such a deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, *e. g.*, *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312. If, as respondents now concede, a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the additional and extraordinary relief of an injunction was warranted. Pp. 165–166.

(e) Given the District Court's errors, this Court need not address whether injunctive relief of some kind was available to respondents on the record below. P. 166.

570 F. 3d 1130, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 166. BREYER, J., took no part in the consideration or decision of the case.

Gregory G. Garre argued the cause for petitioners. With him on the briefs were *Maureen E. Mahoney*, *Richard P.*

Bress, *Philip J. Perry*, *J. Scott Ballenger*, *Drew C. Ensign*, and *B. Andrew Brown*.

Deputy Solicitor General Stewart argued the cause for the federal respondents in support of petitioners. On the briefs were *Solicitor General Kagan*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, *Sarah E. Harrington*, *Andrew C. Mergen*, *Ellen J. Durkee*, and *Anna T. Katselas*.

Lawrence S. Robbins argued the cause for respondents Geertson Seed Farms et al. With him on the brief were *Donald J. Russell*, *Alan E. Untereiner*, *Eva A. Temkin*, *George A. Kimbrell*, *Kevin S. Golden*, and *Richard J. Lazarus*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Dan Himmelfarb* and *Jay C. Johnson;* for the American Sugarbeet Growers Association et al. by *Jerrold J. Ganzfried*, *John F. Bruce*, *Gilbert S. Keteltas*, *Christopher H. Marraro*, and *John F. Stanton;* for the Chamber of Commerce of the United States of America et al. by *F. William Brownell*, *Ryan A. Shores*, *Robin S. Conrad*, *Amar D. Sarwal*, *Harry M. Ng*, *Stacy R. Linden*, *Thomas Ward*, and *Douglas Nelson;* for the Pacific Legal Foundation by *M. Reed Hopper* and *Damien M. Schiff;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Cory L. Andrews*, and *Kevin T. Haroff*.

Briefs of *amici curiae* urging affirmance were filed for the Arkansas Rice Growers Association et al. by *Richard Drury;* for CROPP Cooperative et al. by *Stephanie Tai* and *Dennis M. Grzezinski;* for the Union of Concerned Scientists et al. by *Deborah A. Sivas;* and for Dinah Bear et al. by *Hope M. Babcock*.

Briefs of *amici curiae* were filed for the State of California *ex rel.* Edmund G. Brown, Jr., et al. by *Mr. Brown*, Attorney General, *pro se*, *Matt Rodriquez*, Chief Assistant Attorney General, *Gordon Burns*, Deputy State Solicitor General, *Ken Alex*, Senior Assistant Attorney General, *Sally Magnani*, Supervising Deputy Attorney General, and *Susan S. Fiering*, Deputy Attorney General, for the Commonwealth of Massachusetts by *Martha Coakley*, Attorney General, and *Seth Schofield*, Assistant Attorney General, and for the State of Oregon by *John R. Kroger*, Attorney General; for the Defenders of Wildlife et al. by *Eric R. Glitzenstein* and *Howard M. Crystal;* and for the Natural Resources Defense Council et al. by *Allison M. LaPlante* and *Nathaniel S. W. Lawrence*.

JUSTICE ALITO delivered the opinion of the Court.

This case arises out of a decision by the Animal and Plant Health Inspection Service (APHIS) to deregulate a variety of genetically engineered alfalfa. The District Court held that APHIS violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, by issuing its deregulation decision without first completing a detailed assessment of the environmental consequences of its proposed course of action. To remedy that violation, the District Court vacated the agency's decision completely deregulating the alfalfa variety in question; ordered APHIS not to act on the deregulation petition in whole or in part until it had completed a detailed environmental review; and enjoined almost all future planting of the genetically engineered alfalfa pending the completion of that review. The Court of Appeals affirmed the District Court's entry of permanent injunctive relief. The main issue now in dispute concerns the breadth of that relief. For the reasons set forth below, we reverse and remand for further proceedings.

I

A

The Plant Protection Act (PPA), 114 Stat. 438, 7 U. S. C. § 7701 *et seq.*, provides that the Secretary of the Department of Agriculture (USDA) may issue regulations "to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States." § 7711(a). The Secretary has delegated that authority to APHIS, a division of the USDA. 7 CFR §§ 2.22(a), 2.80(a)(36) (2010). Acting pursuant to that delegation, APHIS has promulgated regulations governing "the introduction of organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests." See § 340.0(a)(2), and n. 1. Under those regulations, certain genetically engineered plants are presumed to be "plant pests"—and thus "regulated articles"

under the PPA—until APHIS determines otherwise. See *ibid.;* §§ 340.1, 340.2, 340.6; see also App. 183. However, any person may petition APHIS for a determination that a regulated article does not present a plant pest risk and therefore should not be subject to the applicable regulations. 7 U. S. C. § 7711(c)(2); 7 CFR § 340.6. APHIS may grant such a petition in whole or in part. § 340.6(d)(3).

In deciding whether to grant nonregulated status to a genetically engineered plant variety, APHIS must comply with NEPA, which requires federal agencies "to the fullest extent possible" to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actio[n] significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C). The statutory text "speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *Kleppe* v. *Sierra Club,* 427 U. S. 390, 410, n. 20 (1976).

An agency need not complete an EIS for a particular proposal if it finds, on the basis of a shorter "environmental assessment" (EA), that the proposed action will not have a significant impact on the environment. 40 CFR §§ 1508.9(a), 1508.13 (2009). Even if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared. See § 1506.1(a) ("[N]o action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives"); § 1506.1(c) ("While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action" satisfies certain requirements).

B

This case involves Roundup Ready Alfalfa (RRA), a kind of alfalfa crop that has been genetically engineered to be tolerant of glyphosate, the active ingredient of the herbicide Roundup. Petitioner Monsanto Company (Monsanto) owns the intellectual property rights to RRA. Monsanto licenses those rights to co-petitioner Forage Genetics International (FGI), which is the exclusive developer of RRA seed.

APHIS initially classified RRA as a regulated article, but in 2004 petitioners sought nonregulated status for two strains of RRA. In response, APHIS prepared a draft EA assessing the likely environmental impact of the requested deregulation. It then published a notice in the Federal Register advising the public of the deregulation petition and soliciting public comments on its draft EA. After considering the hundreds of public comments that it received, APHIS issued a "Finding of No Significant Impact" and decided to deregulate RRA unconditionally and without preparing an EIS. Prior to this decision, APHIS had authorized almost 300 field trials of RRA conducted over a period of eight years. App. 348.

Approximately eight months after APHIS granted RRA nonregulated status, respondents (two conventional alfalfa seed farms and environmental groups concerned with food safety) filed this action against the Secretary of Agriculture and certain other officials in Federal District Court, challenging APHIS's decision to completely deregulate RRA. Their complaint alleged violations of NEPA, the Endangered Species Act of 1973 (ESA), 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*, and the PPA. Respondents did not seek preliminary injunctive relief pending resolution of those claims. Hence, RRA enjoyed nonregulated status for approximately two years. During that period, more than 3,000 farmers in 48 States planted an estimated 220,000 acres of RRA. App. 350.

In resolving respondents' NEPA claim, the District Court accepted APHIS's determination that RRA does not have any harmful health effects on humans or livestock. App. to Pet. for Cert. 43a; accord, *id.*, at 45a. Nevertheless, the District Court held that APHIS violated NEPA by deregulating RRA without first preparing an EIS. In particular, the court found that APHIS's EA failed to answer substantial questions concerning two broad consequences of its proposed action: first, the extent to which complete deregulation would lead to the transmission of the gene conferring glyphosate tolerance from RRA to organic and conventional alfalfa; and, second, the extent to which the introduction of RRA would contribute to the development of Roundup-resistant weeds. *Id.*, at 52a. In light of its determination that the deregulation decision ran afoul of NEPA, the District Court dismissed without prejudice respondents' claims under the ESA and PPA.

After these rulings, the District Court granted petitioners permission to intervene in the remedial phase of the lawsuit. The court then asked the parties to submit proposed judgments embodying their preferred means of remedying the NEPA violation. APHIS's proposed judgment would have ordered the agency to prepare an EIS, vacated the agency's deregulation decision, and replaced that decision with the terms of the judgment itself. *Id.*, at 184a (proposed judgment providing that "[the federal] defendants' [June 14,] 2005 Determination of Nonregulated Status for Alfalfa Genetically Engineered for Tolerance to the Herbicide Glyphosate is hereby vacated *and replaced by the terms of this judgment*" (emphasis added)). The terms of the proposed judgment, in turn, would have permitted the continued planting of RRA pending completion of the EIS, subject to six restrictions. Those restrictions included, among other things, mandatory isolation distances between RRA and non-genetically-engineered alfalfa fields in order to mitigate the risk of gene flow; mandatory harvesting conditions; a re-

quirement that planting and harvesting equipment that had been in contact with RRA be cleaned prior to any use with conventional or organic alfalfa; identification and handling requirements for RRA seed; and a requirement that all RRA seed producers and hay growers be under contract with either Monsanto or FGI and that their contracts require compliance with the other limitations set out in the proposed judgment.

The District Court rejected APHIS's proposed judgment. In its preliminary injunction, the District Court prohibited almost all future planting of RRA pending APHIS's completion of the required EIS. But in order to minimize the harm to farmers who had relied on APHIS's deregulation decision, the court expressly allowed those who had already purchased RRA to plant their seeds until March 30, 2007. *Id.*, at 58a. In its subsequently entered permanent injunction and judgment, the court (1) vacated APHIS's deregulation decision; (2) ordered APHIS to prepare an EIS before it made any decision on Monsanto's deregulation petition; (3) enjoined the planting of any RRA in the United States after March 30, 2007, pending APHIS's completion of the required EIS; and (4) imposed certain conditions (suggested by APHIS) on the handling and identification of already-planted RRA. *Id.*, at 79a, 109a. The District Court denied petitioners' request for an evidentiary hearing.

The Government, Monsanto, and FGI appealed, challenging the scope of the relief granted but not disputing the existence of a NEPA violation. See *Geertson Seed Farms* v. *Johanns*, 570 F. 3d 1130, 1136 (2009). A divided panel of the Court of Appeals for the Ninth Circuit affirmed. Based on its review of the record, the panel first concluded that the District Court had "recognized that an injunction does not 'automatically issue' when a NEPA violation is found" and had instead based its issuance of injunctive relief on the four-factor test traditionally used for that purpose. *Id.*, at 1137. The panel held that the District Court had not com-

mitted clear error in making any of the subsidiary factual findings on which its assessment of the four relevant factors was based. And the panel rejected the claim that the District Court had not given sufficient deference to APHIS's expertise concerning the likely effects of allowing continued planting of RRA on a limited basis. In the panel's view, APHIS's proposed interim measures would have perpetuated a system that had been found by the District Court to have caused environmental harm in the past. *Id.*, at 1139. Hence, the panel concluded that the District Court had not abused its discretion "in choosing to reject APHIS's proposed mitigation measures in favor of a broader injunction to prevent more irreparable harm from occurring." *Ibid.*

The panel majority also rejected petitioners' alternative argument that the District Court had erred in declining to hold an evidentiary hearing before entering its permanent injunction. Writing in dissent, Judge N. Randy Smith disagreed with that conclusion. In his view, the District Court was required to conduct an evidentiary hearing before issuing a permanent injunction unless the facts were undisputed or the adverse party expressly waived its right to such a hearing. Neither of those two exceptions, he found, applied here.

We granted certiorari. 558 U. S. 1142 (2010).

II

A

At the threshold, respondents contend that petitioners lack standing to seek our review of the lower court rulings at issue here. We disagree.

Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. *Horne* v. *Flores*, 557 U. S. 433, 445 (2009). Petitioners here satisfy all three criteria. Petitioners are injured by their inability to sell or license

RRA to prospective customers until such time as APHIS completes the required EIS. Because that injury is caused by the very remedial order that petitioners challenge on appeal, it would be redressed by a favorable ruling from this Court.

Respondents do not dispute that petitioners would have standing to contest the District Court's permanent injunction order if they had pursued a different litigation strategy. Instead, respondents argue that the injury of which petitioners complain is independently caused by a part of the District Court's order that petitioners failed to challenge, namely, the vacatur of APHIS's deregulation decision. The practical consequence of the vacatur, respondents contend, was to restore RRA to the status of a regulated article; and, subject to certain exceptions not applicable here, federal regulations ban the growth and sale of regulated articles. Because petitioners did not specifically challenge the District Court's vacatur, respondents reason, they lack standing to challenge a part of the District Court's order (*i. e.*, the injunction) that does not cause petitioners any injury not also caused by the vacatur. See Brief for Respondents 19–20.

Respondents' argument fails for two independent reasons. First, although petitioners did not challenge the vacatur directly, they adequately preserved their objection that the vacated deregulation decision should have been replaced by APHIS's proposed injunction. Throughout the remedial phase of this litigation, one of the main disputes between the parties has been whether the District Court was required to adopt APHIS's proposed judgment. See, *e. g.*, Intervenor-Appellants' Opening Brief in No. 07–16458 etc. (CA9), p. 59 (urging the Court of Appeals to "vacate the district court's judgment and remand this case to the district court with instructions to enter APHIS's proposed relief"); Opening Brief of Federal Defendants-Appellants in No. 07–16458 etc. (CA9), pp. 21, 46 ("The blanket injunction should be narrowed in accordance with APHIS's proposal"); see also Tr. of

Oral Arg. 6, 25–27, 53–54. That judgment would have replaced the vacated deregulation decision with an order expressly allowing continued planting of RRA subject to certain limited conditions. App. to Pet. for Cert. 184a (proposed judgment providing that "[the federal] defendants' 14 June 2005 Determination of Nonregulated Status for Alfalfa Genetically Engineered for Tolerance to the Herbicide Glyphosate is hereby vacated *and replaced by the terms of this judgment*" (emphasis added)). Accordingly, if the District Court had adopted the agency's suggested remedy, there would still be authority for the continued planting of RRA, because there would, in effect, be a new deregulation decision.[1]

Second, petitioners in any case have standing to challenge the part of the District Court's order enjoining partial deregulation. Respondents focus their standing argument on the part of the judgment enjoining the planting of RRA, but the judgment also states that "[b]efore granting Monsanto's deregulation petition, *even in part*, the federal defendants shall prepare an environmental impact statement." *Id.*, at 108a (emphasis added); see also *id.*, at 79a ("The Court will enter a final judgment . . . ordering the government to prepare an EIS before it makes a decision on Monsanto's deregulation petition"). As respondents concede, that part of the judgment goes beyond the vacatur of APHIS's deregulation decision. See Tr. of Oral Arg. 37, 46.

At oral argument, respondents contended that the restriction on APHIS's ability to effect a partial deregulation of RRA does not cause petitioners "an actual or an imminent harm." *Id.*, at 39–40. In order for a partial deregulation to occur, respondents argued, the case would have to be remanded to the agency, and APHIS would have to prepare an

[1] We need not decide whether the District Court had the authority to replace the vacated agency order with an injunction of its own making. The question whether petitioners are entitled to the relief that they seek goes to the merits, not to standing.

EA "that may or may not come out in favor of a partial deregulation." *Id.*, at 40. Because petitioners cannot prove that those two events would happen, respondents contended, the asserted harm caused by the District Court's partial deregulation ban is too speculative to satisfy the actual or imminent injury requirement.

We reject this argument. If the injunction were lifted, we do not see why the District Court would have to remand the matter to the agency in order for APHIS to effect a partial deregulation. And even if a remand were required, we perceive no basis on which the District Court could decline to remand the matter to the agency so that it could determine whether to pursue a partial deregulation during the pendency of the EIS process.

Nor is any doubt as to whether APHIS would issue a new EA in favor of a partial deregulation sufficient to defeat petitioners' standing. It is undisputed that petitioners have submitted a deregulation petition and that a partial deregulation of the kind embodied in the agency's proposed judgment would afford petitioners much of the relief that they seek; it is also undisputed that, absent the District Court's order, APHIS could attempt to effect such a partial deregulation pending its completion of the EIS. See *id.*, at 7–8, 25–27, 38. For purposes of resolving the particular standing question before us, we need not decide whether or to what extent a party challenging an injunction that bars an agency from granting certain relief must show that the agency would be likely to afford such relief if it were free to do so. In this case, as is clear from APHIS's proposed judgment and from its briefing throughout the remedial phase of this litigation, the agency takes the view that a partial deregulation reflecting its proposed limitations is in the public interest. Thus, there is more than a strong likelihood that APHIS would partially deregulate RRA were it not for the District Court's injunction. The District Court's elimination of that likelihood is plainly sufficient to establish a con-

stitutionally cognizable injury. Moreover, as respondents essentially conceded at oral argument, that injury would be redressed by a favorable decision here, since "vacating the current injunction . . . will allow [petitioners] to go back to the agency, [to] seek a partial deregulation," even if the District Court's vacatur of APHIS's deregulation decision is left intact. *Id.*, at 39. We therefore hold that petitioners have standing to seek this Court's review.[2]

B

We next consider petitioners' contention that respondents lack standing to seek injunctive relief. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought" (internal quotation marks omitted)). Petitioners argue that respondents have failed to show that any of the named respondents is likely to suffer a constitutionally cognizable injury absent injunctive relief. See Brief for Petitioners 40. We disagree.

Respondents include conventional alfalfa farmers. Emphasizing "the undisputed concentration of alfalfa seed farms," the District Court found that those farmers had "established a 'reasonable probability' that their organic and conventional alfalfa crops will be infected with the engineered gene" if RRA is completely deregulated. App. to Pet. for Cert. 50a.[3] A substantial risk of gene flow injures

[2] We do not rest "the primary basis for our jurisdiction on the premise that the District Court enjoined APHIS from partially deregulating RRA in any sense." *Post*, at 172 (STEVENS, J., dissenting). Even if the District Court's order prohibiting a partial deregulation applies only to "the *particular* partial deregulation order proposed to the court by APHIS," *post*, at 173, petitioners would still have standing to challenge that aspect of the order.

[3] At least one of the respondents in this case specifically alleges that he owns an alfalfa farm in a prominent seed-growing region and faces a significant risk of contamination from RRA. See Record, Doc. 62, pp. 1–2; *id.*, ¶ 10, at 3–4 (Declaration of Phillip Geertson in Support of Plaintiffs'

respondents in several ways. For example, respondents represent that, in order to continue marketing their product to consumers who wish to buy non-genetically-engineered alfalfa, respondents would have to conduct testing to find out whether and to what extent their crops have been contaminated. See, *e. g.*, Record, Doc. 62, p. 5 (Declaration of Phillip Geertson in Support of Plaintiffs' Motion for Summary Judgment) (Geertson Declaration) ("Due to the high potential for contamination, I will need to test my crops for the presence of genetically engineered alfalfa seed. This testing will be a new cost to my seed business and we will have to raise our seed prices to cover these costs, making our prices less competitive"); *id.*, Doc. 57, p. 4 (Declaration of Patrick Trask in Support of Plaintiff's Motion for Summary Judgment) ("To ensure that my seeds are pure, I will need to test my crops and obtain certification that my seeds are free of genetically engineered alfalfa"); see also *id.*, Doc. 55, p. 2 ("[T]here is zero tolerance for contaminated seed in the organic market"). Respondents also allege that the risk of gene flow will cause them to take certain measures to minimize the likelihood of potential contamination and to ensure an adequate supply of non-genetically-engineered alfalfa. See, *e. g.*, Geertson Declaration 3 (noting the "increased cost of alfalfa breeding due

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Motion for Summary Judgment) ("Since alfalfa is pollinated by honey, bumble and leafcutter bees, the genetic contamination of the Roundup Ready seed will rapidly spread through the seed growing regions. Bees have a range of at least two to ten miles, and the alfalfa seed farms are much more concentrated"). Other declarations in the record provide further support for the District Court's conclusion that the deregulation of RRA poses a significant risk of contamination to respondents' crops. See, *e. g.*, *id.*, Doc. 53, ¶ 9, p. 2 (Declaration of Jim Munsch) (alleging risk of "significant contamination . . . due to the compact geographic area of the prime alfalfa seed producing areas and the fact that pollen is distributed by bees that have large natural range of activity"); App. ¶ 8, p. 401 (Declaration of Marc Asumendi) ("Roundup alfalfa seed fields are currently being planted in all the major alfalfa seed production areas with little regard to contamination to non-GMO seed production fields").

to potential for genetic contamination"); *id.*, at 6 ("Due to the threat of contamination, I have begun contracting with growers outside of the United States to ensure that I can supply genetically pure, conventional alfalfa seed. Finding new growers has already resulted in increased administrative costs at my seed business").

Such harms, which respondents will suffer even if their crops are not actually infected with the Roundup Ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Those harms are readily attributable to APHIS's deregulation decision, which, as the District Court found, gives rise to a significant risk of gene flow to non-genetically-engineered varieties of alfalfa. Finally, a judicial order prohibiting the growth and sale of all or some genetically engineered alfalfa would remedy respondents' injuries by eliminating or minimizing the risk of gene flow to conventional and organic alfalfa crops. We therefore conclude that respondents have constitutional standing to seek injunctive relief from the complete deregulation order at issue here.

Petitioners appear to suggest that respondents fail to satisfy the "zone of interests" test we have previously articulated as a prudential standing requirement in cases challenging agency compliance with particular statutes. See Reply Brief for Petitioners 12 (arguing that protection against the risk of commercial harm "is not an interest that NEPA was enacted to address"); *Bennett* v. *Spear*, 520 U. S. 154, 162–163 (1997). That argument is unpersuasive because, as the District Court found, respondents' injury has an environmental as well as an economic component. See App. to Pet. for Cert. 49a. In its ruling on the merits of respondents' NEPA claim, the District Court held that the risk that the RRA gene conferring glyphosate resistance will infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA. Petitioners did not appeal that part of the court's ruling, and we have no occasion to

revisit it here. Respondents now seek injunctive relief in order to avert the risk of gene flow to their crops—the very same effect that the District Court determined to be a significant environmental concern for purposes of NEPA. The mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing.

In short, respondents have standing to seek injunctive relief, and petitioners have standing to seek this Court's review of the Ninth Circuit's judgment affirming the entry of such relief. We therefore proceed to the merits of the case.

III

A

The District Court sought to remedy APHIS's NEPA violation in three ways: First, it vacated the agency's decision completely deregulating RRA; second, it enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the mandated EIS; and third, it entered a nationwide injunction prohibiting almost all future planting of RRA. *Id.*, at 108a–110a. Because petitioners and the Government do not argue otherwise, we assume without deciding that the District Court acted lawfully in vacating the deregulation decision. See Tr. of Oral Arg. 7 ("[T]he district court could have vacated the order in its entirety and sent it back to the agency"); accord, *id.*, at 15–16. We therefore address only the latter two aspects of the District Court's judgment. Before doing so, however, we provide a brief overview of the standard governing the entry of injunctive relief.

B

"[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

(3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 391 (2006). The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 31–33 (2008).

Petitioners argue that the lower courts in this case proceeded on the erroneous assumption that an injunction is generally the appropriate remedy for a NEPA violation. In particular, petitioners note that the District Court cited pre-*Winter* Ninth Circuit precedent for the proposition that, in "'the run of the mill NEPA case,'" an injunction delaying the contemplated government project is proper "'until the NEPA violation is cured.'" App. to Pet. for Cert. 65a (quoting *Idaho Watersheds Project* v. *Hahn*, 307 F. 3d 815, 833 (CA9 2002)); see also App. to Pet. for Cert. 55a (quoting same language in preliminary injunction order). In addition, petitioners observe, the District Court and the Court of Appeals in this case both stated that, "in unusual circumstances, an injunction may be withheld, or, more likely, limited in scope" in NEPA cases. *Id.*, at 66a (quoting *National Parks & Conservation Assn.* v. *Babbitt*, 241 F. 3d 722, 737, n. 18 (CA9 2001); internal quotation marks omitted); 570 F. 3d, at 1137.

Insofar as the statements quoted above are intended to guide the determination whether to grant injunctive relief, they invert the proper mode of analysis. An injunction should issue only if the traditional four-factor test is satisfied. See *Winter*, *supra*, at 31–33. In contrast, the statements quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. Nor, contrary to the reasoning of the Court of Appeals, could any such error be cured by a court's perfunctory recognition

that "an injunction does not automatically issue" in NEPA cases. See 570 F. 3d, at 1137 (internal quotation marks omitted). It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above.

Notwithstanding the lower courts' apparent reliance on the incorrect standard set out in the pre-*Winter* Circuit precedents quoted above, respondents argue that the lower courts in fact applied the traditional four-factor test. In their view, the statements that injunctive relief is proper in the "run-of-the-mill" NEPA case, and that such injunctions are granted except in "unusual circumstances," are descriptive rather than prescriptive. See Brief for Respondents 28, n. 14. We need not decide whether respondents' characterization of the lower court opinions in this case is sound. Even if it is, the injunctive relief granted here cannot stand.

C

We first consider whether the District Court erred in enjoining APHIS from partially deregulating RRA during the pendency of the EIS process.[4]

The relevant part of the District Court's judgment states that, "[b]efore granting Monsanto's deregulation petition, *even in part*, the federal defendants shall prepare an envi-

[4] Petitioners focus their challenge on the part of the District Court's order prohibiting the planting of RRA. As we explain below, however, the broad injunction against planting cannot be valid if the injunction against partial deregulation is improper. See *infra*, at 165; see also App. to Pet. for Cert. 64a (District Court order recognizing that APHIS's proposed remedy "seek[s], *in effect*, a partial deregulation that permits the continued expansion of the [RRA] market subject to certain conditions" (emphasis added)). The validity of the injunction prohibiting partial deregulation is therefore properly before us. Like the District Court, we use the term "partial deregulation" to refer to any limited or conditional deregulation. See *id.*, at 64a, 69a.

ronmental impact statement." App. to Pet. for Cert. 108a (emphasis added); see also *id.*, at 79a ("The Court will enter a final judgment . . . ordering the government to prepare an EIS before it makes a decision on Monsanto's deregulation petition"). The plain text of the order prohibits *any* partial deregulation, not just the particular partial deregulation embodied in APHIS's proposed judgment. We think it is quite clear that the District Court meant just what it said. The related injunction against planting states that "*no* [RRA] . . . may be planted" "[u]ntil the federal defendants prepare the EIS and decide the deregulation petition." *Id.*, at 108a (emphasis added). That injunction, which appears in the very same judgment and directly follows the injunction against granting Monsanto's petition "even in part," does not carve out an exception for planting subsequently authorized by a valid partial deregulation decision.

In our view, none of the traditional four factors governing the entry of permanent injunctive relief supports the District Court's injunction prohibiting partial deregulation. To see why that is so, it is helpful to understand how the injunction prohibiting a partial deregulation fits into the broader dispute between the parties.

Respondents in this case brought suit under the Administrative Procedure Act (APA) to challenge a particular agency order: APHIS's decision to *completely* deregulate RRA. The District Court held that the order in question was procedurally defective, and APHIS decided not to appeal that determination. At that point, it was for the agency to decide whether and to what extent it would pursue a *partial* deregulation. If the agency found, on the basis of a new EA, that a limited and temporary deregulation satisfied applicable statutory and regulatory requirements, it could proceed with such a deregulation even if it had not yet finished the onerous EIS required for complete deregulation. If and when the agency were to issue a partial deregulation order, any party aggrieved by that order could bring a separate suit

under the APA to challenge the particular deregulation attempted. See 5 U. S. C. § 702.

In this case, APHIS apparently sought to "streamline" the proceedings by asking the District Court to craft a remedy that, in effect, would have partially deregulated RRA until such time as the agency had finalized the EIS needed for a complete deregulation. See Tr. of Oral Arg. 16, 23–24; App. to Pet. for Cert. 69a. To justify that disposition, APHIS and petitioners submitted voluminous documentary submissions in which they purported to show that the risk of gene flow would be insignificant if the District Court allowed limited planting and harvesting subject to APHIS's proposed conditions. Respondents, in turn, submitted considerable evidence of their own that seemed to cut the other way. This put the District Court in an unenviable position. "The parties' experts disagreed over virtually every factual issue relating to possible environmental harm, including the likelihood of genetic contamination and why some contamination had already occurred." 570 F. 3d, at 1135.

The District Court may well have acted within its discretion in refusing to craft a judicial remedy that would have *authorized* the continued planting and harvesting of RRA while the EIS is being prepared. It does not follow, however, that the District Court was within its rights in *enjoining* APHIS from allowing such planting and harvesting pursuant to the authority vested in the agency by law. When the District Court entered its permanent injunction, APHIS had not yet exercised its authority to partially deregulate RRA. Until APHIS actually seeks to effect a partial deregulation, any judicial review of such a decision is premature.[5]

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[5] NEPA provides that an EIS must be "include[d] in every recommendation or report on *proposals* for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C) (emphasis added); see also *Kleppe* v. *Sierra Club*, 427 U. S. 390, 406 (1976) ("A court has no authority to depart from the statutory language and . . . determine a point during the germination process of a

Nor can the District Court's injunction be justified as a prophylactic measure needed to guard against the possibility that the agency would seek to effect on its own the particular partial deregulation scheme embodied in the terms of APHIS's proposed judgment. Even if the District Court was not required to adopt that judgment, there was no need to stop the agency from effecting a partial deregulation in accordance with the procedures established by law. Moreover, the terms of the District Court's injunction do not just enjoin the *particular* partial deregulation embodied in APHIS's proposed judgment. Instead, the District Court barred the agency from pursuing *any* deregulation—no matter how limited the geographic area in which planting of RRA would be allowed, how great the isolation distances mandated between RRA fields and fields for growing non-genetically-engineered alfalfa, how stringent the regulations governing harvesting and distribution, how robust the enforcement mechanisms available at the time of the decision, and—consequently—no matter how small the risk that the planting authorized under such conditions would adversely affect the environment in general and respondents in particular.

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potential proposal at which an impact statement *should be prepared*" (first emphasis added)). When a particular agency proposal exists and requires the preparation of an EIS, NEPA regulations allow the agency to take at least some action pertaining to that proposal during the pendency of the EIS process. See 40 CFR §§ 1506.1(a), (c) (2009). We do not express any view on the Government's contention that a limited deregulation of the kind embodied in its proposed judgment would not require the prior preparation of an EIS. See Brief for Federal Respondents 21–22 (citing § 1506.1(a)); Tr. of Oral Arg. 20 ("[W]hat we were proposing for the interim, that is allowing continued planting subject to various protective measures, was fundamentally different from the action on which the EIS was being prepared"). Because APHIS has not yet invoked the procedures necessary to attempt a limited deregulation, any judicial consideration of such issues is not warranted at this time.

The order enjoining any partial deregulation was also inconsistent with other aspects of the very same judgment. In fashioning its remedy for the NEPA violation, the District Court steered a "middle course" between more extreme options on either end. See *id.*, at 1136. On the one hand, the District Court rejected APHIS's proposal (supported by petitioners) to allow continued planting and harvesting of RRA subject to the agency's proposed limitations. On the other hand, the District Court did not bar continued planting of RRA as a regulated article under permit from APHIS, see App. to Pet. for Cert. 75a, and it expressly allowed farmers to harvest and sell RRA planted before March 30, 2007, *id.*, at 76a–79a. If the District Court was right to conclude that any partial deregulation, no matter how limited, required the preparation of an EIS, it is hard to see why the limited planting and harvesting that the District Court allowed did not also require the preparation of an EIS. Conversely, if the District Court was right to conclude that the limited planting and harvesting it allowed did not require the preparation of an EIS, then an appropriately limited partial deregulation should likewise have been possible.

Based on the analysis set forth above, it is clear that the order enjoining any deregulation whatsoever does not satisfy the traditional four-factor test for granting permanent injunctive relief. Most importantly, respondents cannot show that they will suffer irreparable injury if APHIS is allowed to proceed with any partial deregulation, for at least two independent reasons.

First, if and when APHIS pursues a partial deregulation that arguably runs afoul of NEPA, respondents may file a new suit challenging such action and seeking appropriate preliminary relief. See 5 U. S. C. §§ 702, 705. Accordingly, a permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm.

Second, a partial deregulation need not cause respondents any injury at all, much less irreparable injury; if the scope

of the partial deregulation is sufficiently limited, the risk of gene flow to their crops could be virtually nonexistent. For example, suppose that APHIS deregulates RRA only in a remote part of the country in which respondents neither grow nor intend to grow non-genetically-engineered alfalfa, and in which no conventional alfalfa farms are currently located. Suppose further that APHIS issues an accompanying administrative order mandating isolation distances so great as to eliminate any appreciable risk of gene flow to the crops of conventional farmers who might someday choose to plant in the surrounding area. See, *e. g.*, Brief in Opposition 9, n. 6 (quoting study concluding "'that in order for there to be *zero* tolerance of any gene flow between [an RRA] seed field and a conventional seed field, those fields would have to have a five-mile isolation distance between them'"); see also Tr. of Oral Arg. 15–16 (representation from the Solicitor General that APHIS may impose conditions on the deregulation of RRA via issuance of an administrative order). Finally, suppose that APHIS concludes in a new EA that its limited deregulation would not pose a significant risk of gene flow or harmful weed development, and that the agency adopts a plan to police vigorously compliance with its administrative order in the limited geographic area in question. It is hard to see how respondents could show that such a limited deregulation would cause them likely irreparable injury. (Respondents in this case do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties.) In any case, the District Court's order prohibiting *any* partial deregulation improperly relieves respondents of their burden to make the requisite evidentiary showing.[6]

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[6] The District Court itself appears to have recognized that its broad injunction may not have been necessary to avert any injury to respondents. See App. to Pet. for Cert. 191a ("It does complicate it to try to fine-tune a particular remedy. So the simpler the remedy, the more attractive it is from the Court's point of view, because it appears to me

Of course, APHIS might ultimately choose not to partially deregulate RRA during the pendency of the EIS, or else to pursue the kind of partial deregulation embodied in its proposed judgment rather than the very limited deregulation envisioned in the above hypothetical. Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene. Indeed, the broad injunction entered here essentially preempts the very procedure by which the agency could determine, independently of the pending EIS process for assessing the effects of a *complete* deregulation, that a *limited* deregulation would not pose any appreciable risk of environmental harm. See 40 CFR §§ 1501.4, 1508.9(a) (2009).

In sum, we do not know whether and to what extent APHIS would seek to effect a limited deregulation during the pendency of the EIS process if it were free to do so; we do know that the vacatur of APHIS's deregulation decision means that virtually no RRA can be grown or sold until such time as a new deregulation decision is in place, and we also know that any party aggrieved by a hypothetical future deregulation decision will have ample opportunity to challenge it, and to seek appropriate preliminary relief, if and when such a decision is made. In light of these particular circumstances, we hold that the District Court did not properly exercise its discretion in enjoining a partial deregulation of any kind pending APHIS's preparation of an EIS. It follows that the Court of Appeals erred in affirming that aspect of the District Court's judgment.

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enforcement is easier. Understanding it is easier, and it may be, while a blunt instrument, it may actually, for the short term, achieve its result, achieve its purpose, *even maybe it overachieves it. . . . Maybe a lot of it is not necessary. I don't know*" (emphasis added)); see also *ibid.* ("I don't say you have to be greater than 1.6 miles, you have to be away from the bees, you have to be dah dah dah. That's the farm business. I'm not even in it"); *id.*, at 192a ("I am not going to get into the isolation distances").

D

We now turn to petitioners' claim that the District Court erred in entering a nationwide injunction against planting RRA. Petitioners argue that the District Court did not apply the right test for determining whether to enter permanent injunctive relief; that, even if the District Court identified the operative legal standard, it erred as a matter of law in applying that standard to the facts of this case; and that the District Court was required to grant petitioners an evidentiary hearing to resolve contested issues of fact germane to the remedial dispute between the parties. We agree that the District Court's injunction against planting went too far, but we come to that conclusion for two independent reasons.

First, the impropriety of the District Court's broad injunction against planting flows from the impropriety of its injunction against partial deregulation. If APHIS may partially deregulate RRA before preparing a full-blown EIS—a question that we need not and do not decide here—farmers should be able to grow and sell RRA in accordance with that agency determination. Because it was inappropriate for the District Court to foreclose even the possibility of a partial and temporary deregulation, it necessarily follows that it was likewise inappropriate to enjoin any and all parties from acting in accordance with the terms of such a deregulation decision.

Second, respondents have represented to this Court that the District Court's injunction against planting does not have any meaningful practical effect independent of its vacatur. See Brief for Respondents 24; see also Tr. of Oral Arg. 38 ("[T]he mistake that was made [by the District Court] was in not appreciating . . . that the vacatur did have [the] effect" of independently prohibiting the growth and sale of almost all RRA). An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, *e. g., Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 311–312 (1982). If a less drastic remedy (such as partial or complete

vacatur of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted. See *ibid.;* see also *Winter*, 555 U. S., at 31–33.

E

In sum, the District Court abused its discretion in enjoining APHIS from effecting a partial deregulation and in prohibiting the possibility of planting in accordance with the terms of such a deregulation. Given those errors, this Court need not express any view on whether injunctive relief of some kind was available to respondents on the record before us. Nor does the Court address the question whether the District Court was required to conduct an evidentiary hearing before entering the relief at issue here. The judgment of 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.

JUSTICE STEVENS, dissenting.

The Court does not dispute the District Court's critical findings of fact: First, Roundup Ready Alfalfa (RRA) can contaminate other plants. See App. to Pet. for Cert. 38a, 54a, 62a. Second, even planting in a controlled setting had led to contamination in some instances. See *id.*, at 69a–70a. Third, the Animal and Plant Health Inspection Service (APHIS) has limited ability to monitor or enforce limitations on planting. See *id.*, at 70a. And fourth, genetic contamination from RRA could decimate farmers' livelihoods and the American alfalfa market for years to come. See *id.*, at 71a; see also *id.*, at 29a–30a. Instead, the majority faults the District Court for "enjoining APHIS from partially deregulating RRA." *Ante*, at 158.

In my view, the District Court may not have actually ordered such relief, and we should not so readily assume that it did. Regardless, the District Court did not abuse its discretion when, after considering the voluminous record and making the aforementioned findings, it issued the order now before us.

I

To understand the District Court's judgment, it is necessary to understand the background of this litigation. Petitioner Monsanto Company (Monsanto) is a large corporation that has long produced a weedkiller called Roundup. After years of experimentation, Monsanto and copetitioner Forage Genetics International (FGI) genetically engineered a mutation in the alfalfa genome that makes the plant immune to Roundup. Monsanto and FGI's new product, RRA, is "the first crop that has been engineered to resist a[n] herbicide" and that can transmit the genetically engineered gene to other plants. See App. to Pet. for Cert. 45a.

In 2004, in the midst of a deregulatory trend in the agricultural sector, petitioners asked APHIS to deregulate RRA, thereby allowing it to be sold and planted nationwide. *Id.*, at 101a. Rather than conducting a detailed analysis and preparing an "environmental impact statement" (EIS), as required by the National Environmental Policy Act of 1969 (NEPA) for every "major Federal actio[n] significantly affecting the quality of the human environment," 42 U. S. C. § 4332(2)(C), APHIS merely conducted an abbreviated "environmental assessment" (EA). During the 6-month period in which APHIS allowed public comment on its EA, the agency received 663 comments, 520 of which opposed deregulation. App. to Pet. for Cert. 29a. Farmers and scientists opined that RRA could contaminate alfalfa that has not been genetically modified, destroying the American export market for alfalfa and, potentially, contaminating other plants and breeding a new type of pesticide-resistant weed. *Id.*, at 29a–30a.

Despite substantial evidence that RRA genes could transfer to other plants, APHIS issued a "Finding of No Significant Impact" and agreed to deregulate RRA "unconditionally," *ante*, at 146. With no EIS to wait for and no regulation blocking its path, petitioners began selling RRA. Farmers and environmental groups swiftly brought this lawsuit to challenge APHIS's decision to deregulate, raising claims under NEPA and other statutes.

The District Court carefully reviewed a long record and found that "APHIS's reasons for concluding" that the risks of genetic contamination are low were "not 'convincing.'" App. to Pet. for Cert. 38a. A review of APHIS's internal documents showed that individuals within the agency warned that contamination might occur. APHIS rested its decision to deregulate on its assertion that contamination risk is "not significant because it is the organic and conventional farmers' responsibility" to protect themselves and the environment. *Ibid.* Yet the agency drew this conclusion without having investigated whether such farmers "can, in fact, protect their crops from contamination." *Ibid.* The District Court likewise found that APHIS's reasons for disregarding the risk of pesticide-resistant weeds were speculative and "not convincing." *Id.*, at 46a. The agency had merely explained that if weeds acquire Roundup resistance, farmers can use "'[a]lternative herbicides.'" *Ibid.* In light of the "acknowledged" risk of RRA gene transmission and the potential "impact on the development of Roundup resistant weeds," the court concluded that there was a significant possibility of serious environmental harm, and granted summary judgment for the plaintiffs. *Id.*, at 54a; see also *id.*, at 45a.

At this point, the question of remedy arose. The parties submitted proposed final judgments, and several corporations with an interest in RRA, including Monsanto, sought permission to intervene. The District Court granted their motion and agreed "to give them the opportunity to present

evidence to assist the court in fashioning the appropriate scope of whatever relief is granted." *Id.*, at 54a (internal quotation marks omitted).

While the District Court considered the proposed judgments, it issued a preliminary injunction. Ordinarily, the court explained, the remedy for failure to conduct an EIS is to vacate the permit that was unlawfully given—the result of which, in this case, would be to prohibit any use of RRA. See *id.*, at 55a; see also *id.*, at 65a. But this case presented a special difficulty: Following APHIS's unlawful deregulation order, some farmers had begun planting genetically modified RRA. *Id.*, at 55a. In its preliminary injunction, the District Court ordered that no new RRA could be planted until APHIS completed the EIS or the court determined that some other relief was appropriate. But, so as to protect these farmers, the court declined to prohibit them from "harvesting, using, or selling" any crops they had already planted. *Id.*, at 56a. And "to minimize the harm to those growers who intend to imminently plant [RRA]," the court permitted "[t]hose growers who intend to plant [RRA] in the next three weeks and have already purchased the seed" to go ahead and plant. *Id.*, at 58a (emphasis deleted). Essentially, the court grandfathered in those farmers who had relied, in good faith, on APHIS's actions.

Before determining the scope of its final judgment, the District Court invited the parties and intervenors to submit "whatever additional evidence" they "wish[ed] to provide," and it scheduled additional oral argument. *Id.*, at 58a–59a. The parties submitted "competing proposals for permanent injunctive relief." *Id.*, at 60a. The plaintiffs requested that no one—not even the grandfathered-in farmers—be allowed to plant, grow, or harvest RRA until the full EIS had been prepared. *Id.*, at 64a. APHIS and the intervenors instead sought a remedy that would "facilitat[e] the continued and dramatic growth" of RRA: a "partial deregulation" order that would permit planting subject to certain conditions,

such as specified minimum distances between RRA and conventional alfalfa and special cleaning requirements for equipment used on the genetically modified crop. See *id.*, at 60a–64a.

The court adopted a compromise. First, it declined to adopt the APHIS-Monsanto proposal. APHIS itself had acknowledged that "gene transmission could and had occurred," and that RRA "could result in the development of Roundup-resistant weeds." *Id.*, at 61a–62a. In light of the substantial record evidence of these risks, the court would not agree to a nationwide planting scheme "without the benefit of the development of all the relevant data," as well as public comment about whether contamination could be controlled. *Id.*, at 68a. The "partial deregulation" proposed by petitioners, the court noted, was really "deregulation with certain conditions," *id.*, at 69a—which, for the same reasons given in the court's earlier order, requires an EIS, *ibid.* The court pointed out numerous problems with the APHIS-Monsanto proposal. Neither APHIS nor Monsanto had provided "evidence that suggests whether, and to what extent, the proposed interim conditions" would actually "be followed," and comparable conditions had failed to prevent contamination in certain limited settings. *Id.*, at 69a–70a. APHIS, moreover, conceded that "it does not have the resources to inspect" the RRA that had already been planted, and so could not possibly be expected "to adequately monitor the more than one million acres of [RRA] intervenors estimate [would] be planted" under their proposal. *Id.*, at 70a. That was especially problematic because any plan to limit contamination depended on rules about harvesting, and farmers were unlikely to follow those rules. *Id.*, at 71a. "APHIS ha[d] still not made any inquiry" into numerous factual concerns raised by the court in its summary judgment order issued several months earlier. *Id.*, at 70a.

Next, the court rejected the plaintiffs' proposed remedy of "enjoin[ing] the harvesting and sale of already planted"

RRA. *Id.*, at 76a. Although any planting or harvesting of RRA poses a contamination risk, the court reasoned that the equities were different for those farmers who had already invested time and money planting RRA in good-faith reliance on APHIS's deregulation order. And small amounts of harvesting could be more easily monitored. Rather than force the farmers to tear up their crops, the court imposed a variety of conditions on the crops' handling and distribution. *Id.*, at 77a.

As to all other RRA, however, the court sided with the plaintiffs and enjoined planting during the pendency of the EIS. Balancing the equities, the court explained that the risk of harm was great. "[C]ontamination cannot be undone; it will destroy the crops of those farmers who do not sell genetically modified alfalfa." *Id.*, at 71a. And because those crops "cannot be replanted for two to four years," that loss will be even greater. *Ibid.* On the other side of the balance, the court recognized that some farmers may wish to switch to genetically modified alfalfa immediately, and some companies like Monsanto want to start selling it to them just as fast. But, the court noted, RRA is a small percentage of those companies' overall business; unsold seed can be stored; and the companies "'have [no] cause to claim surprise'" as to any loss of anticipated revenue, as they "were aware of plaintiffs' lawsuit" and "nonetheless chose to market" RRA. *Id.*, at 72a.

Thus, the District Court stated that it would "vacat[e] the June 2005 deregulation decision"; "enjoi[n] the planting of [RRA] in the United States after March 30, 2007," the date of the decision, "pending the government's completion of the EIS and decision on the deregulation petition"; and impose "conditions on the handling and identification of already-planted [RRA]." *Id.*, at 79a. On the same day, the court issued its judgment. In relevant part, the judgment states:

> "The federal defendants' June 14, 2005 Determination of Nonregulated Status for [RRA] is VACATED. Be-

> fore granting Monsanto's deregulation petition, even in part, the federal defendants shall prepare an [EIS]. Until the federal defendants prepare the EIS and decide the deregulation petition, no [RRA] may be planted. . . .
>
> "[RRA already] planted before March 30, 2007 may be grown, harvested and sold subject to the following conditions." *Id.*, at 108a–109a.

II

Before proceeding to address the Court's opinion on its own terms, it is important to note that I have reservations about the validity of those terms. The Court today rests not only the bulk of its analysis but also the primary basis for our jurisdiction on the premise that the District Court enjoined APHIS from partially deregulating RRA in any sense. See *ante*, at 152–153, 158–164.[1] That is a permissible, but not necessarily correct, reading of the District Court's judgment.

So far as I can tell, until petitioners' reply brief, neither petitioners nor the Government submitted to us that the District Court had exceeded its authority in this manner. And, indeed, the Government had not raised this issue in any court at all. Petitioners did not raise the issue in any of their three questions presented or in the body of their petition for a writ of certiorari. And they did not raise the issue in their opening briefs to this Court. Only after re-

[1] See also *ante*, at 161 ("[T]he District Court barred the agency from pursuing any deregulation—no matter how limited the geographic area in which planting of RRA would be allowed, how great the isolation distances mandated between RRA fields and fields for growing non-genetically-engineered alfalfa, how stringent the regulations governing harvesting and distribution, how robust the enforcement mechanisms available at the time of the decision, and—consequently—no matter how small the risk that the planting authorized under such conditions would adversely affect the environment in general and respondents in particular" (emphasis deleted)).

spondents alleged that Monsanto's injury would not be redressed by vacating the injunction, insofar as RRA would still be a regulated article, did petitioners bring the issue to the Court's attention. Explaining why they have a redressable injury, petitioners alleged that the District Court's order prevents APHIS from "implement[ing] an[y] interim solution allowing continued planting." Reply Brief for Petitioners 5. APHIS, the party that the Court says was wrongly "barred . . . from pursuing *any* deregulation," even "in accordance with the procedures established by law," *ante*, at 161, did not complain about this aspect of the District Court's order even in its reply brief.

Thus, notwithstanding that petitioners "adequately *preserved* their objection that the vacated deregulation decision should have been replaced by APHIS's proposed injunction," *ante*, at 150 (emphasis added), the key legal premise on which the Court decides this case was never adequately *presented*. Of course, this is not standard—or sound—judicial practice. See *Kumho Tire Co.* v. *Carmichael*, 526 U. S. 137, 159 (1999) (STEVENS, J., concurring in part and dissenting in part). Today's decision illustrates why, for it is quite unclear whether the Court's premise is correct, and the Court has put itself in the position of deciding legal issues without the aid of briefing.

In my view, the District Court's judgment can fairly be read to address only (1) total deregulation orders of the kind that spawned this lawsuit, and (2) the *particular* partial deregulation order proposed to the court by APHIS. This interpretation of the judgment is more consistent with the District Court's accompanying opinion, which concluded by stating that the court "will enter a final judgment" "ordering the government to prepare an EIS before [the court] makes a decision on Monsanto's deregulation petition." App. to Pet. for Cert. 79a. The language of that opinion does not appear to "ba[r] the agency from pursuing any deregulation—no matter how limited," *ante*, at 161 (emphasis deleted).

This interpretation is also more consistent with APHIS's own decision not to contest what, according to the Court, was an unprecedented infringement on the agency's statutory authority.

To be sure, the District Court's judgment is somewhat opaque. But it is troubling that we may be asserting jurisdiction and deciding a highly factbound case based on nothing more than a misunderstanding. It is also troubling that we may be making law without adequate briefing on the critical questions we are passing upon. I would not be surprised if on remand the District Court merely clarified its order.

III

Even assuming that the majority has correctly interpreted the District Court's judgment, I do not agree that we should reverse the District Court.

At the outset, it is important to observe that when a district court is faced with an unlawful agency action, a set of parties who have relied on that action, and a prayer for relief to avoid irreparable harm, the court is operating under its powers of equity. In such a case, a court's function is "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944). "Flexibility" and "practicality" are the touchstones of these remedial determinations, as "the public interest," "private needs," and "competing private claims" must all be weighed and reconciled against the background of the court's own limitations and its particular familiarity with the case. *Id.*, at 329–330.[2]

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[2] See also, *e. g.*, *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500 (1941) ("The history of equity jurisdiction is the history of regard for public consequences. . . . There have been as many and as variegated applications of this supple principle as the situations that have brought it into play"); *Seymour* v. *Freer*, 8 Wall. 202, 218 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administra-

When a district court takes on the equitable role of adjusting legal obligations, we review the remedy it crafts for abuse of discretion. "[D]eference," we have explained, "is the hallmark of abuse-of-discretion review." *General Elec. Co.* v. *Joiner*, 522 U. S. 136, 143 (1997). Although equitable remedies are "not left to a trial court's 'inclination,'" they are left to the court's "'judgment.'" *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 416 (1975) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.)). The principles set forth in applicable federal statutes may inform that judgment. See *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 497 (2001) ("[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation" (internal quotation marks omitted)). And historically, courts have had particularly broad equitable power—and thus particularly broad discretion—to remedy public nuisances and other "'purprestures upon public rights and properties,'" *Mugler* v. *Kansas*, 123 U. S. 623, 672 (1887),[3] which include environmental harms.[4]

In my view, the District Court did not "unreasonably exercis[e]" its discretion, *Bennett* v. *Bennett*, 208 U. S. 505, 512 (1908), even if it did categorically prohibit partial deregulation pending completion of the EIS. Rather, the District Court's judgment can be understood as either of two reasonable exercises of its equitable powers.

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tion of justice between the parties"). Indeed, the very "ground of this jurisdiction" is a court's "ability to give a more complete and perfect remedy." 2 J. Story, Equity Jurisprudence § 924, p. 225 (M. Bigelow ed. 13th ed. 1886).

[3] See *Steelworkers* v. *United States*, 361 U. S. 39, 60–61 (1959) *(per curiam)* (reviewing history of injunctions to prevent public nuisances).

[4] See, *e. g.*, *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) (air pollution); *Arizona Copper Co.* v. *Gillespie*, 230 U. S. 46, 56–57 (1913) (water pollution).

Equitable Application of Administrative Law

First, the District Court's decision can be understood as an equitable application of administrative law. Faced with two different deregulation proposals, the District Court appears to have vacated the deregulation that had already occurred, made clear that NEPA requires an EIS for any future deregulation of RRA, and partially stayed the vacatur to the extent it affects farmers who had already planted RRA.[5]

Under NEPA, an agency must prepare an EIS for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C). Recall that the District Court had found, on the basis of substantial evidence, that planting RRA can cause genetic contamination of other crops, planting in controlled settings had led to contamination, APHIS is unable to monitor or enforce limitations on planting, and genetic contamination could decimate the American alfalfa market. In light of that evidence, the court may well have concluded that any deregulation of RRA, even in a "limited . . . geographic area" with "stringent . . . regulations governing harvesting and distribution,"[6]

[5] See Reply Brief for Federal Respondents 3. There is an ongoing debate about the role of equitable adjustments in administrative law. See, *e. g.,* Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L. J. 291 (2003). The parties to this appeal and the majority assume that the District Court's remedy was crafted under its equity powers, and I will do the same.

[6] One of the many matters not briefed in this case is how limited a partial deregulation can be. It is not clear whether the sort of extremely limited "partial deregulations" envisioned by the Court, see *ante*, at 161–164, in which RRA is "deregulated" in one small geographic area pursuant to stringent restrictions, could be achieved only through "partial deregulation" actions, or whether they could also (or exclusively) be achieved through a more case-specific permit process. Under the applicable regulations, a regulated article may still be used subject to a permitting process. See 7 CFR §§ 340.0, 340.4 (2010). These permits "prescribe confinement conditions and standard operating procedures . . . to maintain confinement of the genetically engineered organism." Introduction of Or-

ante, at 161, requires an EIS under NEPA. See generally D. Mandelker, NEPA Law and Litigation §§ 8:33–8:48 (2d ed. 2009) (describing when an EIS is required); cf. *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 371 (1989) (NEPA embodies "sweeping commitment" to environmental safety and principle that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct"). Indeed, it appears that any deregulation of a genetically modified, herbicide-resistant crop that can transfer its genes to other organisms and cannot effectively be monitored easily fits the criteria for when an EIS is required.[7] That is especially so when, as in this case, the environmental threat is novel. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 23 (2008) (EIS is more important when party "is conducting a new

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ganisms and Products Altered or Produced Through Genetic Engineering, 72 Fed. Reg. 39021, 39022 (2007) (hereinafter Introduction).

Ordinarily, "[o]nce an article has been deregulated, APHIS does not place any restrictions or requirements on its use." *Id.*, at 39023. As of 2007, APHIS had never—not once—granted partial approval of a petition for nonregulated status. USDA, Introduction of Genetically Engineered Organisms, Draft Environmental Impact Statement, July 2007, p. 11, online at http://www.aphis.usda.gov/brs/pdf/complete_eis.pdf (as visited June 18, 2010, and available in Clerk of Court's case file). In 2007, APHIS began contemplating a "*new* system" to allow for the release and use of genetically modified organisms, for "special cases" in which there are risks "that could be mitigated with conditions to ensure safe commercial use." Introduction 39024 (emphasis added).

[7] See, *e. g.*, 40 CFR § 1508.8 (2009) (determination whether an EIS is required turns on both "[d]irect effects" and "[i]ndirect effects," and "include[s] those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial"); § 1508.27(b)(4) (determination whether an EIS is required turns on "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"); § 1508.27(b)(5) (determination whether an EIS is required turns on "[t]he degree to which the possible effects on the quality of the human environment are highly uncertain or involve unique or unknown risks").

type of activity with completely unknown effects on the environment").[8]

Moreover, given that APHIS had already been ordered to conduct an EIS on deregulation of RRA, the court could have reasonably feared that partial deregulation would undermine the agency's eventual decision. Courts confronted with NEPA violations regularly adopt interim measures to maintain the status quo, particularly if allowing agency action to go forward risks foreclosing alternative courses of action that the agency might have adopted following completion of an EIS. See Mandelker, NEPA Law and Litigation § 4:61. The applicable regulations, to which the District Court owed deference,[9] provide that during the preparation of an EIS, "no action concerning the [agency's] proposal shall be taken which would . . . [h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives." 40 CFR § 1506.1(a) (2009). As exemplified by the problem of what to do with farmers who had already purchased or planted RRA prior to the District Court's judgment, even minimal deregulation can limit future regulatory options.

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[8] The Court posits a hypothetical in which APHIS deregulates RRA limited to a remote area in which alfalfa is not grown, and issues an accompanying order "mandating isolation distances so great as to eliminate any appreciable risk of gene flow to the crops of conventional farmers who might someday choose to plant in the surrounding area." *Ante*, at 163. At the outset, it is important to note the difference between a plausible hypothetical and a piece of fiction. At least as of 2007, APHIS had never granted partial approval of a petition for nonregulated status. See n. 6, *supra*. And I doubt that it would choose to deregulate genetically modified alfalfa in a place where the growing conditions and sales networks for the product are so poor that no farmer already plants it. Moreover, the notion that this imagined deregulation would pose virtually no environmental risk ignores one of the District Court's critical findings of fact: APHIS has very limited capacity to monitor its own restrictions. The agency could place all manner of constraints on its deregulation orders; they will have no effect unless they are enforced.

[9] See *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 372 (1989).

"Courts must remember that in many cases allowing an agency to proceed makes a mockery of the EIS process, converting it from analysis to rationalization." Herrmann, Injunctions for NEPA Violations: Balancing the Equities, 59 U. Chi. L. Rev. 1263, 1289 (1992); see also 40 CFR § 1502.5 (EIS should be implemented in manner ensuring it "will not be used to rationalize or justify decisions already made").

Although the majority does not dispute that the District Court could have reasonably concluded that NEPA requires an EIS for even partial deregulation of RRA, it suggests that any such conclusion would have been incompatible with the court's decision to permit limited harvesting by farmers who had already planted RRA. See *ante*, at 162.[10] I do not see the "inconsisten[cy]." *Ibid.* NEPA does not apply to actions by federal courts. See 40 CFR § 1508.12. Exercising its equitable discretion to balance the interests of the parties and the public, the District Court would have been well within its rights to find that NEPA requires an EIS before the agency grants "Monsanto's deregulation petition, even in part," App. to Pet. for Cert. 108a, yet also to find that a partial stay of the vacatur was appropriate to protect the interests of those farmers who had already acted in good-faith reliance on APHIS.

Similarly, I do not agree that the District Court's ruling was "premature" because APHIS had not yet effected any partial deregulations, *ante*, at 160. Although it is "for the agency to decide whether and to what extent" it will pursue deregulation, *ante*, at 159, the court's application of NEPA to APHIS's regulation of RRA might have controlled any deregulation during the pendency of the EIS. Petitioners and APHIS had already come back to the court with a proposed partial deregulation order which, the court explained,

[10] The Court states that the order permitted both harvesting and planting. But the court's final judgment permitted only sale and harvesting of RRA planted *before* March 30, 2007, more than a month before the judgment. See App. to Pet. for Cert. 109a; see also *id.*, at 79a.

was incompatible with its determination that there is a substantial risk of gene spreading and that APHIS lacks monitoring capacity. That same concern would apply to *any* partial deregulation order. The court therefore had good reason to make it clear, upfront, that the parties should not continue to expend resources proposing such orders, instead of just moving ahead with an EIS. Cf. *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500 (1941) ("The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision"). Indeed, it was APHIS itself that "sought to 'streamline' " the process. *Ante*, at 160.

Injunctive Relief

Second, the District Court's judgment can be understood as a reasonable response to the nature of the risks posed by RRA. Separate and apart from NEPA's requirement of an EIS, these risks were sufficiently serious, in my view, that the court's injunction was a permissible exercise of its equitable authority.

The District Court found that gene transfer can and does occur, and that if it were to spread through open land the environmental and economic consequences would be devastating. Cf. *Amoco Production Co.* v. *Gambell*, 480 U. S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i. e.*, irreparable"). Although "a mere possibility of a future nuisance will not support an injunction," courts have never required proof "that the nuisance *will* occur"; rather, "it is sufficient . . . that the *risk* of its happening is greater than a reasonable man would incur." 5 J. Pomeroy, A Treatise on Equity Jurisprudence and Equitable Remedies § 1937 (§ 523), p. 4398 (2d ed. 1919) (first emphasis added). Once gene transfer occurred in American fields, it "would be difficult—if not impossible—to reverse the harm." *Hollingsworth* v. *Perry*, 558 U. S. 183, 195 (2010) *(per curiam)*.

Additional considerations support the District Court's judgment. It was clear to the court that APHIS had only limited capacity to monitor planted RRA, and some RRA had already been planted. The marginal threat posed by additional planting was therefore significant. Injunctive remedies are meant to achieve a "nice adjustment and reconciliation between the competing claims" of injury by "mould-[ing] each decree to the necessities of the particular case." *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982) (internal quotation marks omitted). Under these circumstances, it was not unreasonable for the court to conclude that the most equitable solution was to allocate the limited amount of potentially safe RRA to the farmers who had already planted that crop.[11]

The Court suggests that the injunction was nonetheless too sweeping because "a partial deregulation need not cause respondents any injury at all . . . ; if the scope of the partial deregulation is sufficiently limited, the risk of gene flow to their crops could be virtually nonexistent." *Ante*, at 162–163. The Court appears to reach this conclusion by citing one particular study (in a voluminous record), rather than any findings of fact.[12] Even assuming that this study is correct, the

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[11] As explained previously, I do not see the court's broad injunction as "inconsistent," *ante*, at 162, with its decision that farmers who had already planted RRA could harvest their crop. The equities are different for farmers who relied on the agency than for companies like Monsanto that developed an organism knowing it might be regulated; and APHIS could monitor only a limited amount of RRA.

[12] The Court also hypothesizes a set of growing conditions that would isolate RRA from the plaintiffs in this case, even if not from other farmers. See *ante*, at 163. As already explained, these hypotheticals are rather unrealistic. See n. 8, *supra*. And, given that the plaintiffs include environmental organizations as well as farmer and consumer associations, it is hard to see how APHIS could so carefully isolate and protect their interests. In any event, because APHIS concedes that it cannot monitor such limits, rules that protect these or any other parties may be merely hortatory in practice. Moreover, although we have not squarely addressed the

Court ignores the District Court's findings that gene flow is likely and that APHIS has little ability to monitor any conditions imposed on a partial deregulation. Limits on planting or harvesting may operate fine in a laboratory setting, but the District Court concluded that many limits will not be followed and cannot be enforced in the real world.[13]

Against that background, it was perfectly reasonable to wait for an EIS. APHIS and petitioners argued to the District Court that partial deregulation could be safely implemented, they submitted evidence intended to show that planting restrictions would prevent the spread of the newly engineered gene, and they contested "virtually every factual issue relating to possible environmental harm." *Geertson Seed Farms* v. *Johanns*, 570 F. 3d 1130, 1135 (CA9 2009). But lacking "the benefit of the development of all the relevant data," App. to Pet. for Cert. 68a, the District Court did not find APHIS's and petitioners' assertions to be convincing. I cannot say that I would have found otherwise. It was reasonable for the court to conclude that planting could not go forward until more complete study, presented in an EIS, showed that the known problem of gene flow could, in reality, be prevented.[14]

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issue, in my view "[t]here is no general requirement that an injunction affect only the parties in the suit." *Bresgal* v. *Brock*, 843 F. 2d 1163, 1169 (CA9 1987). To limit an injunction against a federal agency to the named plaintiffs "would only encourage numerous other" regulated entities "to file additional lawsuits in this and other federal jurisdictions." *Livestock Marketing Assn.* v. *United States Dept. of Agriculture*, 207 F. Supp. 2d 992, 1007 (SD 2002), aff'd, 335 F. 3d 711, 726 (CA8 2003).

[13] The majority notes that the District Court acknowledged, at a hearing several months before it issued the judgment, that a simple but slightly overinclusive remedy may be preferable to an elaborate set of planting conditions. See *ante*, at 163–164, n. 6. Quite right. As the District Court said to APHIS's lawyer at that hearing, if the agency issues an elaborate set of precautions, "I don't know how you even start to enforce it." App. to Pet. for Cert. 190a–191a.

[14] I suspect that if APHIS and petitioners had come back to the court with more convincing evidence prior to completing an EIS, and moved to

The District Court's decision that more study was needed to assess whether limits on deregulation could prevent environmental damage is further reinforced by the statutory context in which the issue arose. A court's equitable discretion must be guided by "recognized, defined public policy." *Meredith* v. *Winter Haven*, 320 U. S. 228, 235 (1943); see also *Hecht Co.*, 321 U. S., at 331 (explaining that when a court evaluates an agency's decision against the background of a federal statute, the court's discretion "must be exercised in light of the large objectives of the Act"). Congress recognized in NEPA that complex environmental cases often require exceptionally sophisticated scientific determinations, and that agency decisions should not be made on the basis of "incomplete information." *Marsh*, 490 U. S., at 371. Congress also recognized that agencies cannot fully weigh the consequences of these decisions without obtaining public comments through an EIS. See *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 350 (1989).[15] While a court may not presume that a NEPA violation requires an injunction, it may take into account the principles embodied in the statute in considering whether an injunction would be appropriate. This District Court had before it strong evidence that gene transmission was likely to occur and that limits on growing could not be enforced. It also had a large amount of highly detailed evidence about whether growing restrictions, even if enforced, can prevent transmission. That evidence called into question the agency's own claims

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modify the court's order, the court would have done so. Indeed, the District Court showed a willingness to recalibrate its order when it amended its judgment just a few months after the judgment's issuance in light of APHIS's submission that certain requirements were impractical. See App. to Pet. for Cert. 111a–114a.

[15] Accordingly, while "NEPA itself does not mandate particular results," it does mandate a particular process and embodies the principle that federal agencies should "carefully conside[r] detailed information" before incurring potential environmental harm. *Robertson*, 490 U. S., at 350, 349.

regarding the risks posed by partial deregulation. In enjoining partial deregulation until it had the benefit of an EIS to help parse the evidence, the court acted with exactly the sort of caution that Congress endorsed in NEPA.

Finally, it bears mention that the District Court's experience with the case may have given it grounds for skepticism about the representations made by APHIS and petitioners. Sometimes "one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). A "district court may have insights not conveyed by the record." *Pierce* v. *Underwood*, 487 U. S. 552, 560 (1988). In this case, the agency had attempted to deregulate RRA without an EIS in spite of ample evidence of potential environmental harms. And when the court made clear that the agency had violated NEPA, the agency responded by seeking to "'streamline'" the process, *ante*, at 160, submitting a deregulation proposal with Monsanto that suffered from some of the same legal and empirical holes as its initial plan to deregulate. Against that background, the court may have felt it especially prudent to wait for an EIS before concluding that APHIS could manage RRA's threat to the environment.

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The District Court in this case was put in an "unenviable position." *Ibid.* In front of it was strong evidence that RRA poses a serious threat to the environment and to American business, and that limits on RRA deregulation might not be followed or enforced—and that even if they were, the newly engineered gene might nevertheless spread to other crops. Confronted with those disconcerting submissions, with APHIS's unlawful deregulation decision, with a group of farmers who had staked their livelihoods on APHIS's decision, and with a federal statute that prizes informed decisionmaking on matters that seriously affect the environment,

the court did the best it could. In my view, the District Court was well within its discretion to order the remedy that the Court now reverses. Accordingly, I respectfully dissent.

Syllabus

DOE ET AL. *v.* REED, WASHINGTON SECRETARY OF STATE, ET AL.

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

No. 09–559. Argued April 28, 2010—Decided June 24, 2010

The Washington Constitution allows citizens to challenge state laws by referendum. To initiate a referendum, proponents must file a petition with the secretary of state that contains valid signatures of registered Washington voters equal to or exceeding four percent of the votes cast for the office of Governor at the last gubernatorial election. A valid submission requires not only a signature, but also the signer's address and the county in which he is registered to vote.

In May 2009, Washington Governor Christine Gregoire signed into law Senate Bill 5688, which expanded the rights and responsibilities of state-registered domestic partners, including same-sex domestic partners. That same month, Protect Marriage Washington, one of the petitioners here, was organized as a "State Political Committee" for the purpose of collecting the petition signatures necessary to place a referendum challenging SB 5688 on the ballot. If the referendum made it onto the ballot, Protect Marriage Washington planned to encourage voters to reject SB 5688. Protect Marriage Washington submitted the petition with more than 137,000 signatures to the secretary of state, and after conducting the verification and canvassing process required by state law, the secretary determined that the petition contained sufficient signatures to qualify the referendum (R–71) for the ballot. Respondent intervenors invoked the Washington Public Records Act (PRA) to obtain copies of the petition, which contained the signers' names and addresses.

The R–71 petition sponsor and certain signers filed a complaint and a motion for injunctive relief in Federal District Court, seeking to enjoin the public release of the petition. Count I alleges that the PRA "is unconstitutional as applied to referendum petitions," and Count II alleges that the PRA "is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals." Determining that the PRA burdened core political speech, the District Court held that plaintiffs were likely to succeed on the merits of Count I and granted a preliminary injunction preventing release of the signatory information. Reviewing only Count I, the Ninth Circuit held that plain-

tiffs were unlikely to succeed on their claim that the PRA is unconstitutional as applied to referendum petitions in general, and therefore reversed.

Held: Disclosure of referendum petitions does not as a general matter violate the First Amendment. Pp. 194–202.

(a) Because plaintiffs' Count I claim and the relief that would follow—an injunction barring the secretary of state from releasing referendum petitions to the public—reach beyond the particular circumstances of these plaintiffs, they must satisfy this Court's standards for a facial challenge to the extent of that reach. See *United States* v. *Stevens*, 559 U. S. 460, 472–473. P. 194.

(b) The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." *Meyer* v. *Grant*, 486 U. S. 414, 421. In either case, the expression of a political view implicates a First Amendment right.

Petition signing remains expressive even when it has legal effect in the electoral process. But that does not mean that the electoral context is irrelevant to the nature of this Court's First Amendment review. States have significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government is afforded substantial latitude to enforce that regulation. Also pertinent is the fact that the PRA is not a prohibition on speech, but a *disclosure* requirement that may burden "the ability to speak, but [does] 'not prevent anyone from speaking.'" *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 366. This Court has reviewed First Amendment challenges to disclosure requirements in the electoral context under an "exacting scrutiny" standard, requiring "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.*, at 366–367. To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 744. Pp. 194–196.

(c) The State's interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general. That interest is particularly strong with respect to efforts to root out fraud. But the State's interest is not limited to combating fraud; it extends to efforts

to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. The State's interest also extends more generally to promoting transparency and accountability in the electoral process.

Plaintiffs contend that disclosure is not sufficiently related to the interest of protecting the integrity of the electoral process to withstand First Amendment scrutiny. They argue that disclosure is not necessary because the secretary of state is already charged with verifying and canvassing the names on a petition, a measure's advocates and opponents can observe that process, any citizen can challenge the secretary's actions in court, and criminal penalties reduce the danger of fraud in the petition process. But the secretary's verification and canvassing will not catch all the invalid signatures, and public disclosure can help cure the inadequacies of the secretary's process. Disclosure also helps prevent difficult-to-detect fraud such as outright forgery and "bait and switch" fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue. And disclosure promotes transparency and accountability in the electoral process to an extent other measures cannot. Pp. 197–199.

(d) Plaintiffs' main objection is that "the strength of the governmental interest" does not "reflect the seriousness of the actual burden on First Amendment rights." *Davis*, *supra*, at 744. According to plaintiffs, the objective of those seeking disclosure is not to prevent fraud, but to publicly identify signatories and broadcast their political views on the subject of the petition. Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens to seek out R–71 petition signers. That, plaintiffs argue, would subject them to threats, harassment, and reprisals.

The problem for plaintiffs is that their argument rests almost entirely on the specific harm that would attend the disclosure of information on the R–71 petition. But the question before the Court at this stage of the litigation is whether disclosure of referendum petitions in general violates the First Amendment. Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, plaintiffs' broad challenge to the PRA must be rejected. But upholding the PRA against a broad-based challenge does not foreclose success on plaintiffs' narrower challenge in Count II, which is pending before the District Court. See *Buckley* v. *Valeo*, 424 U. S. 1, 74. Pp. 199–202.

586 F. 3d 671, affirmed.

Syllabus

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. BREYER, J., *post*, p. 202, and ALITO, J., *post*, p. 202, filed concurring opinions. SOTOMAYOR, J., filed a concurring opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 212. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post*, p. 215. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 219. THOMAS, J., filed a dissenting opinion, *post*, p. 228.

James Bopp, Jr., argued the cause for petitioners. With him on the briefs were *Richard E. Coleson* and *Sarah E. Troupis.*

Robert M. McKenna, Attorney General of Washington, argued the cause for respondents. With him on the brief for respondent Sam Reed were *Maureen Hart*, Solicitor General, and *William Berggren Collins* and *Anne Elizabeth Egeler*, Deputy Solicitors General. *Leslie R. Weatherhead* filed a brief for respondent Washington Coalition for Open Government. *Kevin J. Hamilton*, *Nicholas P. Gellert*, and *Amanda J. Beane* filed a brief for respondent Washington Families Standing Together.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance Defense Fund by *Casey Mattox;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson*, *John P. Tuskey*, and *Laura B. Hernandez;* for the American Civil Rights Union by *Peter Ferrara;* for the Center for Competitive Politics by *Stephen M. Hoersting;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso* and *Edwin Meese III;* for the Committee for Truth in Politics et al. by *Heidi K. Abegg* and *Alan P. Dye;* for Common Sense for Oregon et al. by *Ross A. Day* and *Kevin L. Mannix;* for Concerned Women for America by *Sharon F. Blakeney* and *Kathleen Cassidy Goodman;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg;* for the Free Speech Defense and Education Fund, Inc., et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Mark B. Weinberg*, and *Gary G. Kreep;* for the Institute for Justice by *William H. Mellor*, *Steven M. Simpson*, and *Robert P. Frommer;* for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart;* for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister;* for ProtectMarriage.com–Yes on 8, A Project of California Renewal, by

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The State of Washington allows its citizens to challenge state laws by referendum. Roughly four percent of Washington voters must sign a petition to place such a referendum on the ballot. That petition, which by law must include the

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Charles J. Cooper and *Jesse M. Panuccio;* and for Voters Want More Choices by *Stuart Gerson* and *Shawn Timothy Newman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Richard Cordray*, Attorney General of Ohio, *Benjamin C. Mizer*, Solicitor General, *Elisabeth A. Long*, Deputy Solicitor, and *Samuel Peterson*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Michael A. Delaney* of New Hampshire, *Paula T. Dow* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *John R. Kroger* of Oregon, *Henry McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *J. B. Van Hollen* of Wisconsin; for American Business Media et al. by *Christopher A. Mohr* and *Michael R. Klipper;* for Daniel A. Smith et al. by *Joseph E. Sandler;* for the Lambda Legal Defense and Education Fund, Inc., et al. by *William M. Hohengarten*, *Gary D. Buseck*, *Mary L. Bonauto*, *Jon W. Davidson*, *Susan Sommer*, *Shannon Minter*, and *Christopher F. Stoll;* for the National and Washington State News Publishers et al. by *Bruce E. H. Johnson*, *Richard A. Bernstein*, *Kevin M. Goldberg*, *Dale M. Cohen*, *Richard J. Tofel*, *Karlene W. Goller*, and *Eric N. Lieberman;* for the National Conference of State Legislatures et al. by *Richard Ruda*, *Charles A. Rothfeld*, *Andrew J. Pincus*, and *Scott L. Shuchart;* and for the Massachusetts Gay and Lesbian Political Caucus et al. by *Jonathan M. Albano.*

Briefs of *amici curiae* were filed for the Brennan Center for Justice et al. by *M. Devereux Chatillon*, *Mark P. Johnson*, and *Monica Youn;* for the Cato Institute by *Glenn M. Willard*, *John C. Hilton*, and *Ilya Shapiro;* for the City of Seattle by *Peter S. Holmes* and *John B. Schochet;* and for the Reporters Committee for Freedom of the Press et al. by *Lucy A. Dalglish*, *Gregg P. Leslie*, *Tonda F. Rush*, *René P. Milam*, *Bruce W. Sanford*, *Bruce D. Brown*, and *Laurie A. Babinski.*

names and addresses of the signers, is then submitted to the government for verification and canvassing, to ensure that only lawful signatures are counted. The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents, and the State construes the PRA to cover submitted referendum petitions.

This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that law to a popular vote. Respondent intervenors invoked the PRA to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.

The course of this litigation, however, has framed the legal question before us more broadly. The issue at this stage of the case is not whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so. We conclude that such disclosure does not as a general matter violate the First Amendment, and we therefore affirm the judgment of the Court of Appeals. We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court.

I

The Washington Constitution reserves to the people the power to reject any bill, with a few limited exceptions not relevant here, through the referendum process. Wash. Const., Art. II, § 1(b). To initiate a referendum, proponents must file a petition with the secretary of state that contains valid signatures of registered Washington voters equal to or exceeding four percent of the votes cast for the office of Governor at the last gubernatorial election. §§ 1(b), (d). A valid submission requires not only a signature, but also the

signer's address and the county in which he is registered to vote. Wash. Rev. Code § 29A.72.130 (2008).

In May 2009, Washington Governor Christine Gregoire signed into law Senate Bill 5688, which "expand[ed] the rights and responsibilities" of state-registered domestic partners, including same-sex domestic partners. 586 F. 3d 671, 675 (CA9 2009). That same month, Protect Marriage Washington, one of the petitioners here, was organized as a "State Political Committee" for the purpose of collecting the petition signatures necessary to place a referendum on the ballot, which would give the voters themselves an opportunity to vote on SB 5688. App. 8–9. If the referendum made it onto the ballot, Protect Marriage Washington planned to encourage voters to reject SB 5688. *Id.*, at 7, 9.

On July 25, 2009, Protect Marriage Washington submitted to the secretary of state a petition containing over 137,000 signatures. See 586 F. 3d, at 675; Brief for Respondent Washington Families Standing Together 6. The secretary of state then began the verification and canvassing process, as required by Washington law, to ensure that only legal signatures were counted. Wash. Rev. Code § 29A.72.230. Some 120,000 valid signatures were required to place the referendum on the ballot. Sam Reed, Washington Secretary of State, Certification of Referendum 71 (Sept. 2, 2009). The secretary of state determined that the petition contained a sufficient number of valid signatures, and the referendum (R–71) appeared on the November 2009 ballot. The voters approved SB 5688 by a margin of 53 percent to 47 percent.

The PRA, Wash. Rev. Code § 42.56.001 *et seq.* (2008), makes all "public records" available for public inspection and copying. § 42.56.070(1). The Act defines "[p]ublic record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." § 42.56.010(2). Washington

takes the position that referendum petitions are "public records." Brief for Respondent Reed 5.

By August 20, 2009, the secretary had received requests for copies of the R–71 petition from an individual and four entities, including Washington Coalition for Open Government (WCOG) and Washington Families Standing Together (WFST), two of the respondents here. 586 F. 3d, at 675. Two entities, WhoSigned.org and KnowThyNeighbor.org, issued a joint press release stating their intention to post the names of the R–71 petition signers online, in a searchable format. See App. 11; 586 F. 3d, at 675.

The referendum petition sponsor and certain signers filed a complaint and a motion for a preliminary injunction in the United States District Court for the Western District of Washington, seeking to enjoin the secretary of state from publicly releasing any documents that would reveal the names and contact information of the R–71 petition signers. App. 4. Count I of the complaint alleges that "[t]he Public Records Act is unconstitutional as applied to referendum petitions." *Id.*, at 16. Count II of the complaint alleges that "the Public Records Act is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." *Id.*, at 17. Determining that the PRA burdened core political speech, the District Court held that plaintiffs were likely to succeed on the merits of Count I and granted them a preliminary injunction on that count, enjoining release of the information on the petition. 661 F. Supp. 2d 1194, 1205–1206 (WD Wash. 2009).

The United States Court of Appeals for the Ninth Circuit reversed. Reviewing only Count I of the complaint, the Court of Appeals held that plaintiffs were unlikely to succeed on their claim that the PRA is unconstitutional as applied to referendum petitions generally. It therefore reversed the District Court's grant of the preliminary injunction. 586 F. 3d, at 681. We granted certiorari. 558 U. S. 1142 (2010).

II

It is important at the outset to define the scope of the challenge before us. As noted, Count I of the complaint contends that the PRA "violates the First Amendment as applied to referendum petitions." App. 16. Count II asserts that the PRA "is unconstitutional as applied to the Referendum 71 petition." *Id.*, at 17. The District Court decision was based solely on Count I; the Court of Appeals decision reversing the District Court was similarly limited. 586 F. 3d, at 676, n. 6. Neither court addressed Count II.

The parties disagree about whether Count I is properly viewed as a facial or as-applied challenge. Compare Reply Brief for Petitioners 8 ("Count I expressly made an as-applied challenge") with Brief for Respondent Reed 1 ("This is a facial challenge to Washington's Public Records Act"). It obviously has characteristics of both: The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow—an injunction barring the secretary of state "from making referendum petitions available to the public," App. 16 (Complaint Count I)—reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach. See *United States* v. *Stevens*, 559 U. S. 460, 472–473 (2010).

III

A

The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referen-

dum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." *Meyer* v. *Grant*, 486 U. S. 414, 421 (1988). In either case, the expression of a political view implicates a First Amendment right. The State, having "cho-[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002) (internal quotation marks and ellipsis omitted).

Respondents counter that signing a petition is a legally operative legislative act and therefore "does not involve any significant expressive element." Brief for Respondent Reed 31. It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment. Respondents themselves implicitly recognize that the signature expresses a particular viewpoint, arguing that one purpose served by disclosure is to allow the public to engage signers in a debate on the merits of the underlying law. See, *e. g.*, *id.*, at 45; Brief for Respondent WCOG 49; Brief for Respondent WFST 58.

Petition signing remains expressive even when it has legal effect in the electoral process. But that is not to say that the electoral context is irrelevant to the nature of our First Amendment review. We allow States significant flexibility in implementing their own voting systems. See *Burdick* v. *Takushi*, 504 U. S. 428, 433–434 (1992). To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial lat-

itude to enforce that regulation. Also pertinent to our analysis is the fact that the PRA is not a prohibition on speech, but instead a *disclosure* requirement. "[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 366 (2010) (internal quotation marks omitted).

We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 64 (1976) (*per curiam*) ("Since *NAACP* v. *Alabama* [*ex rel. Patterson*, 357 U. S. 449 (1958),] we have required that the subordinating interests of the State [offered to justify compelled disclosure] survive exacting scrutiny"); *Citizens United*, *supra*, at 366 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny'" (quoting *Buckley*, *supra*, at 64)); *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 744 (2008) (governmental interest in disclosure "'must survive exacting scrutiny'" (quoting *Buckley*, *supra*, at 64)); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 204 (1999) (*ACLF*) (finding that disclosure rules "fail[ed] exacting scrutiny" (internal quotation marks omitted)).

That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, *supra*, at 366–367 (quoting *Buckley*, *supra*, at 64, 66). To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, *supra*, at 744 (citing *Buckley*, *supra*, at 68, 71).[1]

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[1] JUSTICE SCALIA doubts whether petition signing is entitled to any First Amendment protection at all. *Post*, at 219 (opinion concurring in judgment). His skepticism is based on the view that petition signing has "legal effects" in the legislative process, while other aspects of political

B

Respondents assert two interests to justify the burdens of compelled disclosure under the PRA on First Amendment rights: (1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the petition. See, *e. g.*, Brief for Respondent Reed 39–42, 44–45. Because we determine that the State's interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, we need not, and do not, address the State's "informational" interest.

The State's interest in preserving the integrity of the electoral process is undoubtedly important. "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *ACLF*, *supra*, at 191. The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It "drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) (*per curiam*); see also *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181, 196 (2008) (opinion of STEVENS, J.). The threat of fraud in this context is

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participation—with respect to which we have held there is a First Amendment interest, see *supra*, at 194–196—do not. See *post*, at 221–222, and n. 3. That line is not as sharp as JUSTICE SCALIA would have it; he himself recognizes "the existence of a First Amendment interest in voting," *post*, at 224, which of course also can have legal effect. The distinction becomes even fuzzier given that only *some* petition signing has legal effect, and any such legal effect attaches only well after the expressive act of signing, if the secretary determines that the petition satisfies the requirements for inclusion on the ballot. See *post*, at 221. Petitions that do not qualify for the ballot of course carry no legal effect.

not merely hypothetical; respondents and their *amici* cite a number of cases of petition-related fraud across the country to support the point. See Brief for Respondent Reed 43; Brief for State of Ohio et al. as *Amici Curiae* 22–24.

But the State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. See Brief for Respondent Reed 42. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is "essential to the proper functioning of a democracy." *Id.*, at 39.

Plaintiffs contend that the disclosure requirements of the PRA are not "sufficiently related" to the interest of protecting the integrity of the electoral process. Brief for Petitioners 51. They argue that disclosure is not necessary because the secretary of state is already charged with verifying and canvassing the names on a petition, advocates and opponents of a measure can observe that process, and any citizen can challenge the secretary's actions in court. See Wash. Rev. Code §§ 29A.72.230, 29A.72.240. They also stress that existing criminal penalties reduce the danger of fraud in the petition process. See Brief for Petitioners 50; §§ 29A.84.210, 29A.84.230, 29A.84.250.

But the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks "only 3 to 5% of signatures," Brief for Respondent WFST 54), and the secretary can make mistakes, too, see Brief for Respondent Reed 42. Public disclosure can help cure the inadequacies of the verification and canvassing process.

Disclosure also helps prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and "bait and switch" fraud, in which an individual signs the

petition based on a misrepresentation of the underlying issue. See Brief for Respondent WFST 9–11, 53–54; cf. Brief for Massachusetts Gay and Lesbian Political Caucus et al. as *Amici Curiae* 18–22 (detailing "bait and switch" fraud in a petition drive in Massachusetts). The signer is in the best position to detect these types of fraud, and public disclosure can bring the issue to the signer's attention.

Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs' argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.[2]

C

Plaintiffs' more significant objection is that "the strength of the governmental interest" does not "reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U. S., at 744 (citing *Buckley*, 424 U. S., at 68, 71); see, *e. g.*, Brief for Petitioners 12–13, 30. According to plaintiffs, the objective of those seeking disclosure of the R–71 petition is not to prevent fraud, but to publicly identify those who had validly signed and to broadcast the signers' political views on the subject of the petition. Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens to seek out the R–71 signers. See App. 11; Brief for Petitioners 8, 46–47.

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[2] JUSTICE THOMAS's contrary assessment of the relationship between the disclosure of referendum petitions generally and the State's interests in this case is based on his determination that strict scrutiny applies, *post*, at 232 (dissenting opinion), rather than the standard of review that we have concluded is appropriate, see *supra*, at 196.

Plaintiffs explain that once on the Internet, the petition signers' names and addresses "can be combined with publicly available phone numbers and maps," in what will effectively become a blueprint for harassment and intimidation. *Id.*, at 46. To support their claim that they will be subject to reprisals, plaintiffs cite examples from the history of a similar proposition in California, see, *e. g.*, *id.*, at 2–6, 31–32, and from the experience of one of the petition sponsors in this case, see App. 9.

In related contexts, we have explained that those resisting disclosure can prevail under the First Amendment if they can show "a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, *supra*, at 74; see also *Citizens United*, 558 U. S., at 367. The question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the R–71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions.

The problem for plaintiffs is that their argument rests almost entirely on the specific harm they say would attend disclosure of the information on the R–71 petition, or on similarly controversial ones. See, *e. g.*, Brief for Petitioners 10, 26–29, 46, 56. But typical referendum petitions "concern tax policy, revenue, budget, or other state law issues." Brief for Respondent WFST 36 (listing referenda); see also App. 26 (stating that in recent years the State has received PRA requests for petitions supporting initiatives concerning limiting motor vehicle charges; government regulation of private property; energy resource use by certain electric utilities; long-term care services for the elderly and persons with disabilities; and state, county, and city revenue); *id.*, at 26–27 (stating that in the past 20 years, referendum meas-

ures that have qualified for the ballot in the State concerned land-use regulation; unemployment insurance; charter public schools; and insurance coverage and benefits). Voters care about such issues, some quite deeply—but there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.

Plaintiffs have offered little in response. They have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R–71 petition signers or the signers of other similarly controversial petitions. Indeed, what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps: Several other petitions in the State "have been subject to release in recent years," plaintiffs tell us, Brief for Petitioners 50, but apparently that release has come without incident. Cf. *Citizens United*, *supra*, at 370 ("Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation").

Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the PRA. In doing so, we note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one. See *Buckley*, *supra*, at 74 ("minor parties" may be exempt from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties"); *Citizens United*, *supra*, at 370 (disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed" (citing *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 198 (2003))). The secretary of state

acknowledges that plaintiffs may press the narrower challenge in Count II of their complaint in proceedings pending before the District Court. Brief for Respondent Reed 17.

* * *

We conclude that disclosure under the PRA would not violate the First Amendment with respect to referendum petitions in general and therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BREYER, concurring.

In circumstances where, as here, "a law significantly implicates competing constitutionally protected interests in complex ways," the Court balances interests. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring). "And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others." *Ibid.* As I read their opinions, this is what both the Court and JUSTICE STEVENS do. See *ante*, at 196 (opinion of the Court); *post*, at 217–218 (STEVENS, J., concurring in part and concurring in judgment). And for the reasons stated in those opinions (as well as many of the reasons discussed by JUSTICE SOTOMAYOR), I would uphold the statute challenged in this case. With this understanding, I join the opinion of the Court and JUSTICE STEVENS' opinion.

JUSTICE ALITO, concurring.

The Court holds that the disclosure under the Washington Public Records Act (PRA), Wash. Rev. Code § 42.56.001 *et seq.* (2008), of the names and addresses of persons who sign referendum petitions does not as a general matter violate the First Amendment, *ante* this page, and I agree with that conclusion. Many referendum petitions concern relatively uncontroversial matters, see *ante*, at 200–201, and plaintiffs

have provided no reason to think that disclosure of signatory information in those contexts would significantly chill the willingness of voters to sign. Plaintiffs' facial challenge therefore must fail. See *ante*, at 191, 194.

Nonetheless, facially valid disclosure requirements can impose heavy burdens on First Amendment rights in individual cases. Acknowledging that reality, we have long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of [personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley* v. *Valeo*, 424 U. S. 1, 74 (1976) *(per curiam);* see also *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 367 (2010); *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 197–198 (2003); *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 93 (1982). Because compelled disclosure can "burden the ability to speak," *Citizens United*, *supra*, at 366, and "seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, *supra*, at 64, the as-applied exemption plays a critical role in safeguarding First Amendment rights.

I

The possibility of prevailing in an as-applied challenge provides adequate protection for First Amendment rights only if (1) speakers can obtain the exemption sufficiently far in advance to avoid chilling protected speech and (2) the showing necessary to obtain the exemption is not overly burdensome. With respect to the first requirement, the as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking. To avoid the possibility that a disclosure requirement might chill the willingness of voters to sign a referendum petition (and thus burden a circulator's ability to collect the necessary number of signatures, cf. *Meyer* v. *Grant*, 486 U. S.

414, 423 (1988)), voters must have some assurance *at the time when they are presented with the petition* that their names and identifying information will not be released to the public. The only way a circulator can provide such assurance, however, is if the circulator has sought and obtained an as-applied exemption from the disclosure requirement well before circulating the petition. Otherwise, the best the circulator could do would be to tell voters that an exemption might be obtained at some point in the future. Such speculation would often be insufficient to alleviate voters' concerns about the possibility of being subjected to threats, harassment, or reprisals. Cf. *Citizens United*, *supra*, at 484–485 (THOMAS, J., concurring in part and dissenting in part).

Additionally, speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. We acknowledged as much in *Buckley*, where we noted that "unduly strict requirements of proof could impose a heavy burden" on speech. 424 U. S., at 74. Recognizing that speakers "must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim," we emphasized that speakers "need show only a *reasonable probability*" that disclosure will lead to threats, harassment, or reprisals. *Ibid.* (emphasis added). We stated that speakers could rely on a wide array of evidence to meet that standard, including "specific evidence of past or present harassment of [group] members," "harassment directed against the organization itself," or a "pattern of threats or specific manifestations of public hostility." *Ibid.* Significantly, we also made clear that "[n]ew [groups] that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Ibid.* From its inception, therefore, the as-applied exemption has not imposed onerous burdens of proof on speakers who fear that disclosure might lead to harassment or intimidation.

II

In light of those principles, the plaintiffs in this case have a strong argument that the PRA violates the First Amendment as applied to the Referendum 71 petition.

A

Consider first the burdens on plaintiffs' First Amendment rights. The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case. See *Buckley*, *supra*, at 74 (explaining that speakers seeking as-applied relief from a disclosure requirement can rely on "evidence of reprisals and threats directed against individuals or organizations holding similar views"). Proposition 8 amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const., Art. I, § 7.5, and plaintiffs submitted to the District Court substantial evidence of the harassment suffered by Proposition 8 supporters, see Declaration of Scott F. Bieniek in No. C:09–5456 (WD Wash.), Exhs. 12, 13. Members of this Court have also noted that harassment. See *Hollingsworth* v. *Perry*, 558 U. S. 183, 185–186 (2010) *(per curiam)*; *Citizens United*, *supra*, at 481–482 (opinion of THOMAS, J.). Indeed, if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.

What is more, when plaintiffs return to the District Court, they will have the opportunity to develop evidence of intimidation and harassment of Referendum 71 supporters—an opportunity that was pretermitted because of the District Court's decision to grant a preliminary injunction on count I of plaintiffs' complaint. See 661 F. Supp. 2d 1194, 1205–1206

(WD Wash. 2009); Tr. of Oral Arg. 40–41. For example, plaintiffs allege that the campaign manager for one of the plaintiff groups received threatening e-mails and phone calls, and that the threats were so severe that the manager filed a complaint with the local sheriff and had his children sleep in an interior room of his home. App. 9–10.

B

The inadequacy of the State's interests in compelling public disclosure of referendum signatory information further confirms that courts should be generous in granting as-applied relief in this context. See *Buckley*, *supra*, at 71 (recognizing that the weakness of the State's interests in an individual case can require exempting speakers from compelled disclosure); *Brown*, 459 U. S., at 92–93 (same). As the Court notes, respondents rely on two interests to justify compelled disclosure in this context: (1) providing information to voters about who supports a referendum petition; and (2) preserving the integrity of the referendum process by detecting fraudulent and mistaken signatures. *Ante*, at 197.

1

In my view, respondents' asserted informational interest will not in any case be sufficient to trump the First Amendment rights of signers and circulators who face a threat of harassment. Respondents maintain that publicly disclosing the names and addresses of referendum signatories provides the voting public with "insight into whether support for holding a vote comes predominantly from particular interest groups, political or religious organizations, or other group[s] of citizens," and thus allows voters to draw inferences about whether they should support or oppose the referendum. Brief for Respondent Washington Families Standing Together 58; see also Brief for Respondent Reed 46–48. Additionally, respondents argue that disclosure "allows Washington voters to engage in discussion of referred measures with

persons whose acts secured the election and suspension of state law." *Id.*, at 45; see also Brief for Respondent Washington Families Standing Together 58.

The implications of accepting such an argument are breathtaking. Were we to accept respondents' asserted informational interest, the State would be free to require petition signers to disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships. Requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006); *Brown*, *supra*, at 91; *Buckley*, 424 U. S., at 64; *DeGregory* v. *Attorney General of N. H.*, 383 U. S. 825, 829 (1966); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U. S. 539, 544 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958). Indeed, the State's informational interest paints such a chilling picture of the role of government in our lives that at oral argument the Washington attorney general balked when confronted with the logical implications of accepting such an argument, conceding that the State could not require petition signers to disclose their religion or ethnicity. Tr. of Oral Arg. 37, 56.

Respondents' informational interest is no more legitimate when viewed as a means of providing the public with information needed to locate and contact supporters of a referendum. In the name of pursuing such an interest, the State would be free to require petition signers to disclose any information that would more easily enable members of the voting public to contact them and engage them in discussion, including telephone numbers, e-mail addresses, and Internet aliases. Once again, permitting the government to require speakers to disclose such information runs against the current of our associational privacy cases. But more impor-

tant, when speakers are faced with a reasonable probability of harassment or intimidation, the State no longer has *any* interest in enabling the public to locate and contact supporters of a particular measure—for in that instance, disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights.

In this case, two groups proposed to place on the Internet the names and addresses of all those who signed Referendum 71, and it is alleged that their express aim was to encourage "uncomfortable conversation[s]." 661 F. Supp. 2d, at 1199 (internal quotation marks omitted). If this information is posted on the Internet, then anyone with access to a computer could compile a wealth of information about all of those persons, including in many cases all of the following: the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes (such as size, type of construction, purchase price, and mortgage amount), information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities). The potential that such information could be used for harassment is vast.

2

Respondents also maintain that the State has an interest in preserving the integrity of the referendum process and that public disclosure furthers that interest by helping the State detect fraudulent and mistaken signatures. I agree with the Court that preserving the integrity of the referendum process constitutes a sufficiently important state interest. *Ante*, at 197. But I harbor serious doubts as to whether public disclosure of signatory information serves that interest in a way that always "reflect[s] the seriousness of the

actual burden on First Amendment rights." *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 744 (2008).

First, the realities of Washington law undermine the State's argument that public disclosure is necessary to ensure the integrity of the referendum process. The State of Washington first authorized voter initiatives via constitutional amendment in 1912, and the following year the Washington Legislature passed a statute specifying the particulars of the referendum process. See *State ex rel. Case* v. *Superior Ct. for Thurston Cty.*, 81 Wash. 623, 628, 143 P. 461, 462 (1914). Significantly, Washington's laws pertaining to initiatives and referenda did not then and do not now authorize the public disclosure of signatory information. See Wash. Rev. Code §29A.72.010 *et seq.;* 1913 Wash. Laws pp. 418–437. Instead, the public disclosure requirement stems from the PRA, which was enacted in 1972 and which requires the public disclosure of state documents generally, not referendum documents specifically. See Wash. Rev. Code §42.56.001 *et seq.* Indeed, if anything, Washington's referenda and initiative laws suggest that signatory information should remain confidential: Outside observers are permitted to observe the secretary of state's verification and canvassing process only "so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process," §29A.72.230, and the State is required to destroy all those petitions that fail to qualify for the ballot, §29A.72.200.

Second, the State fails to come to grips with the fact that public disclosure of referendum signatory information is a relatively recent practice in Washington. Prior to the adoption of the PRA in 1972, the Washington attorney general took the view that referendum petitions were not subject to public disclosure. See Op. Wash. Atty. Gen. 55–57 No. 274, pp. 1–2 (May 28, 1956), online at http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=topic&id=10488 (all Internet materials as visited June 17, 2010, and available in Clerk of

Court's case file) (declaring that public disclosure of initiative petitions would be "contrary to public policy" and would run contrary to "a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege"). Indeed, the secretary of state represents on his Web site that even after the PRA was enacted, "various Secretary of State administrations took the position, from 1973 to 1998, that the personal information on petition sheets were NOT subject to disclosure." B. Zylstra, The Disclosure History of Petition Sheets (Sept. 17, 2009), online at http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets. Although the secretary of state apparently changed this policy in the late 1990's, it appears that the secretary did not release *any* initiative petitions until 2006. *Ibid.* And to date, the secretary has released only a handful of petitions. *Ibid.;* App. 26. That history substantially undermines the State's assertion that public disclosure is necessary to ensure the integrity of the referendum process. For nearly a century, Washington's referendum process operated—and apparently operated successfully—without the public disclosure of signatory information. The State has failed to explain how circumstances have changed so dramatically in recent years that public disclosure is now required.

Third, the experiences of other States demonstrate that publicly disclosing the names and identifying information of referendum signatories is not necessary to protect against fraud and mistake. To give but one example, California has had more initiatives on the ballot than any other State save Oregon. See Initiative and Referendum Institute, Initiative Use, p. 1 (Feb. 2009), online at http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%281904=2008%29.pdf. Nonetheless, California law explicitly protects the privacy of initiative and referendum signatories. See Cal. Elec. Code

Ann. § 18650 (West 2003); Cal. Govt. Code Ann. § 6253.5 (West 2008). It is thus entirely possible for a State to keep signatory information private and maintain a referendum and initiative process free from fraud.

Finally, Washington could easily and cheaply employ alternative mechanisms for protecting against fraud and mistake that would be far more protective of circulators' and signers' First Amendment rights. For example, the Washington attorney general represented to us at oral argument that "the Secretary of State's first step after receiving submitted petitions is to take them to his archiving section and to have them digitized." Tr. of Oral Arg. 30. With a digitized list, it should be relatively easy for the secretary to check for duplicate signatures on a referendum petition. And given that the secretary maintains a "centralized, uniform, interactive computerized statewide voter registration list that contains the name and registration information of every registered voter in the state," Wash. Rev. Code Ann. § 29A.08.125(1) (West Supp. 2010), the secretary could use a computer program to cross-check the names and addresses on the petition with the names and addresses on the voter registration rolls, thus ensuring the accuracy and legitimacy of each signature.

Additionally, using the digitized version of the referendum petition, the State could set up a simple system for Washington citizens to check whether their names have been fraudulently signed to a petition. For example, on his Web site, the secretary maintains an interface that allows voters to confirm their voter registration information simply by inputting their name and date of birth. See http://wei.secstate.wa.gov/osos/VoterVault/Pages/MyVote.aspx. Presumably the secretary could set up a similar interface for referendum petitions. Indeed, the process would seem to be all the more simple given that Washington requires a "unique identifier [to] be assigned to each registered voter in the state." § 29A.08.125(4).

* * *

As-applied challenges to disclosure requirements play a critical role in protecting First Amendment freedoms. To give speech the breathing room it needs to flourish, prompt judicial remedies must be available well before the relevant speech occurs and the burden of proof must be low. In this case—both through analogy and through their own experiences—plaintiffs have a strong case that they are entitled to as-applied relief, and they will be able to pursue such relief before the District Court.

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring.

I write separately to emphasize a point implicit in the opinion of the Court and the concurring opinions of JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE BREYER: In assessing the countervailing interests at stake in this case, we must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action. States enjoy "considerable leeway" to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (*e. g.*, the number of signatures required, the time for submission, and the method of verification). *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 191 (1999). As the Court properly recognizes, each of these structural decisions "inevitably affects—at least to some degree—the individual's right" to speak about political issues and "to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983). For instance, requiring petition signers to be registered voters or to use their real names no doubt limits the ability or willingness of some individuals to undertake the expressive act of signing a petition. Regula-

tions of this nature, however, stand "a step removed from the communicative aspect of petitioning," and the ability of States to impose them can scarcely be doubted. *Buckley*, 525 U. S., at 215 (O'Connor, J., concurring in judgment in part and dissenting in part); see also *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345 (1995) (contrasting measures to "control the mechanics of the electoral process" with the "regulation of pure speech"). It is by no means necessary for a State to prove that such "reasonable, nondiscriminatory restrictions" are narrowly tailored to its interests. *Anderson*, 460 U. S., at 788.

The Court today confirms that the State of Washington's decision to make referendum petition signatures available for public inspection falls squarely within the realm of permissible election-related regulations. Cf. *Buckley*, 525 U. S., at 200 (describing a state law requiring petition circulators to submit affidavits containing their names and addresses as "exemplif[ying] the type of regulation" that States may adopt). Public disclosure of the identity of petition signers, which is the rule in the overwhelming majority of States that use initiatives and referenda, advances States' vital interests in "[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788–789 (1978) (internal quotation marks and alteration omitted); see also *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 371 (2010) ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"); Brief for Respondent Washington Families Standing Together 34 (reporting that only one State exempts initiative and referendum petitions from public disclosure). In a society "in which the citizenry is the final judge of the proper conduct of public business," openness in the democratic process is of "critical importance." *Cox Broadcasting*

Corp. v. *Cohn*, 420 U. S. 469, 495 (1975); see also *post*, at 222 (SCALIA, J., concurring in judgment) (noting that "[t]he public nature of federal lawmaking is constitutionally required").

On the other side of the ledger, I view the burden of public disclosure on speech and associational rights as minimal in this context. As this Court has observed with respect to campaign-finance regulations, "disclosure requirements . . . 'do not prevent anyone from speaking.'" *Citizens United*, 558 U. S., at 366. When it comes to initiatives and referenda, the impact of public disclosure on expressive interests is even more attenuated. While campaign-finance disclosure injects the government into what would otherwise have been private political activity, the process of legislating by referendum is inherently public. To qualify a referendum for the ballot, citizens are required to sign a petition and supply identifying information to the State. The act of signing typically occurs in public, and the circulators who collect and submit signatures ordinarily owe signers no guarantee of confidentiality. For persons with the "civic courage" to participate in this process, *post*, at 228 (opinion of SCALIA, J.), the State's decision to make accessible what they voluntarily place in the public sphere should not deter them from engaging in the expressive act of petition signing. Disclosure of the identity of petition signers, moreover, in no way directly impairs the ability of anyone to speak and associate for political ends either publicly or privately.

Given the relative weight of the interests at stake and the traditionally public nature of initiative and referendum processes, the Court rightly rejects petitioners' constitutional challenge to the State of Washington's petition disclosure regulations. These same considerations also mean that any party attempting to challenge particular applications of the State's regulations will bear a heavy burden. Even when a referendum involves a particularly controversial subject and some petition signers fear harassment from nonstate actors, a State's important interests in "protect[ing] the integrity

and reliability of the initiative process" remain undiminished, and the State retains significant discretion in advancing those interests. *Buckley*, 525 U. S., at 191. Likewise, because the expressive interests implicated by the act of petition signing are always modest, I find it difficult to see how any incremental disincentive to sign a petition would tip the constitutional balance. Case-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner that discriminates based on the content of referenda or the viewpoint of petition signers, or in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process. With this understanding, I join the opinion of the Court.

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

This is not a hard case. It is not about a restriction on voting or on speech and does not involve a classic disclosure requirement. Rather, the case concerns a neutral, nondiscriminatory policy of disclosing information already in the State's possession that, it has been alleged, might one day indirectly burden petition signatories. The burden imposed by Washington's application of the Public Records Act (PRA)

to referendum petitions in the vast majority, if not all, its applications is not substantial. And the State has given a more than adequate justification for its choice.

For a number of reasons, the application of the PRA to referendum petitions does not substantially burden any individual's expression. First, it is not "a regulation of pure speech." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345 (1995); cf. *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). It does not prohibit expression, nor does it require that any person signing a petition disclose or say anything at all. See *McIntyre*, 514 U. S. 334. Nor does the State's disclosure alter the content of a speaker's message. See *id.*, at 342–343.

Second, any effect on speech that disclosure might have is minimal. The PRA does not necessarily make it more difficult to circulate or obtain signatures on a petition, see *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 193–196 (1999); *Meyer* v. *Grant*, 486 U. S. 414, 422–423 (1988), or to communicate one's views generally. Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time. If disclosure indirectly burdens a speaker, "the amount of speech covered" is small—only a single, narrow message conveying one fact in one place, *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 165 (2002); cf. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). And while the democratic act of casting a ballot or signing a petition does serve an expressive purpose, the act does not involve any "interactive communication," *Meyer*, 486 U. S., at 422, and is "not principally" a method of "individual expression of political sentiment," *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 373 (1997) (STEVENS, J., dissenting); cf. *O'Brien*, 391 U. S., at 377.[1]

[1] Although a "petition" is a classic means of political expression, the type of petition at issue in this case is not merely a document on which people are expressing their views but rather is a state-created forum with a particular function: sorting those issues that have enough public support to

Weighed against the possible burden on constitutional rights are the State's justifications for its rule. In this case, the State has posited a perfectly adequate justification: an interest in deterring and detecting petition fraud.[2] Given the pedigree of this interest and of similar regulations, the State need not produce concrete evidence that the PRA is the best way to prevent fraud. See *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181, 191–200 (2008) (opinion of STEVENS, J.) (discussing voting fraud); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 391 (2000) ("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"); see also *Timmons*, 520 U. S., at 375 (STEVENS, J., dissenting) (rejecting "imaginative [and] theoretical" justification supported only by "bare assertion").[3] And there is more than enough evidence to support the State's election-

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warrant limited space on a referendum ballot. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 278 (1981) (STEVENS, J., concurring in judgment).

[2] Washington also points out that its disclosure policy informs voters about who supports the particular referendum. In certain election-law contexts, this informational rationale (among others) may provide a basis for regulation; in this case, there is no need to look beyond the State's quite obvious antifraud interest.

[3] There is no reason to think that our ordinary presumption that the political branches are better suited than courts to weigh a policy's benefits and burdens is inapplicable in this case. The degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decision-making. Thus, when a law appears to have been adopted without reasoned consideration, see, *e. g.*, *Salazar* v. *Buono*, 559 U. S. 700, 756–757 (2010) (STEVENS, J., dissenting), for discriminatory purposes, see, *e. g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 517–518, 524–525 (1960), or to entrench political majorities, see, *e. g.*, *Vieth* v. *Jubelirer*, 541 U. S. 267, 317–319, 324–326, 332–333 (2004) (STEVENS, J., dissenting), we are less willing to defer to the institutional strengths of the legislature. That one may call into question the process used to create a law is not a reason to "disregar[d]" "sufficiently strong," "valid[,] neutral justifications" for an otherwise "nondiscriminatory" policy. *Crawford*, 553 U. S., at 204. But it is a reason to examine more carefully the justifications for that measure.

integrity justification. See *ante,* at 197–199 (opinion of the Court).

There remains the issue of petitioners' as-applied challenge. As a matter of law, the Court is correct to keep open the possibility that in particular instances in which a policy such as the PRA burdens expression "by the public enmity attending publicity," *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio),* 459 U. S. 87, 98 (1982), speakers may have a winning constitutional claim. "'[F]rom time to time throughout history,'" persecuted groups have been able "'to criticize oppressive practices and laws either anonymously or not at all.'" *McIntyre,* 514 U. S., at 342.[4]

In my view, this is unlikely to occur in cases involving the PRA. Any burden on speech that petitioners posit is speculative as well as indirect. For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures.[5] Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can

[4] JUSTICE SCALIA conceives of the issue as a right to anonymous speech. See, *e. g., post,* at 220 (opinion concurring in judgment). But our decision in *McIntyre* posited no such freewheeling right. The Constitution protects "freedom of speech." Amdt. 1; see also *McIntyre,* 514 U. S., at 336 ("The question presented is whether [a] . . . statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment"). That freedom can be burdened by a law that exposes the speaker to fines, as much as it can be burdened by a law that exposes a speaker to harassment, changes the content of his speech, or prejudices others against his message. See *id.,* at 342. The right, however, is the right to speak, not the right to speak without being fined or the right to speak anonymously.

[5] A rare case may also arise in which the level of threat to any individual is not quite so high but a State's disclosure would substantially limit a group's ability to "garner the number of signatures necessary to place [a] matter on the ballot," thereby "limiting [its] ability to make the matter the focus of statewide discussion." *Meyer* v. *Grant,* 486 U. S. 414, 423 (1988).

become just as heated as debates about domestic partnerships. And as a general matter, it is very difficult to show that by later disclosing the names of petition signatories, individuals will be less willing to sign petitions. Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech.[6] A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co.* v. *Knott*, 235 U. S. 23, 26 (1914).

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Accordingly, I concur with the opinion of the Court to the extent that it is not inconsistent with my own, and I concur in the judgment.

JUSTICE SCALIA, concurring in the judgment.

Plaintiffs claim the First Amendment, as applied to the States through the Fourteenth Amendment, forbids the State of Washington to release to the public signed referendum petitions, which they submitted to the State in order to suspend operation of a law and put it to a popular vote. I doubt whether signing a petition that has the effect of suspending a law fits within "the freedom of speech" at all. But even if, as the Court concludes, *ante*, at 194–195, it does, a long history of practice shows that the First Amendment does not prohibit public disclosure.

We should not repeat and extend the mistake of *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995). There, with neither textual support nor precedents requiring the result,

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[6] See, *e. g.*, *Bates* v. *Little Rock*, 361 U. S., at 521–522, 523–524; *Buckley* v. *Valeo*, 424 U. S. 1, 69–72 (1976) *(per curiam)*; *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 98–101 (1982); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 197–198 (1999).

the Court invalidated a form of election regulation that had been widely used by the States since the end of the 19th century. *Id.*, at 371 (SCALIA, J., dissenting). The Court held that an Ohio statute prohibiting the distribution of anonymous campaign literature violated the First and Fourteenth Amendments.

Mrs. McIntyre sought a general right to "speak" anonymously about a referendum. Here, plaintiffs go one step further—they seek a general right to participate anonymously in the referendum itself.[1] Referendum petitions are subject to public disclosure under the Public Records Act (PRA), Wash. Rev. Code § 42.56.001 *et seq.* (2008), which requires government agencies to "make available for public inspection and copying all public records," subject to certain exemptions not relevant here. § 42.56.070(1). Plaintiffs agcontend that disclosure of the names, and other personal information included on the petitions, of those who took this legislative action violates their First Amendment right to anonymity.

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[1] Plaintiffs seem to disavow reliance on *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), see Reply Brief for Petitioners 12. Certainly, there are differences between *McIntyre* and this case. Mrs. McIntyre was required to disclose her identity herself, by placing her name on her handbill. Here, plaintiffs do not object to signing their names to the referendum petition, where it can presumably be observed by later signers; they challenge only the later disclosure of that information by the State. But both cases are about public disclosure, and both involve a claim to anonymity under the First Amendment. If anything, the line plaintiffs seek to draw—which seeks a sort of *partial* anonymity—is stranger still.

JUSTICE STEVENS quibbles with the shorthand I use, and tries to rein in *McIntyre*'s holding, by saying that it did not create a "right to speak anonymously," *ante*, at 218, n. 4 (opinion concurring in part and concurring in judgment). But *McIntyre* used the same shorthand. See 514 U. S., at 357 ("[t]he right to remain anonymous"); *id.*, at 342 ("[t]he freedom to publish anonymously"); see also *ibid.* ("an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment").

Today's opinion acknowledges such a right, finding that it can be denied here only because of the State's interest in "preserving the integrity of the electoral process," *ante*, at 197. In my view this is not a matter for judicial interest balancing. Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect. "A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality." *McIntyre, supra*, at 375 (SCALIA, J., dissenting).

I

When a Washington voter signs a referendum petition subject to the PRA, he is acting as a legislator. The Washington Constitution vests "[t]he legislative authority" of the State in the legislature, but "the people reserve to themselves the power . . . to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." Art. 2, § 1. This "referendum" power of popular legislation is exercised by submitting a petition, in accordance with certain specifications, to the Washington secretary of state with valid signatures of registered voters in number equal to or exceeding four percent of the votes cast in the last gubernatorial election. § 1(b); Wash. Rev. Code § 29A.72.100, 130, 140, 150, 160 (2008).

The filing of a referendum petition that satisfies these requirements has two legal effects: (1) It requires the secretary to place the measure referred to the people on the ballot at the next general election; and (2) it suspends operation of the measure, causing it only to have effect 30 days after it is approved during that election. Art. 2, § 1(d). See Brief for Respondent Reed 2–6. A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the

legislature, seeks to affect the legal force of the measure at issue.[2]

Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment.[3] Nor do they identify historical evidence demonstrating that "the freedom of speech" the First Amendment codified encompassed a right to legislate without public disclosure. This should come as no surprise; the exercise of lawmaking power in the United States has traditionally been public.

The public nature of federal lawmaking is constitutionally required. Article I, § 5, cl. 3, requires Congress to legislate in public: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."[4] State constitutions enacted around

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[2] The Court notes that "only *some* petition signing has legal effect." *Ante*, at 197, n. 1. That is true. Some petitions may never be submitted to the secretary; they are irrelevant here, since they will never be subject to the PRA. But some petitions that are submitted to the secretary may lack the requisite number of signatures. Even as to those, the petition signer has exercised *his portion* of the legislative power when he signs the petition, much like a legislator who casts a losing vote.

[3] The Court quotes *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002), which stated that a State, "having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.'" *Ante*, at 195. That is correct, but it is not on point. *White* involved a *prohibition on speaking* as a condition of running for judicial office. I do not suggest that a State could require legislators (or the citizen-legislators who participate in a referendum) to give up First Amendment rights unconnected with their act of legislating. The electioneering disclosure cases the Court cites, *ante*, at 196, are likewise not on point, since they involve disclosure requirements applied to political speech, not legislative action.

[4] The exception for "such Parts as may in their Judgment require Secrecy" was assuredly not designed to permit anonymous voting. It refers to details whose disclosure would threaten an important national inter-

the time of the founding had similar provisions. See, *e. g.*, Ky. Const., Art. I, § 20 (1792); Ga. Const., Art. I, § 15 (1798). The desirability of public accountability was obvious. "[A]s to the votes of representatives and senators in Congress, no man has yet been bold enough to vindicate a secret or ballot vote, as either more safe or more wise, more promotive of independence in the members, or more beneficial to their constituents." 1 J. Story, Commentaries on the Constitution § 841, p. 591 (4th ed. 1873).

Moreover, even when the people *asked* Congress for legislative changes—by exercising their constitutional right "to petition the Government for a redress of grievances," U. S. Const., Amdt. 1—they did so publicly. The petition was read aloud in Congress. Mazzone, Freedom's Associations, 77 Wash. L. Rev. 639, 726 (2002). The petitioner's name (when large groups were not involved), his request, and what action Congress had taken on the petition were consistently recorded in the House and Senate Journals. See, *e. g.*, Journal of the Senate, June 18, 1790, 1st Cong., 1st Sess., 163; Journal of the House of Representatives, Nov. 24, 1820, 16th Cong., 2d Sess., 32. Even when the people exercised legislative power directly, they did so not anonymously, but openly in townhall meetings. See generally J. Zimmerman, The New England Town Meeting (1999).

Petitioning the government and participating in the traditional town meeting were precursors of the modern initiative and referendum. Those innovations were modeled after similar devices used by the Swiss democracy in the 1800's, and were first used in the United States by South Dakota in 1898. See S. Piott, Giving Voters a Voice 1–3, 16 (2003). The most influential advocate of the initiative and referen-

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est. The similar clause in the Articles of Confederation created an exception to the journal requirement for parts of the proceedings "relating to treaties, alliances or military operations, as in [Congress's] judgment require secresy." Art. IX. The Constitution's requirement is broader, but its object is obviously the same.

dum in the United States analogized the Swiss practice to the town meeting, because both "required open conduct of political affairs and free expression of opinions." *Id.*, at 5 (discussing J. W. Sullivan, Direct Legislation by the Citizenship through the Initiative and Referendum (1892)). Plaintiffs' argument implies that the public nature of these practices, so longstanding and unquestioned, violated the freedom of speech. There is no historical support for such a claim.

II

Legislating was not the only governmental act that was public in America. Voting was public until 1888 when the States began to adopt the Australian secret ballot. See *Burson* v. *Freeman*, 504 U. S. 191, 203 (1992) (plurality opinion). We have acknowledged the existence of a First Amendment interest in voting, see, *e. g.*, *Burdick* v. *Takushi*, 504 U. S. 428 (1992), but we have never said that it includes the right to vote anonymously. The history of voting in the United States completely undermines that claim.

Initially, the Colonies mostly continued the English traditions of voting by a show of hands or by voice—*viva voce* voting. *Burson*, *supra*, at 200; E. Evans, A History of the Australian Ballot System in the United States 1–6 (1917) (Evans). One scholar described the *viva voce* system as follows:

> "'The election judges, who were magistrates, sat upon a bench with their clerks before them. Where practicable, it was customary for the candidates to be present in person, and to occupy a seat at the side of the judges. As the voter appeared, his name was called out in a loud voice. The judges inquired, "John Jones (or Smith), for whom do you vote?"—for governor, or whatever was the office to be filled. He replied by proclaiming the name of his favorite. Then the clerks enrolled the vote, and the judges announced it as enrolled. The representa-

> tive of the candidate for whom he voted arose, bowed, and thanked him aloud; and his partisans often applauded.'" *Id.*, at 5 (quoting J. Wise, The End of An Era 55–56 (1899)).

See also R. Dinkin, Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776–1789, p. 101 (1982) (Dinkin).

Although there was variation, the election official would ordinarily compile a poll with the name and residence of each voter, and the name of the candidate for whom he voted. See C. Bishop, History of Elections in the American Colonies 160–164 (1893) (Bishop); P. Argersinger, Structure, Process, and Party: Essays in American Political History 47 (1992) (Argersinger). To prevent fraud, the Colonies in Rhode Island, New York, and New Jersey adopted the English rule that "copies of the poll must be delivered on demand to persons who were willing to pay a reasonable charge for the labor of writing them." Bishop 186. Some Colonies allowed candidates to demand a copy of the poll, *ibid.*, and required the legislature to examine the poll in a contested election, *id.*, at 188–189. Thus, as in this case, the government not only publicly collected identifying information about who voted and for which candidate, it also disclosed that information to the public.

Any suggestion that *viva voce* voting infringed the accepted understanding of the pre-existing freedom of speech to which the First Amendment's text refers is refuted by the fact that several state constitutions that required or authorized *viva voce* voting *also* explicitly guaranteed the freedom of speech. See, *e. g.*, Ky. Const., Art. X, § 7, Art. VI, § 16 (1799); Ill. Const., Art. VIII, § 22, Art. I, § 28 (1818). Surely one constitutional provision did not render the other invalid.

Of course the practice of *viva voce* voting was gradually replaced with the paper ballot, which was thought to reduce fraud and undue influence. See Evans 1–6; Dinkin 101–106. There is no indication that the shift resulted from a sudden

realization that public voting infringed voters' freedom of speech, and the manner in which it occurred suggests the contrary. States adopted the paper ballot at different times, and some States changed methods multiple times. New York's 1777 Constitution, for example, explicitly provided for the State to switch between methods. Art. VI. Kentucky's 1792 Constitution required paper ballots, Art. III, § 2, but its 1799 Constitution required *viva voce* voting, Art. VI, § 16. The different voting methods simply reflected different views about how democracy should function. One scholar described Virginia's and Kentucky's steadfast use of *viva voce* voting through the Civil War as follows: "[I]n the appeal to unflinching manliness at the polls these two states insisted still that every voter should show at the hustings the courage of his personal conviction." Schouler, Evolution of the American Voter, 2 The American Historical Review 665, 671 (1897). See also *id.*, at 666–667 ("In Virginia and the other states in close affiliation with her this oral expression was vaunted as the privilege of the free-born voter, to show the faith that was in him by an outspoken announcement of his candidate").

The new paper ballots did not make voting anonymous. See Evans 10 ("[T]he ballot was not secret"); Argersinger 48 ("Certainly there were no legal provisions to ensure secrecy"). Initially, many States did not regulate the form of the paper ballot. See Evans 10; Argersinger 48–49. Taking advantage of this, political parties began printing ballots with their candidates' names on them. They used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance, making the votes public. See *Burson*, *supra*, at 200–201; Evans 10–11. Abuse of these unofficial paper ballots was rampant. The polling place had become an "open auction place" where votes could be freely bought or coerced. *Burson*, *supra*, at 202. Employers threatened employees. Party workers

kept voters from the other party away from the ballot box. Ballot peddlers paid voters and then watched them place the ballot in the box. See L. Fredman, The Australian Ballot: The Story of an American Reform 22–29 (1968); Argersinger 48–50. Thus, although some state courts said that voting by ballot was meant to be more secret than the public act of *viva voce* voting; and although some state constitutional requirements of ballot voting were held to guarantee ballot secrecy, thus prohibiting the numbering of ballots for voter identification purposes, see *Williams* v. *Stein*, 38 Ind. 89 (1871); *Brisbin* v. *Cleary*, 26 Minn. 107, 1 N. W. 825 (1879); in general, voting by ballot was by no means secret. Most important of all for present purposes, I am aware of no assertion of ballot secrecy that relied on federal or state constitutional guarantees of freedom of speech.

It was precisely discontent over the nonsecret nature of ballot voting, and the abuses that produced, which led to the States' adoption of the Australian secret ballot. New York and Massachusetts began that movement in 1888, and almost 90 percent of the States had followed suit by 1896. *Burson*, 504 U. S., at 203–205. But I am aware of no contention that the Australian system was required by the First Amendment (or the state counterparts). That would have been utterly implausible, since the inhabitants of the Colonies, the States, and the United States had found public voting entirely compatible with "the freedom of speech" for several centuries.

* * *

The long history of public legislating and voting contradicts plaintiffs' claim that disclosure of petition signatures having legislative effect violates the First Amendment. As I said in *McIntyre*, "[w]here the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was

intended to enshrine." 514 U. S., at 378 (dissenting opinion). Just as the century-old practice of States' prohibiting anonymous electioneering was sufficient for me to reject the First Amendment claim to anonymity in *McIntyre*, the many-centuries-old practices of public legislating and voting are sufficient for me to reject plaintiffs' claim.

Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. Of course nothing prevents the people of Washington from keeping petition signatures secret to avoid that—just as nothing prevented the States from moving to the secret ballot. But there is no constitutional basis for this Court to impose that course upon the States—or to insist (as today's opinion does) that it can only be avoided by the demonstration of a "sufficiently important governmental interest," *ante*, at 196 (internal quotation marks omitted). And it may even be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously *(McIntyre)* and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

JUSTICE THOMAS, dissenting.

Just as "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) *(per curiam)*, so too is citizen *participation* in those processes, which necessarily entails political speech and association under the First Amendment. In my view, compelled disclo-

sure of signed referendum and initiative petitions[1] under the Washington Public Records Act (PRA), Wash. Rev. Code § 42.56.001 *et seq.* (2008), severely burdens those rights and chills citizen participation in the referendum process. Given those burdens, I would hold that Washington's decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process. I respectfully dissent.

I

This case concerns the interaction of two distinct sets of Washington statutes. The first set, codified in Washington's Election Code, regulates the referendum and initiative process. These statutes require, among other things, that referendum signers write their names and addresses on petition sheets, and mandate that this information be disclosed to Washington's secretary of state for canvassing and verification. See, *e. g.*, §§ 29A.72.130, 29A.72.230 (2008). Petitioners do not contend that these requirements violate their First Amendment rights; that is, they do not argue that the Constitution allows them to support a referendum measure without disclosing their names *to the State.*

The second set of statutes—the PRA—is not a referendum or election regulation. Rather, the PRA requires disclosure of all nonexempt "public records" upon request by any person. See §§ 42.56.010(2), 42.56.070. Washington has concluded that signed referendum petitions are "public records" subject to disclosure under the PRA, and has "routinely disclosed petitions in response to public records requests." Brief for Respondent Reed 5–6.

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[1] Generally speaking, in a referendum, voters approve or reject an Act already passed by the legislature. In an initiative, voters adopt or reject an entirely new law, either a statute or a constitutional amendment. See T. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 2 (1989).

Petitioners do not challenge the constitutionality of the PRA *generally*. They contend only that Washington violates their First Amendment rights by construing the PRA to apply to signed referendum petitions. See Brief for Petitioners 35–39. As the Court notes, the parties dispute whether this challenge is best conceived as a facial challenge or an as-applied challenge. See *ante*, at 194. In my view, the Court correctly concludes that petitioners must "satisfy our standards for a facial challenge" because their claim, and the relief that they seek, "reach beyond" their "particular circumstances." *Ibid.*

We typically disfavor facial challenges. See *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449 (2008). They "often rest on speculation," can lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and may prevent governmental officers from implementing laws "in a manner consistent with the Constitution." *Id.*, at 450–451. For those reasons, we rejected in *Washington State Grange* political parties' preenforcement facial challenge to a Washington initiative that allowed candidates in a primary election to self-designate their political party preference on the primary election ballot. See *id.*, at 458–459. Because the challenge was a preenforcement one, Washington "had no opportunity to implement" the initiative, *id.*, at 450, so the political parties' arguments that it violated their association rights all depended "on the possibility that voters will be confused as to the meaning of the party-preference designation," *id.*, at 454. Moreover, a facial challenge was inappropriate because the regulation did "not on its face impose a severe burden on political parties' associational rights." *Id.*, at 444.

Those considerations point in the opposite direction here. Washington's construction of the PRA "on its face impose[s] a severe burden," *ibid.*—compelled disclosure of privacy in political association protected by the First Amendment, see

infra this page and 232—on all referendum signers. And Washington has had several "opportunit[ies] to implement" the PRA's disclosure requirements with respect to initiative petitions. *Washington State Grange*, *supra*, at 450. Indeed, Washington admits that "[a]ll petitions for initiatives, referendum, recall, and candidate nomination are public records subject to disclosure." Brief for Respondent Reed 59; see also App. 26 (listing six completed requests for disclosure of signed initiative petitions since 2006). Washington thus has eliminated any "possibility" that referendum petition signers "will be confused as to" how the State will respond to a request under the PRA to disclose their names and addresses. *Washington State Grange*, 552 U. S., at 454.

Accordingly, I would consider petitioners' facial challenge here. For purposes of this case, I will assume that to prevail, petitioners must satisfy our most rigorous standard, and show that there is "'no set of circumstances . . . under which the'" PRA could be constitutionally applied to a referendum or initiative petition, "*i. e.*, that the [PRA] is unconstitutional in all of its applications," *id.*, at 449 (quoting *United States* v. *Salerno*, 481 U. S. 739, 745 (1987)).

II

A

The Court correctly concludes that "an individual expresses" a "political view" by signing a referendum petition. *Ante*, at 194–195. The Court also rightly rejects the baseless argument that such expressive activity falls "outside the scope of the First Amendment" merely because "it has legal effect in the electoral process." *Ante*, at 195. Yet, the Court does not acknowledge the full constitutional implications of these conclusions.

The expressive political activity of signing a referendum petition is a paradigmatic example of "the practice of persons sharing common views banding together to achieve a common end." *Citizens Against Rent Control/Coalition for*

Fair Housing v. *Berkeley*, 454 U. S. 290, 294 (1981). A referendum supported by only one person's signature is a nullity; it will never be placed on the ballot. The Doe petitioners recognized as much when they—and more than 120,000 other Washingtonians, see *ante*, at 192—joined with petitioner Protect Marriage Washington, "a state political action committee" organized under § 42.17.040, to effect Protect Marriage Washington's "major purpose" of collecting enough valid signatures to place Referendum 71 on the general election ballot. App. to Pet. for Cert. 29a. For these reasons, signing a referendum petition amounts to "'political association'" protected by the First Amendment. *Citizens Against Rent Control*, *supra*, at 295 (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 15 (1976) *(per curiam)*).

This Court has long recognized the "vital relationship between" political association "and privacy in one's associations," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958), and held that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs," *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 91 (1982). This constitutional protection "yield[s] only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest." *Id.*, at 91–92 (internal quotation marks, citations, and brackets omitted). Thus, unlike the Court, I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association. *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 206, 212 (1999) *(ACLF)* (THOMAS, J., concurring in judgment). Under that standard, a disclosure requirement passes constitutional muster only if it is narrowly tailored—*i. e.*, the least restrictive means—to serve a compelling state interest. See *id.*, at 206.

B

Washington's application of the PRA to a referendum petition does not survive strict scrutiny.

1

Washington first contends that it has a compelling interest in "transparency and accountability," which it claims encompasses several subordinate interests: preserving the integrity of its election process, preventing corruption, deterring fraud, and correcting mistakes by the secretary of state or by petition signers. See Brief for Respondent Reed 40–42; 57–59.

It is true that a State has a substantial interest in regulating its referendum and initiative processes "to protect the[ir] integrity and reliability." *ACLF*, 525 U. S., at 191. But Washington points to no precedent from this Court recognizing "correcting errors" as a distinct compelling interest that could support disclosure regulations. And our cases strongly suggest that preventing corruption and deterring fraud bear less weight in this particular electoral context: the signature-gathering stage of a referendum or initiative drive. The Court has twice observed that "'the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.'" *Id.*, at 203 (quoting *Meyer* v. *Grant*, 486 U. S. 414, 427 (1988)). Similarly, because "[r]eferenda are held on issues, not candidates for public office," the "risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790 (1978) (citations omitted).

We should not abandon those principles merely because Washington and its *amici* can point to a mere eight instances of initiative-related fraud, see Brief for Respondent Reed 42; Brief for State of Ohio et al. as *Amici Curiae* 22–24, among the 809 initiative measures placed on state ballots in this

country between 1988 and 2008, see Initiative and Referendum Institute, Initiative Use 2 (Feb. 2009), online at http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(1904-2008).pdf (as visited June 21, 2010, and available in Clerk of Court's case file). If anything, these meager figures reinforce the conclusion that the risks of fraud or corruption in the initiative and referendum process are remote and thereby undermine Washington's claim that those two interests should be considered compelling for purposes of strict scrutiny.

Thus, I am not persuaded that Washington's interest in protecting the integrity and reliability of its referendum process, as the State has defined that interest, is compelling. But I need not answer that question here. Even assuming the interest is compelling, on-demand disclosure of a referendum petition to any person under the PRA is "a blunderbuss approach" to furthering that interest, *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 642 (1996) (THOMAS, J., concurring in judgment and dissenting in part) (internal quotation marks omitted), not the least restrictive means of doing so. The events that prompted petitioners' complaint in this case demonstrate as much.

As Washington explained during oral argument, after the secretary of state receives signed referendum petitions, his "first step . . . is to take them to his archiving section and to have them digitized. As soon as they're digitized, they're available on disks for anyone who requests them" under the PRA. Tr. of Oral Arg. 30. In this case, two organizations announced their intention to obtain the digitized names and addresses of referendum signers and post them "online, in a searchable format." *Ante*, at 193.

There is no apparent reason why Washington must broadly disclose referendum signers' names and addresses in this manner to vindicate the interest that it invokes here. Washington—which is in possession of that information because

of referendum regulations that petitioners do not challenge, see *supra*, at 229—could put the names and addresses of referendum signers into a similar electronic database that state employees could search *without* subjecting the name and address of each signer to wholesale public disclosure. The secretary could electronically cross-reference the referendum database against the "statewide voter registration list" contained in Washington's "statewide voter registration database," § 29A.08.651(1),[2] to ensure that each referendum signer meets Washington's residency and voter registration requirements, see § 29A.72.130. Doing so presumably would drastically reduce or eliminate possible errors or mistakes that Washington argues the secretary *might* make, see Brief for Respondent Reed 42, since it would allow the secretary to verify virtually all of the signatures instead of the mere "3 to 5%" he "ordinarily checks," *ante*, at 198 (internal quotation marks omitted).[3]

An electronic referendum database would also enable the secretary to determine whether multiple entries correspond to a single registered voter, thereby detecting whether a voter had signed the petition more than once. In addition, the database would protect victims of "forgery" or " 'bait and switch' fraud." *Ibid.* In Washington, "a unique identifier is assigned to each legally registered voter in the state." § 29A.08.651(4). Washington could create a Web site, linked to the electronic referendum database, where a voter concerned that his name had been fraudulently signed could conduct a search using his unique identifier to ensure that his name was absent from the database—without requiring dis-

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[2] Under Washington law, this "computerized list must serve as the single system for storing and maintaining the official list of registered voters throughout the state" and "must contain the name and registration information of every legally registered voter in the state." Wash. Rev. Code §§ 29A.08.651(2)–(3) (2008).

[3] See § 29A.72.230 (permitting the secretary of state to verify and canvass referendum petitions using approved statistical sampling methods).

closure of the names and addresses of all the voluntary, legitimate signers.

Washington admits that creating this sort of electronic referendum database "could be done." Tr. of Oral Arg. 51. Implementing such a system would not place a heavy burden on Washington; "the Secretary of State's staff" already uses an "electronic voter registration database" in its "verification process." *Id.*, at 50.

Washington nevertheless contends that its citizens must "have access to public records . . . to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot." Brief for Respondent Reed 41. "[W]ithout the access to signed petitions that the PRA provides," Washington argues, its "citizens could not fulfill their role as the final judge of public business." *Ibid.* (internal quotation marks omitted).

But Washington's Election Code already gives Washington voters access to referendum petition data. Under §29A.72.230, "[t]he verification and canvass of signatures on the [referendum] petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon" court order. Each side is entitled to at least two such observers, although the secretary may increase that number if, in his opinion, doing so would not "cause undue delay or disruption of the verification process." *Ibid.*

Washington does not explain why this existing access, which petitioners do not challenge here, is insufficient to permit its citizens to oversee the verification process under §29A.72.230, or to decide intelligently whether to pursue a court challenge under §29A.72.240. Moreover, if Washington had implemented the more narrowly tailored electronic referendum database discussed above, observers could see the secretary of state's employees examine the data using

exactly the same techniques they would use if the data were released to them under the PRA. Obtaining a digitized list to navigate on their own computer would not allow an observer to learn any additional information.

Washington law also contains several other measures that preserve the integrity of the referendum process. First, it is a crime in Washington to forge a signature on a referendum petition, or to knowingly sign one more than once. See § 29A.84.230. Second, referendum supporters must gather a large number of valid signatures—four percent of the votes cast for Governor in the immediately preceding gubernatorial election—to place a referendum petition on the ballot. § 29A.72.150. Third, Washington's required referendum petition form limits each petition to a single subject. See § 29A.72.130. Fourth, a large, plain-English warning must appear at the top of the referendum petition, alerting signers to the law's requirements. See § 29A.72.140. Fifth, Washington prescribes the text of the declaration that a circulator must submit along with the signed petition sheets. See § 29A.72.130. Sixth, Washington prescribes verification and canvassing methods. See § 29A.72.230.

The Court's dismissive treatment of those provisions, see *ante*, at 198, is perplexing, given the analysis that the Court endorsed in *ACLF*. There, the Court held that two disclosure requirements governing Colorado's initiative process were unconstitutional, see 525 U. S., at 186–187, specifically finding that they were "not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify" them, and emphasizing that its "judgment [wa]s informed by other means Colorado employs to accomplish its regulatory purposes," *id.*, at 192. The entire last section of the Court's opinion detailed those "less problematic measures" by which Colorado "can *and d[id]* meet" its "substantial interests in regulating the ballot-initiative process." *Id.*, at 204 (emphasis added). With one exception—a law deeming an initiative void if the circulator violated any

law applicable to the circulation process—those Colorado laws correspond exactly to the Washington regulatory requirements listed above. See *id.*, at 205. Including the observer provision, § 29A.72.230, and the provision permitting court review of the secretary's decision to certify (or not to certify) a referendum petition, § 29A.72.240, Washington thus appears to provide even more of the "less problematic measures" than Colorado did to "protect the integrity of the initiative process," *id.*, at 204, and I see no reason why Washington's identical provisions should not "inform" the analysis here.

It is readily apparent that Washington can vindicate its stated interest in "transparency and accountability" through a number of more narrowly tailored means than wholesale public disclosure. Accordingly, this interest cannot justify applying the PRA to a referendum petition.

2

Washington also contends that it has a compelling interest in "providing relevant information to Washington voters," and that on-demand disclosure to the public is a narrowly tailored means of furthering that interest. Brief for Respondent Reed 44. This argument is easily dispatched, since this Court has already rejected it in a similar context.

In *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), the Court held that an Ohio law prohibiting anonymous political pamphleting violated the First Amendment. One of the interests Ohio had invoked to justify that law was identical to Washington's here: the "interest in providing the electorate with relevant information." *Id.*, at 348. The Court called that interest "plainly insufficient to support the constitutionality of [Ohio's] disclosure requirement." *Id.*, at 349. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.*, at 348. "Don't underestimate the

common man," we advised. *Id.*, at 348, n. 11 (internal quotation marks omitted).

> "People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message. . . . And then, once they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth." *Ibid.* (internal quotation marks omitted).

See also *Bellotti*, 435 U. S., at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source").

This observation applies equally to referendum measures. People are intelligent enough to evaluate the merits of a referendum without knowing who supported it. Thus, just as this informational interest did not justify the Ohio law in *McIntyre*, it does not justify applying the PRA to referendum petitions.

C

The foregoing analysis applies in every case involving disclosure of a referendum measure's supporters, as it must for petitioners' facial challenge to succeed. See *Washington State Grange*, 552 U. S., at 449 (quoting *Salerno*, 481 U. S., at 745). Washington does not argue that the strength of its transparency and accountability interest rises or falls based on the *topic* of a referendum. Nor would such an argument be convincing. We have no basis to assume that Washington's interest in maintaining the integrity of its referendum process is high for a charter-school referendum but low for an unemployment insurance referendum, or that a library or land-use referendum is more likely to be a target of fraud or corruption than a referendum on insurance coverage and benefits. See *ante*, at 200–201. The strength of Washington's interest remains constant across all types of referendum measures.

So too does the strength of a signer's First Amendment interest. The First Amendment rights at issue here are associational rights, and a long, unbroken line of this Court's precedents holds that privacy of association is protected under the First Amendment. See *supra*, at 231–232. The loss of associational privacy that comes with disclosing referendum petitions to the general public under the PRA constitutes the same harm as to each signer of each referendum, regardless of the topic. To be sure, a referendum signer may be more willing to disclose to the general public his political association with persons signing certain referendum measures than his association with others. But that choice belongs to the voter; the State may not make it for him by ascribing a lower level of First Amendment protection to an associational interest that some think a voter may be (or should be) more willing to disclose. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another").

Finally, the less restrictive means available to vindicate Washington's transparency and accountability interest can be employed for all referendum measures, regardless of topic. There is nothing measure-specific about an electronic database or additional observers. And the forgery prohibition and other existing requirements in Washington law that help "protect the integrity of the initiative process," *ACLF*, 525 U. S., at 204, apply equally to all referendum measures.

Because the strength of Washington's interest in transparency and a signer's individual First Amendment interest in privacy of political association remain constant across all referendum topics, and because less restrictive means to protect the integrity of the referendum process are not topic specific, I would hold that on-demand public disclosure of referendum petitions under the PRA is not narrowly tailored for any referendum.

III

Significant practical problems will result from requiring as-applied challenges to protect referendum signers' constitutional rights.

A

The Court's approach will "require substantial litigation over an extended time" before a potential signer of any referendum will learn whether, if he signs a referendum, his associational privacy right will remain intact. *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 326 (2010). And the tenacious litigant's reward for trying to protect his First Amendment rights? An "interpretive process [that] itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Id.*, at 327. The large number of such fine and questionable distinctions in these types of cases reinforces my view that as-applied challenges provide no more than "a hollow assurance" that referendum signers' First Amendment rights will be protected. *Id.*, at 484 (THOMAS, J., concurring in part and dissenting in part). Consider just a few examples.

In Washington, a referendum sponsor must file the proposed referendum with the secretary of state before collecting signatures. See § 29A.72.010. May the sponsor seek an injunction against disclosure through an as-applied challenge before filing the proposed measure, or simultaneously with its filing? Because signature gathering will not have started, the sponsor will not be able to present any evidence specific to signers or potential signers of *that particular referendum* showing "a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Ante*, at 200 (internal quotation marks omitted). Thus, to succeed at that stage of litigation,

plaintiffs must point to (at least) one other instance of harassment arising from a similar referendum. The Court has never held that such evidence would be acceptable; but if it is, that necessarily means that some signers, at some point, will have suffered actual "threats, harassment, and reprisals" for engaging in protected First Amendment activity.

If the sponsor must wait at least until signature gathering has started on *his* referendum to file an as-applied challenge, it is still unclear what sort of evidence of "threats, harassment, or reprisals" directed toward *his* supporters would satisfy the Court's standard. How many instances of "threats, harassment, or reprisals" must a signer endure before a court may grant relief on an as-applied challenge? And how dispersed throughout the group of the necessary 120,000 signers, see *ante*, at 192, must these threats be?

More importantly, the Court's standard does not appear to require *actual* "threats, harassment, or reprisals," but merely a "'*reasonable probability*'" that disclosure of the signers' names and addresses will lead to such activity. *Ante*, at 200 (emphasis added). What sort of evidence suffices to satisfy this apparently more relaxed, though perhaps more elusive, standard? Does one instance of actual harassment directed toward one signer mean that the "reasonable probability" requirement is met? And again, how widespread must this "reasonable probability" be? The Court does not answer any of these questions, leaving a vacuum to be filled on a case-by-case basis. This will, no doubt, result in the "drawing of" arbitrary and "questionable" "fine distinctions" by even the most well-intentioned district or circuit judge. *Citizens United*, 558 U. S., at 327.

B

In addition, as I have previously explained, the state of technology today creates at least *some* probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed.

"'[T]he advent of the Internet' enables" rapid dissemination of "'the information needed' to" threaten or harass every referendum signer. *Id.*, at 484 (opinion of THOMAS, J.). "Thus, 'disclosure permits citizens . . . to react to the speech of [their political opponents] in a proper'—or undeniably *improper*—'way' long before a plaintiff could prevail on an as-applied challenge." *Ibid.*

The Court apparently disagrees, asserting that "there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case." *Ante*, at 201. That conclusion rests on the premise that some referendum measures are so benign that the fact of public disclosure will not chill protected First Amendment activity. I am not convinced that this premise is correct.

The historical evidence shows that the referendum and initiative process first gained popularity as a means of "provid-[ing] an occasional safety valve for interests that failed to get a fair hearing in the legislatures." T. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 59 (1989). Unsurprisingly, such interests tended to be controversial by nature. Early examples include "the single tax, prohibition, women's suffrage, prolabor legislation, and the graduated income tax." *Id.*, at 58. And proponents of initiative measures tended to include politically marginalized groups such as the "Farmer's Alliance" in rural States; "[t]housands of labor federations, notably the miners"; and "the Women's Suffrage Association," which "saw the initiative and referendum as a possible new means to overcome" repeated failed attempts in state legislatures to secure for women the right to vote. *Id.*, at 50–51.

These characteristics of initiative and referendum drives persist today. Consider, for example, the goal of increasing ethics in government—a seemingly laudable and unobjectionable goal. So thought some citizens of Utah, who, frustrated with the state legislature's failure to pass ethics laws

commensurate with their preferences, filed a "21-page initiative target[ing] legislative conduct with a broad array of reforms that would significantly change how business gets done on Utah's Capitol Hill." McKitrick, Suit Demands Secrecy for Ethics Petition Signers, Salt Lake Tribune, Apr. 15, 2010, p. A4 (hereinafter Salt Lake Tribune). But Utah law provides that "[i]nitiative packets," which contain the names and addresses (and, in some cases, birthdates) of petition signers, "are public once they are delivered to the county clerks" for verification and canvassing. Utah Code Ann. §20A–7–206(7) (2009 Lexis Supp. Pamphlet).

The attorneys sponsoring that initiative moved for an injunction to prevent disclosure of the initiative packets under §20A–7–206(7) because, they claimed, "'[t]he [state] Republican Party has said it will target our folks.'" Salt Lake Tribune A4. According to these attorneys, a facially benign initiative may well result in political retribution and retaliation in a State where Republicans currently hold the offices of Governor, Lieutenant Governor, attorney general, state treasurer, state auditor, and a supermajority in both the Utah House of Representatives (71%) and the Utah Senate (72%), see State Yellow Book: Who's Who in the Executive and Legislative Branches of the 50 State Governments 650–651, 1292–1294 (Spring 2010), as well as four of the five seats in the State's delegation to the United States Congress, see GPO, 2009–2010 Official Congressional Directory, 111th Cong., pp. 299, 307 (2009).

The difficulty in predicting which referendum measures will prove controversial—combined with Washington's default position that signed referendum petitions will be disclosed on demand, thereby allowing anyone to place this information on the Internet for broad dissemination—raises the significant probability that today's decision will "inhibit the exercise of legitimate First Amendment activity" with respect to referendum and initiative petitions. *Colorado Republican*, 518 U. S., at 634 (THOMAS, J., concurring in judg-

ment and dissenting in part). "[D]isclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, 558 U. S., at 483 (THOMAS, J., concurring in part and dissenting in part). Our cases have long recognized this reality;[4] as the Court recently reiterated, the First Amendment does not require "case-by-case determinations" if "archetypical" First Amendment rights "would be chilled in the meantime." *Id.*, at 329.

This chill in protected First Amendment activity harms others besides the dissuaded signer. We have already expressed deep skepticism about restrictions that "mak[e] it less likely that" a referendum "will garner the number of signatures necessary to place the matter on the ballot, thus limiting [the] ability to make the matter the focus of statewide discussion." *Meyer*, 486 U. S., at 423. Such restrictions "inevitabl[y] . . . reduc[e] the total quantum of speech on a public issue." *Ibid.* The very public that the PRA is supposed to serve is thus harmed by the way Washington implements that statute here.

* * *

Petitioners do not argue that the Constitution gives supporters of referendum petitions a right to act without *any-*

[4] See, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958) (noting the "hardly . . . novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute" an "effective . . . restraint on freedom of association"); *Bates* v. *Little Rock*, 361 U. S. 516, 523 (1960) ("Freedoms such as" the "freedom of association for the purpose of advancing ideas and airing grievances" are "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference"); see also *id.*, at 528 (Black and Douglas, JJ., concurring) ("First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or *exposure by government*" (emphasis added)).

one knowing their identities. Thus, Washington's requirements that referendum supporters sign their names and addresses to a referendum petition, and that this information be disclosed to the State for canvassing and verification, see Wash. Rev. Code § 29A.72.230, are not at issue. And, petitioners do not contend that Washington's citizens may *never* obtain access to referendum data. Thus, Washington's rules allowing access to at least two representative observers from each side, see *ibid.*, and authorizing courts to review the secretary of state's verification and canvassing decision if those observers are dissatisfied with the secretary's decision, see § 29A.72.240, are also not in question.

The Court is asked to assess the constitutionality of the PRA only with regard to referendum petitions. The question before us is whether *all* signers of *all* referendum petitions must resort to "substantial litigation over an extended time," *Citizens United*, *supra*, at 326, to prevent Washington from trenching on their protected First Amendment rights by subjecting their referendum petition signatures to on-demand public disclosure. In my view, they need not.

Syllabus

MORRISON ET AL. *v.* NATIONAL AUSTRALIA BANK LTD. ET AL.

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

No. 08–1191. Argued March 29, 2010—Decided June 24, 2010

In 1998, respondent National Australia Bank (National), a foreign bank whose "ordinary shares" are not traded on any exchange in this country, purchased respondent HomeSide Lending, a company headquartered in Florida that was in the business of servicing mortgages—seeing to collection of the monthly payments, etc. In 2001, National had to write down the value of HomeSide's assets, causing National's share prices to fall. Petitioners, Australians who purchased National's shares before the writedowns, sued respondents—National, HomeSide, and officers of both companies—in Federal District Court for violation of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b–5. They claimed that HomeSide and its officers had manipulated financial models to make the company's mortgage-servicing rights appear more valuable than they really were; and that National and its chief executive officer were aware of this deception. Respondents moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The District Court granted the former motion, finding no jurisdiction because the domestic acts were, at most, a link in a securities fraud that concluded abroad. The Second Circuit affirmed.

Held:

1. The Second Circuit erred in considering § 10(b)'s extraterritorial reach to raise a question of subject-matter jurisdiction, thus allowing dismissal under Rule 12(b)(1). What conduct § 10(b) reaches is a merits question, while subject-matter jurisdiction "refers to a tribunal's power to hear a case." *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 81 (internal quotation marks omitted). The District Court had jurisdiction under 15 U. S. C. § 78aa to adjudicate the § 10(b) question. However, it is unnecessary to remand in view of that error because the same analysis justifies dismissal under Rule 12(b)(6). Pp. 253–254.

2. Section 10(b) does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. Pp. 255–273.

Syllabus

(a) It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 *(Aramco)*. When a statute gives no clear indication of an extraterritorial application, it has none. Nonetheless, the Second Circuit believed the Exchange Act's silence about § 10(b)'s extraterritorial application permitted the court to "discern" whether Congress would have wanted the statute to apply. This disregard of the presumption against extraterritoriality has occurred over many decades in many courts of appeals and has produced a collection of tests for divining congressional intent that are complex in formulation and unpredictable in application. The results demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. Pp. 255–261.

(b) Because Rule 10b–5 was promulgated under § 10(b), it "does not extend beyond conduct encompassed by § 10(b)'s prohibition." *United States* v. *O'Hagan*, 521 U. S. 642, 651. Thus, if § 10(b) is not extraterritorial, neither is Rule 10b–5. On its face, § 10(b) contains nothing to suggest that it applies abroad. Contrary to the argument of petitioners and the Solicitor General, a general reference to foreign commerce in the definition of "interstate commerce," see 15 U. S. C. § 78c(a)(17), does not defeat the presumption against extraterritoriality, *Aramco*, *supra*, at 251. Nor does a fleeting reference, in § 78b(2)'s description of the Exchange Act's purposes, to the dissemination and quotation abroad of prices of domestically traded securities. Nor does Exchange Act § 30(b), which says that the Act does not apply "to any person insofar as he transacts a business in securities without the jurisdiction of the United States," unless he does so in violation of regulations promulgated by the SEC "to prevent . . . evasion of [the Act]." This would be an odd way of indicating that the Act always has extraterritorial application; the Commission's enabling regulations preventing "evasion" seem directed at actions abroad that might conceal a domestic violation. The argument of petitioners and the Solicitor General also fails to account for § 30(a), which explicitly provides for a specific extraterritorial application. That provision would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative. There being no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, it does not. Pp. 261–265.

Syllabus

(c) The domestic activity in this case—Florida is where HomeSide and its executives engaged in the alleged deceptive conduct and where some misleading public statements were made—does not mean petitioners only seek domestic application of the Act. It is a rare case of prohibited extraterritorial application that lacks *all* contact with United States territory. In *Aramco*, for example, where the plaintiff had been hired in Houston and was an American citizen, see 499 U. S., at 247, this Court concluded that the "focus" of congressional concern in Title VII of the Civil Rights Act of 1964 was neither that territorial event nor that relationship, but domestic employment. Applying that analysis here: The Exchange Act's focus is not on the place where the deception originated, but on purchases and sales of securities in the United States. Section 10(b) applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities. The primacy of the domestic exchange is suggested by the Exchange Act's prologue, see 48 Stat. 881, and by the fact that the Act's registration requirements apply only to securities listed on national securities exchanges, § 78*l*(a). This focus is also strongly confirmed by § 30(a) and (b). Moreover, the Court rejects the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad for the same reason that *Aramco* rejected overseas application of Title VII: The probability of incompatibility with other countries' laws is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures." 499 U. S., at 256. Neither the Government nor petitioners provide any textual support for their proposed alternative test, which would find a violation where the fraud involves significant and material conduct in the United States. Pp. 266–273.

547 F. 3d 167, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 273. STEVENS, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 274. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Thomas A. Dubbs argued the cause for petitioners. With him on the briefs were *James W. Johnson*, *Barry M. Okun*, and *Samuel Issacharoff*.

George T. Conway III argued the cause for respondents. With him on the briefs were *John F. Lynch*, *Carrie M. Reilly*, *Eric Seiler*, and *A. Graham Allen.*

Matthew D. Roberts argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Stewart*, *David M. Becker*, *Mark D. Cahn*, *Jacob H. Stillman*, *Mark Pennington*, and *William K. Shirey.**

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing

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*Briefs of *amici curiae* urging reversal were filed for Alecta pensionsförsäkring, ömsesidigt et al. by *Max W. Berger;* and for Mn Services Vermogensbeheer B. V. et al. by *Eric Alan Isaacson* and *Randi D. Bandman.*

Briefs of *amici curiae* urging affirmance were filed for the Competitive Enterprise Institute by *Sam Kazman;* for the European Aeronautic Defence & Space Co. N. V. et al. by *Ira M. Feinberg* and *John A. Redmon;* for the Government of the Commonwealth of Australia by *Donald I. Baker* and *W. Todd Miller;* for Infineon Technologies AG by *Deanne E. Maynard* and *Brian R. Matsui;* for the Institute of International Bankers et al. by *Paul A. Engelmayer*, *Louis R. Cohen*, and *Ali M. Stoeppelwerth;* for the International Chamber of Commerce et al. by *Andrew J. Pincus* and *Alex C. Lakatos;* for Law Professor Richard W. Painter et al. by *Douglas W. Dunham* and *Ellen P. Quackenbos;* for NYSE Euronext by *Richard A. Martin*, *Patryk J. Chudy*, *Warrington Parker*, and *Holly K. Kulka;* for Professors and Students of the Yale Law School Capital Markets and Financial Instruments Clinic by *Jonathan R. Macey;* for the Republic of France by *Stephen J. Marzen* and *Wendy E. Ackerman;* for the Securities Industry and Financial Markets Association et al. by *Deborah M. Buell*, *Meredith Kotler*, *Lauren L. Peacock*, and *Jorge G. Tenreiro;* for the United Kingdom of Great Britain and Northern Ireland by *John E. Beerbower;* and for the Washington Legal Foundation by *Nicholas I. Porritt*, *Daniel J. Popeo*, and *Cory L. Andrews.*

Briefs of *amici curiae* were filed for the Australian Shareholders' Association et al. by *Allyn Z. Lite* and *Joseph J. DePalma;* and for the Organization for International Investment by *David M. Rice*, *Matthew J. Kemner*, and *Troy M. Yoshino.*

foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.

I

Respondent National Australia Bank Limited (National) was, during the relevant time, the largest bank in Australia. Its Ordinary Shares—what in America would be called "common stock"—are traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States. There are listed on the New York Stock Exchange, however, National's American Depositary Receipts (ADRs), which represent the right to receive a specified number of National's Ordinary Shares. 547 F. 3d 167, 168, and n. 1 (CA2 2008).

The complaint alleges the following facts, which we accept as true. In February 1998, National bought respondent HomeSide Lending, Inc., a mortgage-servicing company headquartered in Florida. HomeSide's business was to receive fees for servicing mortgages (essentially the administrative tasks associated with collecting mortgage payments, see J. Rosenberg, Dictionary of Banking and Financial Services 600 (2d ed. 1985)). The rights to receive those fees, so-called mortgage-servicing rights, can provide a valuable income stream. See 2 The New Palgrave Dictionary of Money and Finance 817 (P. Newman, M. Milgate, & J. Eatwell eds. 1992). How valuable each of the rights is depends, in part, on the likelihood that the mortgage to which it applies will be fully repaid before it is due, terminating the need for servicing. HomeSide calculated the present value of its mortgage-servicing rights by using valuation models designed to take this likelihood into account. It recorded the value of its assets, and the numbers appeared in National's financial statements.

From 1998 until 2001, National's annual reports and other public documents touted the success of HomeSide's business, and respondents Frank Cicutto (National's managing direc-

tor and chief executive officer), Kevin Race (HomeSide's chief operating officer), and Hugh Harris (HomeSide's chief executive officer) did the same in public statements. But on July 5, 2001, National announced that it was writing down the value of HomeSide's assets by $450 million; and then again on September 3, by another $1.75 billion. The prices of both Ordinary Shares and ADRs slumped. After downplaying the July writedown, National explained the September writedown as the result of a failure to anticipate the lowering of prevailing interest rates (lower interest rates lead to more refinancings, *i. e.*, more early repayments of mortgages), other mistaken assumptions in the financial models, and the loss of goodwill. According to the complaint, however, HomeSide, Race, Harris, and another HomeSide senior executive who is also a respondent here had manipulated HomeSide's financial models to make the rates of early repayment unrealistically low in order to cause the mortgage-servicing rights to appear more valuable than they really were. The complaint also alleges that National and Cicutto were aware of this deception by July 2000, but did nothing about it.

As relevant here, petitioners Russell Leslie Owen and Brian and Geraldine Silverlock, all Australians, purchased National's Ordinary Shares in 2000 and 2001, before the writedowns.[1] They sued National, HomeSide, Cicutto, and the three HomeSide executives in the United States District Court for the Southern District of New York for alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act

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[1] Robert Morrison, an American investor in National's ADRs, also brought suit, but his claims were dismissed by the District Court because he failed to allege damages. *In re National Australia Bank Securities Litigation*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, *9 (SDNY, Oct. 25, 2006). Petitioners did not appeal that decision, 547 F. 3d 167, 170, n. 3 (CA2 2008) (case below), and it is not before us. Inexplicably, Morrison continued to be listed as a petitioner in the Court of Appeals and here.

of 1934, 48 Stat. 891, 15 U. S. C. §§ 78j(b) and 78t(a), and Securities and Exchange Commission (SEC) Rule 10b–5, 17 CFR § 240.10b–5 (2009), promulgated pursuant to § 10(b).[2] They sought to represent a class of foreign purchasers of National's Ordinary Shares during a specified period up to the September writedown. 547 F. 3d, at 169.

Respondents moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The District Court granted the motion on the former ground, finding no jurisdiction because the acts in this country were, "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *In re National Australia Bank Securities Litigation*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, *8 (SDNY, Oct. 25, 2006). The Court of Appeals for the Second Circuit affirmed on similar grounds. The acts performed in the United States did not "compris[e] the heart of the alleged fraud." 547 F. 3d, at 175–176. We granted certiorari, 558 U. S. 1047 (2009).

II

Before addressing the question presented, we must correct a threshold error in the Second Circuit's analysis. It considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction, wherefore it affirmed the Dis-

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[2] The relevant text of § 10(b) and SEC Rule 10b–5 are set forth later in this opinion. Section 20(a), 48 Stat. 899, provides:

"Every person who, directly or indirectly, controls any person liable under any provision of [the Exchange Act] or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

Liability under § 20(a) is obviously derivative of liability under some other provision of the Exchange Act; § 10(b) is the only basis petitioners asserted.

trict Court's dismissal under Rule 12(b)(1). See 547 F. 3d, at 177. In this regard it was following Circuit precedent, see *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200, 208, modified on other grounds en banc, 405 F. 2d 215 (1968). The Second Circuit is hardly alone in taking this position, see, *e. g., In re CP Ships Ltd. Securities Litigation*, 578 F. 3d 1306, 1313 (CA11 2009); *Continental Grain (Australia) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F. 2d 409, 421 (CA8 1979).

But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, "refers to a tribunal's '"power to hear a case."'" *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 81 (2009) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006), in turn quoting *United States* v. *Cotton*, 535 U. S. 625, 630 (2002)). It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. See *Bell* v. *Hood*, 327 U. S. 678, 682 (1946). The District Court here had jurisdiction under 15 U. S. C. § 78aa[3] to adjudicate the question whether § 10(b) applies to National's conduct.

In view of this error, which the parties do not dispute, petitioners ask us to remand. We think that unnecessary. Since nothing in the analysis of the courts below turned on the mistake, a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion. As we have done before in situations like this, see, *e. g.*, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359, 381–384 (1959), we proceed to address whether petitioners' allegations state a claim.

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[3] Section 78aa provides:

"The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder."

III

A

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) *(Aramco)* (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate, see *Blackmer* v. *United States*, 284 U. S. 421, 437 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters. *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Aramco*, *supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, see *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 173–174 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.

Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to "discern" whether Congress would have wanted the statute to apply. See 547 F. 3d, at 170 (internal quotation marks omitted). This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various Courts of Appeals in determining the application of the Exchange Act, and § 10(b) in particular, to fraudulent schemes that involve conduct and effects abroad. That has produced

a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.

As of 1967, District Courts at least in the Southern District of New York had consistently concluded that, by reason of the presumption against extraterritoriality, § 10(b) did not apply when the stock transactions underlying the violation occurred abroad. See *Schoenbaum* v. *Firstbrook*, 268 F. Supp. 385, 392 (1967) (citing *Ferraioli* v. *Cantor*, CCH Fed. Sec. L. Rep. ¶ 91615 (SDNY 1965), and *Kook* v. *Crang*, 182 F. Supp. 388, 390 (SDNY 1960)). *Schoenbaum* involved the sale in Canada of the treasury shares of a Canadian corporation whose publicly traded shares (but not, of course, its treasury shares) were listed on both the American Stock Exchange and the Toronto Stock Exchange. Invoking the presumption against extraterritoriality, the court held that § 10(b) was inapplicable (though it incorrectly viewed the defect as jurisdictional). 268 F. Supp., at 391–392, 393–394. The decision in *Schoenbaum* was reversed, however, by a Second Circuit opinion which held that "neither the usual presumption against extraterritorial application of legislation nor the specific language of [§]30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States . . . ." *Schoenbaum*, 405 F. 2d, at 206. It sufficed to apply § 10(b) that, although the transactions in treasury shares took place in Canada, they affected the value of the common shares publicly traded in the United States. See *id.*, at 208–209. Application of § 10(b), the Second Circuit found, was "necessary to protect American investors," *id.*, at 206.

The Second Circuit took another step with *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F. 2d 1326 (1972), which involved an American company that had been fraudulently induced to buy securities in England. There, unlike in *Schoenbaum*, some of the deceptive conduct had occurred

in the United States but the corporation whose securities were traded (abroad) was not listed on any domestic exchange. *Leasco* said that the presumption against extraterritoriality applies only to matters over which the United States would not have prescriptive jurisdiction, 468 F. 2d, at 1334. Congress had prescriptive jurisdiction to regulate the deceptive conduct in this country, the language of the Act could be read to cover that conduct, and the court concluded that "if Congress had thought about the point," it would have wanted § 10(b) to apply. *Id.*, at 1334–1337.

With *Schoenbaum* and *Leasco* on the books, the Second Circuit had excised the presumption against extraterritoriality from the jurisprudence of § 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation. As long as there was prescriptive jurisdiction to regulate, the Second Circuit explained, whether to apply § 10(b) even to "predominantly foreign" transactions became a matter of whether a court thought Congress "wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F. 2d 974, 985 (1975); see also *IIT* v. *Vencap, Ltd.*, 519 F. 2d 1001, 1017–1018 (CA2 1975).

The Second Circuit had thus established that application of § 10(b) could be premised upon either some effect on American securities markets or investors *(Schoenbaum)* or significant conduct in the United States *(Leasco)*. It later formalized these two applications into (1) an "effects test," "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and (2) a "conduct test," "whether the wrongful conduct occurred in the United States." *SEC* v. *Berger*, 322 F. 3d 187, 192–193 (CA2 2003). These became the north star of the Second Circuit's § 10(b) jurisprudence, pointing the way to what Con-

gress would have wished. Indeed, the Second Circuit declined to keep its two tests distinct on the ground that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba Ltd.* v. *Lep Group PLC*, 54 F. 3d 118, 122 (1995). The Second Circuit never put forward a textual or even extratextual basis for these tests. As early as *Bersch*, it confessed that "if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond," 519 F. 2d, at 993.

As they developed, these tests were not easy to administer. The conduct test was held to apply differently depending on whether the harmed investors were Americans or foreigners: When the alleged damages consisted of losses to American investors abroad, it was enough that acts "of material importance" performed in the United States "significantly contributed" to that result; whereas those acts must have "directly caused" the result when losses to foreigners abroad were at issue. See *ibid.* And "merely preparatory activities in the United States" did not suffice "to trigger application of the securities laws for injury to foreigners located abroad." *Id.*, at 992. This required the court to distinguish between mere preparation and using the United States as a "base" for fraudulent activities in other countries. *Vencap*, *supra*, at 1017–1018. But merely satisfying the conduct test was sometimes insufficient without "'some additional factor tipping the scales'" in favor of the application of American law. *Interbrew* v. *Edperbrascan Corp.*, 23 F. Supp. 2d 425, 432 (SDNY 1998) (quoting *Europe & Overseas Commodity Traders, S. A.* v. *Banque Paribas London*, 147 F. 3d 118, 129 (CA2 1998)). District Courts have noted the difficulty of applying such vague formulations. See, *e. g.*, *In re Alstom SA*, 406 F. Supp. 2d 346, 366–385 (SDNY 2005). There is no more damning indictment of the "con-

duct" and "effects" tests than the Second Circuit's own declaration that "the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases." *IIT* v. *Cornfeld*, 619 F. 2d 909, 918 (1980) (internal quotation marks omitted).

Other Circuits embraced the Second Circuit's approach, though not its precise application. Like the Second Circuit, they described their decisions regarding the extraterritorial application of § 10(b) as essentially resolving matters of policy. See, *e. g.*, *SEC* v. *Kasser*, 548 F. 2d 109, 116 (CA3 1977); *Continental Grain*, 592 F. 2d, at 421–422; *Grunenthal GmbH* v. *Hotz*, 712 F. 2d 421, 424–425 (CA9 1983); *Kauthar SDN BHD* v. *Sternberg*, 149 F. 3d 659, 667 (CA7 1998). While applying the same fundamental methodology of balancing interests and arriving at what seemed the best policy, they produced a proliferation of vaguely related variations on the "conduct" and "effects" tests. As described in a leading Seventh Circuit opinion: "Although the circuits . . . seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, agreement appears to end at that point."[4] *Id.*, at 665. See

[4] The principal concurrence (see *post*, p. 274 (STEVENS, J., concurring in judgment) (hereinafter concurrence)) disputes this characterization, launching into a Homeric simile which takes as its point of departure (and mistakes for praise rather than condemnation) then-Justice Rehnquist's statement in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975), that "'[w]hen we deal with private actions under Rule 10b–5, . . . we deal with a judicial oak which has grown from little more than a legislative acorn.'" *Post*, at 276. The concurrence seemingly believes that the Courts of Appeals have carefully trimmed and sculpted this "judicial oak" into a cohesive canopy, under the watchful eye of Judge Henry Friendly, the "master arborist," *ibid.* See *post*, at 274–276. Even if one thinks that the "conduct" and "effects" tests are numbered among Judge Friendly's many fine contributions to the law, his successors, though perhaps under the impression that they nurture the same mighty oak, are in reality tending each its own botanically distinct tree. It is telling that the concurrence never attempts its own synthesis of the various balancing tests the Circuits have adopted.

also *id.*, at 665–667 (describing the approaches of the various Circuits and adopting yet another variation).

At least one Court of Appeals has criticized this line of cases and the interpretive assumption that underlies it. In *Zoelsch* v. *Arthur Andersen & Co.*, 824 F. 2d 27, 32 (1987) (Bork, J.), the District of Columbia Circuit observed that rather than courts' "divining what 'Congress would have wished' if it had addressed the problem[, a] more natural inquiry might be what jurisdiction Congress in fact thought about and conferred." Although tempted to apply the presumption against extraterritoriality and be done with it, see *id.*, at 31–32, that court deferred to the Second Circuit because of its "preeminence in the field of securities law," *id.*, at 32. See also *Robinson* v. *TCI/US West Communications Inc.*, 117 F. 3d 900, 906–907 (CA5 1997) (expressing agreement with *Zoelsch*'s criticism of the emphasis on policy considerations in some of the cases).

Commentators have criticized the unpredictable and inconsistent application of § 10(b) to transnational cases. See, *e. g.*, Choi & Silberman, Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 465, 467–468; Chang, Multinational Enforcement of U. S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction, 9 Ford. J. Corp. & Fin. L. 89, 106–108, 115–116 (2004); Langevoort, *Schoenbaum* Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace, 55 Law & Contemp. Prob. 241, 244–248 (1992). Some have challenged the premise underlying the Courts of Appeals' approach, namely, that Congress did not consider the extraterritorial application of § 10(b) (thereby leaving it open to the courts, supposedly, to determine what Congress would have wanted). See, *e. g.*, Sachs, The International Reach of Rule 10b–5: The Myth of Congressional Silence, 28 Colum. J. Transnat'l L. 677 (1990) (arguing that Congress considered, but rejected, applying the Exchange Act to transactions abroad). Others,

more fundamentally, have noted that using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application. See, *e. g.*, Note, Let There Be Fraud (Abroad): A Proposal for a New U. S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts, 28 Law & Pol'y Int'l Bus. 477, 492–493 (1997).

The criticisms seem to us justified. The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.[5]

B

Rule 10b–5, the regulation under which petitioners have brought suit,[6] was promulgated under § 10(b), and "does not

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[5] The concurrence urges us to cast aside our inhibitions and join in the judicial lawmaking, because "[t]his entire area of law is replete with judge-made rules," *post*, at 276. It is doubtless true that, because the implied private cause of action under § 10(b) and Rule 10b–5 is a thing of our own creation, we have also defined its contours. See, *e. g.*, *Blue Chip Stamps*, *supra*. But when it comes to "the scope of [the] conduct prohibited by [Rule 10b–5 and] § 10(b), the text of the statute controls our decision." *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994). It is only with respect to the additional "elements of the 10b–5 private liability scheme" that we "have had 'to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act.'" *Ibid.* (quoting *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 294 (1993)).

[6] Rule 10b–5 makes it unlawful:

"for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

extend beyond conduct encompassed by § 10(b)'s prohibition." *United States* v. *O'Hagan*, 521 U. S. 642, 651 (1997). Therefore, if § 10(b) is not extraterritorial, neither is Rule 10b–5.

On its face, § 10(b) contains nothing to suggest it applies abroad:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . . .
>
> "[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe . . . ." 15 U. S. C. 78j(b).

Petitioners and the Solicitor General contend, however, that three things indicate that § 10(b) or the Exchange Act in general has at least some extraterritorial application.

First, they point to the definition of "interstate commerce," a term used in § 10(b), which includes "trade, commerce, transportation, or communication . . . between any foreign country and any State." 15 U. S. C. § 78c(a)(17). But "we have repeatedly held that even statutes that contain

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"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (2009).

The Second Circuit considered petitioners' appeal to raise only a claim under Rule 10b–5(b), since it found their claims under subsections (a) and (c) to be forfeited. 547 F. 3d, at 176, n. 7. We do likewise.

broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Aramco*, 499 U. S., at 251; see *id.*, at 251–252 (discussing cases). The general reference to foreign commerce in the definition of "interstate commerce" does not defeat the presumption against extraterritoriality.[7]

Petitioners and the Solicitor General next point out that Congress, in describing the purposes of the Exchange Act, observed that the "prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries." 15 U. S. C. § 78b(2). The antecedent of "such transactions," however, is found in the first sentence of the section, which declares that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest." § 78b. Nothing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets. The fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality.

Finally, there is § 30(b) of the Exchange Act, 15 U. S. C. § 78dd(b), which *does* mention the Act's extraterritorial application: "The provisions of [the Exchange Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the

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[7] This conclusion does not render meaningless the inclusion of "trade, commerce, transportation, or communication . . . between any foreign country and any State" in the definition of "interstate commerce." 15 U. S. C. § 78c(a)(17). For example, an issuer based abroad, whose executives approve the publication in the United States of misleading information affecting the price of the issuer's securities traded on the New York Stock Exchange, probably will make use of some instrumentality of "communication . . . between [a] foreign country and [a] State."

jurisdiction of the United States," unless he does so in violation of regulations promulgated by the Securities and Exchange Commission "to prevent . . . evasion of [the Act]." (The parties have pointed us to no regulation promulgated pursuant to § 30(b).) The Solicitor General argues that "[this] exemption would have no function if the Act did not apply in the first instance to securities transactions that occur abroad." Brief for United States as *Amicus Curiae* 14.

We are not convinced. In the first place, it would be odd for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad. And if the whole Act applied abroad, why would the Commission's enabling regulations be limited to those preventing "evasion" of the Act, rather than all those preventing "violation"? The provision seems to us directed at actions abroad that might conceal a domestic violation, or might cause what would otherwise be a domestic violation to escape on a technicality. At most, the Solicitor General's proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality. See *Aramco*, *supra*, at 253.

The Solicitor General also fails to account for § 30(a), which reads in relevant part as follows:

> "It shall be unlawful for any broker or dealer . . . to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe . . . ." 15 U. S. C. § 78dd(a).

Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect. Its explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative. Even if that were not true, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms. See *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 455–456 (2007). No one claims that § 30(a) applies here.

The concurrence claims we have impermissibly narrowed the inquiry in evaluating whether a statute applies abroad, citing for that point the dissent in *Aramco*, see *post*, at 278–279. But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a "clear statement rule," *post*, at 278, if by that is meant a requirement that a statute say "this law applies abroad." Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give "the most faithful reading" of the text, *post*, at 280, there is no clear indication of extraterritoriality here. The concurrence does not even try to refute that conclusion, but merely puts forward the same (at best) uncertain indications relied upon by petitioners and the Solicitor General. As the opinion *for the Court* in *Aramco* (which we prefer to the dissent) shows, those uncertain indications do not suffice.[8]

In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.

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[8] The concurrence notes that, post-*Aramco*, Congress provided explicitly for extraterritorial application of Title VII, the statute at issue in *Aramco*. *Post*, at 279, n. 6. All this shows is that Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications, which is what the cited amendment did. See Civil Rights Act of 1991, § 109, 105 Stat. 1077.

IV

A

Petitioners argue that the conclusion that § 10(b) does not apply extraterritorially does not resolve this case. They contend that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide's financial models; their complaint also alleged that Race and Hughes made misleading public statements there. This is less an answer to the presumption against extraterritorial application than it is an assertion—a quite valid assertion—that that presumption here (as often) is not self-evidently dispositive, but its application requires further analysis. For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case. The concurrence seems to imagine just such a timid sentinel, see *post,* at 280–281, but our cases are to the contrary. In *Aramco,* for example, the Title VII plaintiff had been hired in Houston, and was an American citizen. See 499 U. S., at 247. The Court concluded, however, that neither that territorial event nor that relationship was the "focus" of congressional concern, *id.*, at 255, but rather domestic employment. See also *Foley Bros.*, 336 U. S., at 283, 285–286.

Applying the same mode of analysis here, we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U. S. C. § 78j(b). See *SEC* v. *Zandford,* 535 U. S.

813, 820 (2002). Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to "regulate," see *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 12 (1971); it is parties or prospective parties to those transactions that the statute seeks to "protec[t]," *id.*, at 10. See also *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 195 (1976). And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.[9]

The primacy of the domestic exchange is suggested by the very prologue of the Exchange Act, which sets forth as its object "[t]o provide for the regulation of securities exchanges . . . operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges . . . ." 48 Stat. 881. We know of no one who thought that the Act was intended to "regulat[e]" *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so. The Act's registration requirements apply only to securities listed on national securities exchanges. 15 U. S. C. § 78*l*(a).

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[9] The concurrence seems to think this test has little to do with our conclusion in Part III, *supra*, that § 10(b) does not apply extraterritorially. See *post*, at 284–285. That is not so. If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation). Thus, although it is true, as we have said, that our threshold conclusion that § 10(b) has no extraterritorial effect does not resolve this case, it is a necessary first step in the analysis.

The concurrence also makes the curious criticism that our evaluation of where a putative violation occurs is based on the text of § 10(b) rather than the doctrine in the Courts of Appeals. *Post*, at 274–275. Although it concedes that our test is textually plausible, *post*, at 274, it does not (and cannot) make the same claim for the Court-of-Appeals doctrine it endorses. That is enough to make our test the better one.

With regard to securities *not* registered on domestic exchanges, the exclusive focus on *domestic* purchases and sales [10] is strongly confirmed by § 30(a) and (b), discussed earlier. The former extends the normal scope of the Exchange Act's prohibitions to acts effecting, in violation of rules prescribed by the Commission, a "transaction" in a United States security "on an exchange not within or subject to the jurisdiction of the United States." § 78dd(a). And the latter specifies that the Act does not apply to "any person insofar as he transacts a business in securities without the jurisdiction of the United States," unless he does so in violation of regulations promulgated by the Commission "to prevent the evasion [of the Act]." § 78dd(b). Under both provisions it is the foreign location of the *transaction* that establishes (or reflects the presumption of) the Act's inapplicability, absent regulations by the Commission.

The same focus on domestic transactions is evident in the Securities Act of 1933, 48 Stat. 74, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 170–171 (1994). That legislation makes it unlawful to sell a security, through a prospectus or otherwise, making use of "any means or instruments of transportation or communication in interstate commerce or of the mails," unless a registration statement is in effect.

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[10] That is in our view the meaning which the presumption against extraterritorial application requires for the words "purchase or sale of . . . any security not so registered" in § 10(b)'s phrase "in connection with the purchase or sale of any security registered on a national securities exchange *or any security not so registered.*" (Emphasis added.) Even without the presumption against extraterritorial application, the only alternative to that reading makes nonsense of the phrase, causing it to cover all purchases and sales of registered securities, and all purchases and sales of nonregistered securities—a thought which, if intended, would surely have been expressed by the simpler phrase "all purchases and sales of securities."

15 U. S. C. § 77e(a)(1). The Commission has interpreted that requirement "not to include . . . sales that occur outside the United States." 17 CFR § 230.901 (2009).

Finally, we reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad for the same reason that *Aramco* rejected overseas application of Title VII to all domestically concluded employment contracts or all employment contracts with American employers: The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures." 499 U. S., at 256. Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters. See, *e. g.*, Brief for United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 16–21. The Commonwealth of Australia, the United Kingdom of Great Britain and Northern Ireland, and the Republic of France have filed *amicus* briefs in this case. So have (separately or jointly) such international and foreign organizations as the International Chamber of Commerce, the Swiss Bankers Association, the Federation of German Industries, the French Business Confederation, the Institute of International Bankers, the European Banking Federation, the Australian Bankers' Association, and the Association Française des Entreprises Privées. They all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted—whether the purchase or sale

is made in the United States, or involves a security listed on a domestic exchange—meets that requirement.

B

The Solicitor General suggests a different test, which petitioners also endorse: "[A] transnational securities fraud violates [§]10(b) when the fraud involves significant conduct in the United States that is material to the fraud's success." Brief for United States as *Amicus Curiae* 16; see Brief for Petitioners 26. Neither the Solicitor General nor petitioners provide any textual support for this test. The Solicitor General sets forth a number of purposes such a test would serve: achieving a high standard of business ethics in the securities industry, ensuring honest securities markets and thereby promoting investor confidence, and preventing the United States from becoming a "Barbary Coast" for malefactors perpetrating frauds in foreign markets. Brief for United States as *Amicus Curiae* 16–17. But it provides no textual support for the last of these purposes, or for the first two as applied to the foreign securities industry and securities markets abroad. It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.

If, moreover, one is to be attracted by the desirable consequences of the "significant and material conduct" test, one should also be repulsed by its adverse consequences. While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets. See Brief for Infineon Technologies AG as *Amicus Curiae* 1–2, 22–25; Brief for European Aeronautic Defence & Space Co. N. V. et al. as *Amici Curiae* 2–4; Brief for Securities Industry and Financial Markets Association et al. as *Amici Curiae*

10–16; Coffee, Securities Policeman to the World? The Cost of Global Class Actions, N. Y. L. J. 5 (2008); S. Grant & D. Zilka, The Current Role of Foreign Investors in Federal Securities Class Actions, PLI Corporate Law and Practice Handbook Series, PLI Order No. 11072, pp. 15–16 (Sept.–Oct. 2007); Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14, 38–41 (2007).

As case support for the "significant and material conduct" test, the Solicitor General relies primarily on *Pasquantino* v. *United States*, 544 U. S. 349 (2005).[11] In that case we concluded that the wire-fraud statute, 18 U. S. C. § 1343 (2000 ed., Supp. II), was violated by defendants who ordered liquor over the phone from a store in Maryland with the intent to smuggle it into Canada and deprive the Canadian Government of revenue. 544 U. S., at 353, 371. Section 1343 prohibits "any scheme or artifice to defraud,"—fraud *simplic-*

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[11] Discussed in Brief for United States as *Amicus Curiae* 22–23. The Solicitor General also cites, without description, a number of antitrust cases to support the proposition that domestic conduct with consequences abroad can be covered even by a statute that does not apply extraterritorially: *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *United States* v. *Pacific & Arctic R. & Nav. Co.*, 228 U. S. 87 (1913). These are no longer of relevance to the point (if they ever were), since *Continental Ore* overruled the holding of *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (1909), that the antitrust laws do not apply extraterritorially. See *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U. S. 400, 407–408 (1990). Moreover, the pre-*Continental Ore* cases all involved conspiracies to restrain trade in the United States, see *Sisal Sales*, *supra*, at 274–276; *Thomsen*, *supra*, at 88; *Pacific & Arctic*, *supra*, at 105–106. And although a final case cited by the Solicitor General, *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287–288 (1952), might be read to permit application of a nonextraterritorial statute whenever conduct in the United States contributes to a violation abroad, we have since read it as interpreting the statute at issue—the Lanham Act—to have extraterritorial effect, *Aramco*, 499 U. S. 244, 252 (1991) (quoting 15 U. S. C. § 1127).

iter, without any requirement that it be "in connection with" any particular transaction or event. The *Pasquantino* Court said that the petitioners' "offense was complete the moment they executed the scheme inside the United States," and that it was "[t]his domestic element of petitioners' conduct [that] the Government is punishing." *Id.*, at 371. Section 10(b), by contrast, punishes not all acts of deception, but only such acts "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of the statute.

The Solicitor General points out that the "significant and material conduct" test is in accord with prevailing notions of international comity. If so, that proves that *if* the United States asserted prescriptive jurisdiction pursuant to the "significant and material conduct" test it would not violate customary international law; but it in no way tends to prove that that is what Congress has done.

Finally, the Solicitor General argues that the Commission has adopted an interpretation similar to the "significant and material conduct" test, and that we should defer to that. In the two adjudications the Solicitor General cites, however, the Commission did not purport to be providing its own interpretation of the statute, but relied on decisions of federal courts—mainly Court of Appeals decisions that in turn relied on the *Schoenbaum* and *Leasco* decisions of the Second Circuit that we discussed earlier. See *In re U. S. Securities Clearing Corp.*, 52 S. E. C. 92, 95, n. 14, 96, n. 16 (1994); *In re Robert F. Lynch*, Exchange Act Release No. 11737, 8 S. E. C. Docket 75, 77, 78, n. 15 (1975). We need "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Aramco*, 499 U. S., at 260 (SCALIA, J., concurring in part and concurring in judgment). Since the Commission's interpretations relied on cases we disapprove, which ignored or dis-

carded the presumption against extraterritoriality, we owe them no deference.

* * *

Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States. Petitioners have therefore failed to state a claim on which relief can be granted. We affirm the dismissal of petitioners' complaint on this ground.

It is so ordered.

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

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

Section 10(b) of the Securities Exchange Act of 1934 applies to fraud "in connection with" two categories of transactions: (1) "the purchase or sale of any security registered on a national securities exchange" or (2) "the purchase or sale of . . . any security not so registered." 15 U. S. C. § 78j(b). In this case, the purchased securities are listed only on a few foreign exchanges, none of which has registered with the Securities and Exchange Commission as a "national securities exchange." See § 78f. The first category therefore does not apply. Further, the relevant purchases of these unregistered securities took place entirely in Australia and involved only Australian investors. And in accordance with the presumption against extraterritoriality, I do not read the second category to include such transactions. Thus, while state law or other federal fraud statutes, see, *e. g.*, 18 U. S. C.

§ 1341 (mail fraud), § 1343 (wire fraud), may apply to the fraudulent activity alleged here to have occurred in the United States, I believe that § 10(b) does not. This case does not require us to consider other circumstances.

To the extent the Court's opinion is consistent with these views, I join it.

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

While I agree that petitioners have failed to state a claim on which relief can be granted, my reasoning differs from the Court's. I would adhere to the general approach that has been the law in the Second Circuit, and most of the rest of the country, for nearly four decades.

I

Today the Court announces a new "transactional test," *ante*, at 269, for defining the reach of § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U. S. C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5(b) (2009): Henceforth, those provisions will extend only to "transactions in securities listed on domestic exchange[s] and domestic transactions in other securities," *ante*, at 267. If one confines one's gaze to the statutory text, the Court's conclusion is a plausible one. But the federal courts have been construing § 10(b) in a different manner for a long time, and the Court's textual analysis is not nearly so compelling, in my view, as to warrant the abandonment of their doctrine.

The text and history of § 10(b) are famously opaque on the question of when, exactly, transnational securities frauds fall within the statute's compass. As those types of frauds became more common in the latter half of the 20th century, the federal courts were increasingly called upon to wrestle with that question. The Court of Appeals for the Second Circuit, located in the Nation's financial center, led the effort. Beginning in earnest with *Schoenbaum* v. *Firstbrook*, 405 F. 2d

200, rev'd on rehearing on other grounds, 405 F. 2d 215 (1968) (en banc), that court strove, over an extended series of cases, to "discern" under what circumstances "Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to [transnational] transactions," 547 F. 3d 167, 170 (2008) (internal quotation marks omitted). Relying on opinions by Judge Henry Friendly,[1] the Second Circuit eventually settled on a conduct-and-effects test. This test asks "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Id.*, at 171. Numerous cases flesh out the proper application of each prong.

The Second Circuit's test became the "north star" of § 10(b) jurisprudence, *ante*, at 257, not just regionally but nationally as well. With minor variations, other courts converged on the same basic approach.[2] See Brief for United States as *Amicus Curiae* 15 ("The courts have uniformly agreed that Section 10(b) can apply to a transnational securities fraud either when fraudulent conduct has effects in the United States or when sufficient conduct relevant to the fraud occurs in the United States"); see also 1 Restatement (Third) of Foreign Relations Law of the United States § 416 (1986) (setting forth conduct-and-effects test). Neither Con-

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[1] See, *e. g.*, *IIT, Int'l Inv. Trust* v. *Cornfeld*, 619 F. 2d 909 (CA2 1980); *IIT* v. *Vencap, Ltd.*, 519 F. 2d 1001 (CA2 1975); *Bersch* v. *Drexel Firestone, Inc.*, 519 F. 2d 974 (CA2 1975); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F. 2d 1326 (CA2 1972).

[2] I acknowledge that the Courts of Appeals have differed in their applications of the conduct-and-effects test, with the consequence that their respective rulings are not perfectly "cohesive." *Ante*, at 259, n. 4. It is nevertheless significant that the other Courts of Appeals, along with the other branches of Government, have "embraced the Second Circuit's approach," *ante*, at 259. If this Court were to do likewise, as I would have us do, the lower courts would of course cohere even more tightly around the Second Circuit's rule.

gress nor the Securities and Exchange Commission acted to change the law. To the contrary, the Commission largely adopted the Second Circuit's position in its own adjudications. See *ante*, at 272.

In light of this history, the Court's critique of the decision below for applying "judge-made rules" is quite misplaced. *Ante*, at 261. This entire area of law is replete with judge-made rules, which give concrete meaning to Congress' general commands.[3] "When we deal with private actions under Rule 10b–5," then-Justice Rehnquist wrote many years ago, "we deal with a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975). The "'Mother Court'" of securities law tended to that oak. *Id.*, at 762 (Blackmun, J., dissenting) (describing the Second Circuit). One of our greatest jurists—the judge who, "without a doubt, did more to shape the law of securities regulation than any [other] in the country"[4]—was its master arborist.

The development of § 10(b) law was hardly an instance of judicial usurpation. Congress invited an expansive role for judicial elaboration when it crafted such an open-ended statute in 1934. And both Congress and the Commission subsequently affirmed that role when they left intact the relevant statutory and regulatory language, respectively, throughout all the years that followed. See Brief for Alecta pensionsförsäkring, ömsesidigt et al. as *Amici Curiae* 31–33; cf. *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*,

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[3] It is true that "when it comes to 'the scope of [the] conduct prohibited by [Rule 10b–5 and] § 10(b), the text of the statute [has] control[led] our decision[s].'" *Ante*, at 261, n. 5 (quoting *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994); some brackets in original). The problem, when it comes to transnational securities frauds, is that the text of the statute does not provide a great deal of control. As with any broadly phrased, longstanding statute, courts have had to fill in the gaps.

[4] Loss, In Memoriam: Henry J. Friendly, 99 Harv. L. Rev. 1722, 1723 (1986).

508 U. S. 286, 294 (1993) (inferring from recent legislation Congress' desire to "acknowledg[e]" the Rule 10b–5 action without "entangling" itself in the precise formulation thereof). Unlike certain other domains of securities law, this is "a case in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability," and much else besides. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 163 (2008).

This Court has not shied away from acknowledging that authority. We have consistently confirmed that, in applying § 10(b) and Rule 10b–5, courts may need "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Blue Chip*, 421 U. S., at 737. And we have unanimously "recogniz[ed] a judicial authority to shape . . . the 10b–5 cause of action," for that is a task "Congress has left to us." *Musick, Peeler*, 508 U. S., at 293, 294; see also *id.*, at 292 (noting with approval that "federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes"). Indeed, we have unanimously endorsed the Second Circuit's basic interpretive approach to § 10(b)—ridiculed by the Court today—of striving to "divin[e] what Congress would have wanted," *ante*, at 261.[5] "Our task," we have said, is "to at-

[5] Even as the Court repeatedly declined to grant certiorari on cases raising the issue, individual Justices went further and endorsed the Second Circuit's basic approach to determining the transnational reach of § 10(b). See, *e. g.*, *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 529–530 (1974) (Douglas, J., joined by Brennan, White, and Marshall, JJ., dissenting) ("It has been recognized that the 1934 Act, including the protections of Rule 10b–5, applies when foreign defendants have defrauded American investors, particularly when . . . they have profited by virtue of proscribed conduct within our boundaries. This is true even when the defendant is organized under the laws of a foreign country, is conducting much of its

tempt to infer how the 1934 Congress would have addressed the issue." *Musick, Peeler*, 508 U. S., at 294.

Thus, while the Court devotes a considerable amount of attention to the development of the case law, *ante*, at 255–260, it draws the wrong conclusions. The Second Circuit refined its test over several decades and dozens of cases, with the tacit approval of Congress and the Commission and with the general assent of its sister Circuits. That history is a reason we should give additional weight to the Second Circuit's "judge-made" doctrine, not a reason to denigrate it. "The longstanding acceptance by the courts, coupled with Congress' failure to reject [its] reasonable interpretation of the wording of § 10(b), . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this Court." *Blue Chip*, 421 U. S., at 733.

II

The Court's other main critique of the Second Circuit's approach—apart from what the Court views as its excessive reliance on functional considerations and reconstructed congressional intent—is that the Second Circuit has "disregard[ed]" the presumption against extraterritoriality. *Ante*, at 255. It is the Court, however, that misapplies the presumption, in two main respects.

First, the Court seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule. We have been here before. In the case on which the Court primarily relies, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244 (1991) *(Aramco)*, Chief Justice Rehnquist's majority opinion included a sentence that appeared to make the same move. See *id.*, at 258 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous

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activity outside the United States, and is therefore governed largely by foreign law" (citing, *inter alia*, *Leasco*, 468 F. 2d, at 1334–1339, and *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200, rev'd on rehearing on other grounds, 405 F. 2d 215 (CA2 1968) (en banc))).

occasions on which it has expressly legislated the extraterritorial application of a statute"). Justice Marshall, in dissent, vigorously objected. See *id.*, at 261 ("[C]ontrary to what one would conclude from the majority's analysis, this canon is *not* a 'clear statement' rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will").

Yet even *Aramco*—surely the most extreme application of the presumption against extraterritoriality in my time on the Court[6]—contained numerous passages suggesting that the presumption may be overcome without a clear directive. See *id.*, at 248–255 (majority opinion) (repeatedly identifying congressional "intent" as the touchstone of the presumption). And our cases both before and after *Aramco* make perfectly clear that the Court continues to give effect to "*all available evidence* about the meaning" of a provision when considering its extraterritorial application, lest we defy Congress' will. *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 177 (1993) (emphasis added).[7] Contrary to JUSTICE SCALIA's

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[6] And also one of the most short lived. See Civil Rights Act of 1991, § 109, 105 Stat. 1077 (repudiating *Aramco*).

[7] See also, *e. g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764 (1993) (declining to apply presumption in assessing question of Sherman Act extraterritoriality); *Smith* v. *United States*, 507 U. S. 197, 201–204 (1993) (opinion for the Court by Rehnquist, C. J.) (considering presumption "[l]astly," to resolve "any lingering doubt," after considering structure, legislative history, and judicial interpretations of Federal Tort Claims Act); cf. *Sale*, 509 U. S., at 188 (stating that presumption "has special force when we are construing treaty and statutory provisions that," unlike § 10(b), "may involve foreign and military affairs for which the President has unique responsibility"); Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85, 110 (1998) (explaining that lower courts "have been unanimous in concluding that the presumption against extraterritoriality is not a clear statement rule"). The Court also relies on *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 455–456 (2007). *Ante*, at 265. Yet *Microsoft*'s articulation of the presumption is a far cry from the Court's rigid theory. "As a principle of general application," *Microsoft* innocuously observed, "we have stated that courts should

personal view of statutory interpretation, that evidence legitimately encompasses more than the enacted text. Hence, while the Court's dictum that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *ante*, at 255, makes for a nice catchphrase, the point is overstated. The presumption against extraterritoriality can be useful as a theory of congressional purpose, a tool for managing international conflict, a background norm, a tiebreaker. It does not relieve courts of their duty to give statutes the most faithful reading possible.

Second, and more fundamentally, the Court errs in suggesting that the presumption against extraterritoriality is fatal to the Second Circuit's test. For even if the presumption really were a clear statement (or "clear indication," *ante*, at 255, 265) rule, it would have only marginal relevance to this case.

It is true, of course, that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 164 (2004), and that, absent contrary evidence, we presume "Congress is primarily concerned with domestic conditions," *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). Accordingly, the presumption against extraterritoriality "provides a sound basis for concluding that Section 10(b) does not apply when a securities fraud with no effects in the United States is hatched and executed entirely outside this country." Brief for United States as *Amicus Curiae* 22. But that is just about all it provides a sound basis for concluding. And the conclusion is not very illuminating, because no party to the litigation disputes it. No one contends that § 10(b) applies to wholly foreign frauds.

'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" 550 U. S., at 455 (quoting *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 164 (2004)).

Rather, the real question in this case is how much, and what kinds of, *domestic* contacts are sufficient to trigger application of § 10(b).[8] In developing its conduct-and-effects test, the Second Circuit endeavored to derive a solution from the Exchange Act's text, structure, history, and purpose. Judge Friendly and his colleagues were well aware that United States courts "cannot and should not expend [their] resources resolving cases that do not affect Americans or involve fraud emanating from America." 547 F. 3d, at 175; see also *id.*, at 171 (overriding concern is "'whether there is sufficient United States involvement'" (quoting *Itoba Ltd.* v. *Lep Group PLC*, 54 F. 3d 118, 122 (CA2 1995))).

The question just stated does not admit of an easy answer. The text of the Exchange Act indicates that § 10(b) extends to at least some activities with an international component, but, again, it is not pellucid as to which ones.[9] The Second

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[8] Cf. Dodge, 16 Berkeley J. Int'l L., at 88, n. 25 (regardless of whether one frames question as "whether the presumption against extraterritoriality should apply [or] whether the regulation is extraterritorial," "one must ultimately grapple with the basic issue of what connection to the United States is sufficient to justify the assumption that Congress would want its laws to be applied").

[9] By its terms, § 10(b) regulates "interstate commerce," 15 U. S. C. § 78j, which the Exchange Act defines to include "trade, commerce, transportation, or communication . . . between any foreign country and any State, or between any State and any place or ship outside thereof." § 78c(a)(17). Other provisions of the Exchange Act make clear that Congress contemplated some amount of transnational application. See, *e. g.*, § 78b(2) (stating, in explaining necessity for regulation, that "[t]he prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold"); § 78dd(b) (exempting from regulation foreign parties "*unless*" they transact business in securities "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter" (emphasis added)); see also *Schoenbaum*, 405 F. 2d, at 206–208 (reviewing statutory text and legislative history). The Court finds these textual references insufficient to overcome the presumption against extraterritoriality, *ante*, at 262–264,

Circuit draws the line as follows: Section 10(b) extends to transnational frauds "only when substantial acts in furtherance of the fraud were committed within the United States," *SEC* v. *Berger*, 322 F. 3d 187, 193 (CA2 2003) (internal quotation marks omitted), or when the fraud was "'intended to produce'" and did produce "'detrimental effects within'" the United States, *Schoenbaum*, 405 F. 2d, at 206.[10]

This approach is consistent with the understanding shared by most scholars that Congress, in passing the Exchange Act, "expected U. S. securities laws to apply to certain international transactions or conduct." Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14, 19 (2007); see also *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F. 2d 1326, 1336 (CA2 1972) (Friendly, J.) (detailing evidence that Congress "meant § 10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized United States markets"). It is also consistent with the traditional understanding, regnant in the 1930's as it is now, that the presumption against extraterritoriality does not apply "when the conduct [at issue] occurs within the United States," and has lesser force when "the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Environmental Defense Fund, Inc.* v. *Massey*, 986 F. 2d 528, 531 (CADC 1993); accord, Restatement (Second) of Foreign Relations Law of the United States § 38 (1964–1965);

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but as explained in the main text, that finding rests upon the Court's misapplication of the presumption.

[10] The Government submits that a "transnational securities fraud violates Section 10(b) if significant conduct material to the fraud's success occurs in the United States." Brief for United States as *Amicus Curiae* 6. I understand the Government's submission to be largely a repackaging of the "conduct" prong of the Second Circuit's test. The Government expresses no view on that test's "effects" prong, as the decision below considered only respondents' conduct. See *id.*, at 15, n. 2; 547 F. 3d 167, 171 (CA2 2008).

cf. *Small* v. *United States*, 544 U. S. 385, 400 (2005) (THOMAS, J., joined by SCALIA and KENNEDY, JJ., dissenting) (presumption against extraterritoriality "lend[s] no support" to a "rule restricting a federal statute from reaching conduct *within U. S. borders*"); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 705 (1962) (presumption against extraterritoriality not controlling "[s]ince the activities of the defendants had an impact within the United States and upon its foreign trade"). And it strikes a reasonable balance between the goals of "preventing the export of fraud from America," protecting shareholders, enhancing investor confidence, and deterring corporate misconduct, on the one hand, and conserving United States resources and limiting conflict with foreign law, on the other.[11] 547 F. 3d, at 175.

Thus, while § 10(b) may not give any "clear indication" on its face as to how it should apply to transnational securities frauds, *ante*, at 255, 265, it does give strong clues that it should cover at least some of them, see n. 9, *supra*. And in my view, the Second Circuit has done the best job of discerning what sorts of transnational frauds Congress meant in 1934—and still means today—to regulate. I do not take issue with the Court for beginning its inquiry with the statutory text, rather than the doctrine in the Courts of Appeals. Cf. *ante*, at 267, n. 9. I take issue with the Court for beginning *and ending* its inquiry with the statutory text, when the text

[11] Given its focus on "domestic conditions," *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949), I expect that virtually all "'foreign-cubed'" actions—actions in which "(1) *foreign* plaintiffs [are] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries," 547 F. 3d, at 172—would fail the Second Circuit's test. As they generally should. Under these circumstances, the odds of the fraud having a substantial connection to the United States are low. In recognition of the Exchange Act's focus on American investors and the novelty of foreign-cubed lawsuits, and in the interest of promoting clarity, it might have been appropriate to incorporate one bright line into the Second Circuit's test, by categorically excluding such lawsuits from § 10(b)'s ambit.

does not speak with geographic precision, and for dismissing the long pedigree of, and the persuasive account of congressional intent embodied in, the Second Circuit's rule.

Repudiating the Second Circuit's approach in its entirety, the Court establishes a novel rule that will foreclose private parties from bringing § 10(b) actions whenever the relevant securities were purchased or sold abroad and are not listed on a domestic exchange.[12] The real motor of the Court's opinion, it seems, is not the presumption against extraterritoriality but rather the Court's belief that transactions on domestic exchanges are "the focus of the Exchange Act" and "the objects of [its] solicitude." *Ante*, at 266, 267. In reality, however, it is the "public interest" and "the interests of investors" that are the objects of the statute's solicitude. *Europe & Overseas Commodity Traders, S. A.* v. *Banque Paribas London*, 147 F. 3d 118, 125 (CA2 1998) (citing H. R. Rep. No. 1838, 73d Cong., 2d Sess., 32–33 (1934)); see also *Basic Inc.* v. *Levinson*, 485 U. S. 224, 230 (1988) ("The 1934 Act was designed to protect investors against manipulation of stock prices" (citing S. Rep. No. 792, 73d Cong., 2d Sess., 1–5 (1934))); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 195 (1976) ("The 1934 Act was intended principally to protect investors . . . "); S. Rep. No. 1455, 73d Cong., 2d Sess., 68 (1934) ("The Securities Exchange Act of 1934 aims to protect the interests of the public against the predatory opera-

[12] The Court's opinion does not, however, foreclose the Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case. The Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, see Brief for United States as *Amicus Curiae* 12–13, but they also pose a lesser threat to international comity, *id.*, at 26–27; cf. *Empagran*, 542 U. S., at 171 (" '[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U. S. Government' " (quoting Griffin, Extraterritoriality in U. S. and EU Antitrust Enforcement, 67 Antitrust L. J. 159, 194 (1999); alteration in original)).

tions of directors, officers, and principal stockholders of corporations . . . "). And while the clarity and simplicity of the Court's test may have some salutary consequences, like all bright-line rules it also has drawbacks.

Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b).

The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision's reach to a degree that would surprise and alarm generations of American investors—and, I am convinced, the Congress that passed the Exchange Act. Indeed, the Court's rule turns § 10(b) jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statute's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.

III

In my judgment, if petitioners' allegations of fraudulent misconduct that took place in Florida are true, then respondents may have violated § 10(b), and could potentially be held accountable in an enforcement proceeding brought by the Commission. But it does not follow that shareholders who have failed to allege that the bulk or the heart of the fraud occurred in the United States, or that the fraud had an ad-

verse impact on American investors or markets, may maintain a private action to recover damages they suffered abroad. Some cases involving foreign securities transactions have extensive links to, and ramifications for, this country; this case has Australia written all over it. Accordingly, for essentially the reasons stated in the Court of Appeals' opinion, I would affirm its judgment.

The Court instead elects to upend a significant area of securities law based on a plausible, but hardly decisive, construction of the statutory text. In so doing, it pays short shrift to the United States' interest in remedying frauds that transpire on American soil or harm American citizens, as well as to the accumulated wisdom and experience of the lower courts. I happen to agree with the result the Court reaches in this case. But "I respectfully dissent," once again, "from the Court's continuing campaign to render the private cause of action under § 10(b) toothless." *Stoneridge*, 552 U. S., at 175 (STEVENS, J., dissenting).

Syllabus

GRANITE ROCK CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.

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

No. 08–1214. Argued January 19, 2010—Decided June 24, 2010

In June 2004, respondent local union (Local), supported by its parent international (IBT), initiated a strike against petitioner Granite Rock, the employer of some of Local's members, following the expiration of the parties' collective-bargaining agreement (CBA) and an impasse in their negotiations. On July 2, the parties agreed to a new CBA containing no-strike and arbitration clauses, but could not reach a separate back-to-work agreement holding local and international union members harmless for any strike-related damages Granite Rock incurred. IBT instructed Local to continue striking until Granite Rock approved such a hold-harmless agreement, but the company refused to do so, informing Local that continued strike activity would violate the new CBA's no-strike clause. IBT and Local responded by announcing a companywide strike involving numerous facilities and workers, including members of other IBT locals.

Granite Rock sued IBT and Local, invoking federal jurisdiction under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), seeking strike-related damages for the unions' alleged breach of contract, and asking for an injunction against the ongoing strike because the hold-harmless dispute was an arbitrable grievance under the new CBA. The unions conceded § 301(a) jurisdiction, but asserted that the new CBA was never validly ratified by a vote of Local's members, and, thus, the CBA's no-strike clause did not provide a basis for Granite Rock to challenge the strike. After Granite Rock amended its complaint to add claims that IBT tortiously interfered with the new CBA, the unions moved to dismiss. The District Court granted IBT's motion to dismiss the tortious interference claims on the ground that § 301(a) supports a federal cause of action only for breach of contract. But the court denied Local's separate motion to send the parties' dispute over the CBA's ratification date to arbitration, ruling that a jury should decide whether ratification occurred on July 2, as Granite Rock contended, or on August 22, as Local alleged. After the jury concluded that the CBA was ratified on July 2, the court ordered arbitration to proceed on Granite Rock's breach-of-contract claims. The Ninth Circuit affirmed the dismissal of the tortious interference claims, but reversed the arbitration order,

holding that the parties' ratification-date dispute was a matter for an arbitrator to resolve under the CBA's arbitration clause. The Court of Appeals reasoned that the clause covered the ratification-date dispute because the clause clearly covered the related strike claims; national policy favoring arbitration required ambiguity about the arbitration clause's scope to be resolved in favor of arbitrability; and, in any event, Granite Rock had implicitly consented to arbitrate the ratification-date dispute by suing under the contract.

Held:

1. The parties' dispute over the CBA's ratification date was a matter for the District Court, not an arbitrator, to resolve. Pp. 296–309.

(a) Whether parties have agreed to arbitrate a particular dispute is typically an "'issue for judicial determination,'" *e. g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83, as is a dispute over an arbitration contract's formation, see, *e. g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944. These principles would neatly dispose of this case if the formation dispute here were typical. But it is not. It is based on when (not whether) the new CBA containing the parties' arbitration clause was ratified and thereby formed. To determine whether the parties' dispute over the CBA's ratification date is arbitrable, it is necessary to apply the rule that a court may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate *that dispute*. See, *e. g.*, *id.*, at 943. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the specific arbitration clause that a party seeks to have the court enforce. See, *e. g.*, *Rent-A-Center, West, Inc.* v. *Jackson*, *ante*, at 68–70. Absent an agreement committing them to an arbitrator, such issues typically concern the scope and enforceability of the parties' arbitration clause. In addition, such issues always include whether the clause was agreed to, and may include when that agreement was formed. Pp. 296–297.

(b) In cases invoking the "federal policy favoring arbitration of labor disputes," *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 377, courts adhere to the same framework, see, *e. g.*, *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, and discharge their duty to satisfy themselves that the parties agreed to arbitrate a particular dispute by (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand and (2) ordering arbitration only where the presumption is not rebutted, see, *e. g.*, *id.*, at 651–652. Local is thus wrong to suggest that the presumption takes courts outside the settled framework for determining arbitrability. This Court has never held that the presumption overrides the principle that a court

may submit to arbitration "only those disputes . . . the parties have agreed to submit," *First Options*, *supra*, at 943, nor that courts may use policy considerations as a substitute for party agreement, see, *e. g.*, *AT&T Technologies*, *supra*, at 648–651. The presumption should be applied only where it reflects, and derives its legitimacy from, a judicial conclusion (absent a provision validly committing the issue to an arbitrator) that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed, is legally enforceable, and is best construed to encompass the dispute. See, *e. g.*, *First Options*, *supra*, at 944–945. This simple framework compels reversal of the Ninth Circuit's judgment because it requires judicial resolution of two related questions central to Local's arbitration demand: when the CBA was formed, and whether its arbitration clause covers the matters Local wishes to arbitrate. Pp. 297–303.

(c) The parties characterize their ratification-date dispute as a formation dispute because a union vote ratifying the CBA's terms was necessary to form the contract. For purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed. That is so where, as here, an agreement's ratification date determines its formation date, and thus determines whether its provisions were enforceable during the period relevant to the parties' dispute. This formation-date question requires judicial resolution here because it relates to Local's arbitration demand in a way that required the District Court to determine the CBA's ratification date in order to decide whether the parties consented to arbitrate the matters the demand covered. The CBA requires arbitration only of disputes that "arise under" the agreement. The parties' ratification-date dispute does not clearly fit that description. But the Ninth Circuit credited Local's argument that the ratification-date dispute should be presumed arbitrable because it relates to a dispute (the no-strike dispute) that *does* clearly "arise under" the CBA. The Ninth Circuit overlooked the fact that this theory of the ratification-date dispute's arbitrability fails if, as Local asserts, the new CBA was not formed until August 22, because in that case there was no CBA for the July no-strike dispute to "arise under." Local attempts to address this flaw in the Circuit's reasoning by arguing that a December 2004 document the parties executed rendered the new CBA effective as of May 1, 2004, the date the prior CBA expired. The Court of Appeals did not rule on this claim, and this Court need not do so either because it was not raised in Local's brief in opposition to the certiorari petition. Pp. 303–306.

(d) Another reason to reverse the Court of Appeals' judgment is that the ratification-date dispute, whether labeled a formation dispute or not, falls outside the arbitration clause's scope on grounds the pre-

sumption favoring arbitration cannot cure. CBA § 20 provides, *inter alia*, that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [Grievance] procedure," which includes arbitration. The parties' ratification-date dispute cannot properly be said to fall within this provision's scope for at least two reasons. First, the question whether the CBA was validly ratified on July 2, 2004—a question concerning the CBA's very existence—cannot fairly be said to "arise under" the CBA. Second, even if the "arising under" language could in isolation be construed to cover this dispute, § 20's remaining provisions all but foreclose such a reading by describing that section's arbitration requirement as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation. The Ninth Circuit's contrary conclusion finds no support in § 20's text. That court's only effort to grapple with that text misses the point by focusing on whether Granite Rock's claim to enforce the CBA's *no-strike* provisions could be characterized as "arising under" the agreement, which is not the dispositive issue here. Pp. 307–308.

(e) Local's remaining argument in support of the Court of Appeals' judgment—that Granite Rock "implicitly" consented to arbitration when it sued to enforce the CBA's no-strike and arbitrable grievance provisions—is similarly unavailing. Although it sought an injunction against the strike so the parties could arbitrate the labor grievance giving rise to it, Granite Rock's decision to sue does not establish an agreement, "implicit" or otherwise, to arbitrate an issue (the CBA's formation date) that the company did not raise and has always rightly characterized as beyond the arbitration clause's scope. Pp. 308–309.

2. The Ninth Circuit did not err in declining to recognize a new federal common-law cause of action under LMRA § 301(a) for IBT's alleged tortious interference with the CBA. Though virtually all other Circuits have rejected such claims, Granite Rock argues that doing so in this case is inconsistent with federal labor law's goal of promoting industrial peace and economic stability through judicial enforcement of CBAs, and with this Court's precedents holding that a federal common law of labor contracts is necessary to further this goal, see, *e. g.*, *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 451. The company says the remedy it seeks is necessary because other potential avenues for deterrence and redress, such as state-law tort claims, unfair labor practices claims before the National Labor Relations Board (NLRB), and federal common-law breach-of-contract claims, are either unavailable or insufficient. But Granite Rock has not yet exhausted all of these avenues for relief, so this case does not provide an opportunity to judge their efficacy. Accordingly, it would be premature to recognize the cause of action Granite Rock seeks, even assuming § 301(a) authorizes

this Court to do so. That is particularly true here because the complained-of course of conduct has already prompted judgments favorable to Granite Rock from the jury below and from the NLRB in separate proceedings concerning the union's attempts to delay the new CBA's ratification. Those proceedings, and others to be conducted on remand, buttress the conclusion that Granite Rock's assumptions about the adequacy of other avenues of relief are questionable, and that the Court of Appeals did not err in declining to recognize the new federal tort Granite Rock requests. Pp. 309–313.

546 F. 3d 1169, reversed in part, affirmed in part, and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, and in which STEVENS and SOTOMAYOR, JJ., joined as to Part III. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 314.

Garry G. Mathiason argued the cause for petitioner. With him on the briefs were *Alan S. Levins*, *Adam J. Peters*, *Rachelle L. Wills*, *Sofija Anderson*, and *Arthur R. Miller*.

Robert Bonsall argued the cause for respondent Teamsters Local 287. With him on the brief were *Duane B. Beeson* and *David Rosenfeld*. *Peter D. Nussbaum* argued the cause for respondent International Brotherhood of Teamsters. With him on the brief were *Stephen P. Berzon* and *Peder J. V. Thoreen*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case involves an employer's claims against a local union and the union's international parent for economic dam-

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*Briefs of *amici curiae* urging reversal were filed for the Center on National Labor Policy, Inc., et al. by *Michael E. Avakian* and *Quentin Riegel;* and for the Chamber of Commerce of the United States of America by *Andrew J. Pincus*, *Evan M. Tager*, *Robin S. Conrad*, *Shane Brennan Kawka*, and *Amar D. Sarwal*.

Lynn K. Rhinehart, *James B. Coppess*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

William Bevan III, *David J. Bird*, and *Michael E. Kennedy* filed a brief for the Associated General Contractors of America, Inc., as *amicus curiae*.

ages arising out of a 2004 strike. The claims turn in part on whether a collective-bargaining agreement (CBA) containing a no-strike provision was validly formed during the strike period. The employer contends that it was, while the unions contend that it was not. Because the CBA contains an arbitration clause, we first address whether the parties' dispute over the CBA's ratification date was a matter for the District Court or an arbitrator to resolve. We conclude that it was a matter for judicial resolution. Next, we address whether the Court of Appeals erred in declining the employer's request to recognize a new federal cause of action under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), for the international union's alleged tortious interference with the CBA. The Court of Appeals did not err in declining this request.

I

Petitioner Granite Rock Company is a concrete and building materials company that has operated in California since 1900. Granite Rock employs approximately 800 employees under different labor contracts with several unions, including respondent International Brotherhood of Teamsters, Local 287 (Local). Granite Rock and Local were parties to a 1999 CBA that expired in April 2004. The parties' attempt to negotiate a new CBA hit an impasse and, on June 9, 2004, Local members initiated a strike in support of their contract demands.[1]

The strike continued until July 2, 2004, when the parties reached agreement on the terms of a new CBA. The CBA

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[1] In deciding the arbitration question in this case we rely upon the terms of the CBA and the facts in the District Court record. In reviewing the judgment affirming dismissal of Granite Rock's tort claims against respondent International Brotherhood of Teamsters (IBT) for failure to state a claim, we rely on the facts alleged in Granite Rock's Third Amended Complaint. See, *e. g.*, *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 250 (1989).

contained a no-strike clause but did not directly address union members' liability for any strike-related damages Granite Rock may have incurred before the new CBA was negotiated but after the prior CBA had expired. At the end of the negotiating session on the new CBA, Local's business representative, George Netto, approached Granite Rock about executing a separate "back-to-work" agreement that would, among other things, hold union members harmless for damages incurred during the June 2004 strike. Netto did not make execution of such an agreement a condition of Local's ratification of the CBA, or of Local's decision to cease picketing. Thus, Local did not have a back-to-work or hold-harmless agreement in place when it voted to ratify the CBA on July 2, 2004.

Respondent IBT, which had advised Local throughout the CBA negotiations and whose leadership and members supported the June strike, opposed Local's decision to return to work without a back-to-work agreement shielding both Local and IBT members from liability for strike-related damages. In an effort to secure such an agreement, IBT instructed Local's members not to honor their agreement to return to work on July 5, and instructed Local's leaders to continue the work stoppage until Granite Rock agreed to hold Local and IBT members free from liability for the June strike. Netto demanded such an agreement on July 6, but Granite Rock refused the request and informed Local that the company would view any continued strike activity as a violation of the new CBA's no-strike clause. IBT and Local responded by announcing a companywide strike that involved numerous facilities and hundreds of workers, including members of IBT locals besides Local 287.

According to Granite Rock, IBT not only instigated this strike; it supported and directed it. IBT provided pay and benefits to union members who refused to return to work, directed Local's negotiations with Granite Rock, supported Local financially during the strike period with a $1.2 million

loan, and represented to Granite Rock that IBT had unilateral authority to end the work stoppage in exchange for a hold-harmless agreement covering IBT members within and outside Local's bargaining unit.

On July 9, 2004, Granite Rock sued IBT and Local in the District Court, seeking an injunction against the ongoing strike and strike-related damages. Granite Rock's complaint, originally and as amended, invoked federal jurisdiction under LMRA § 301(a), alleged that the July 6 strike violated Local's obligations under the CBA's no-strike provision, and asked the District Court to enjoin the strike because the hold-harmless dispute giving rise to the strike was an arbitrable grievance. See *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, 237–238, 253–254 (1970) (holding that federal courts may enjoin a strike where a CBA contemplates arbitration of the dispute that occasions the strike). The unions conceded that LMRA § 301(a) gave the District Court jurisdiction over the suit but opposed Granite Rock's complaint, asserting that the CBA was not validly ratified on July 2 (or at any other time relevant to the July 2004 strike) and, thus, its no-strike clause did not provide a basis for Granite Rock's claims challenging the strike.

The District Court initially denied Granite Rock's request to enforce the CBA's no-strike provision because Granite Rock was unable to produce evidence that the CBA was ratified on July 2. App. 203–213. Shortly after the District Court ruled, however, a Local member testified that Netto had put the new CBA to a ratification vote on July 2, and that the voting Local members unanimously approved the agreement. Based on this statement and supporting testimony from 12 other employees, Granite Rock moved for a new trial on its injunction and damages claims.

On August 22, while that motion was pending, Local conducted a second successful "ratification" vote on the CBA, and on September 13, the day the District Court was scheduled to hear Granite Rock's motion, the unions called off

their strike. Although their return to work mooted Granite Rock's request for an injunction, the District Court proceeded with the hearing and granted Granite Rock a new trial on its damages claims. The parties proceeded with discovery, and Granite Rock amended its complaint, which already alleged federal[2] claims for breach of the CBA against both Local and IBT, to add federal inducement of breach and interference with contract (hereinafter tortious interference) claims against IBT.

IBT and Local both moved to dismiss. Among other things, IBT argued that Granite Rock could not plead a federal tort claim under § 301(a) because that provision supports a federal cause of action only for breach of contract. The District Court agreed and dismissed Granite Rock's tortious interference claims. The District Court did not, however, grant Local's separate motion to send the parties' dispute over the CBA's ratification date to arbitration.[3] The District Court held that whether the CBA was ratified on July 2 or August 22 was an issue for the court to decide, and submitted the question to a jury. The jury reached a unanimous verdict that Local ratified the CBA on July 2, 2004. The District Court entered the verdict and ordered the parties to proceed with arbitration on Granite Rock's breach-of-contract claims for strike-related damages.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. See 546 F. 3d 1169 (2008). The Court of Appeals affirmed the District Court's dismissal of Granite Rock's tortious interference claims against IBT. See *id.*, at 1170–1175. But it disagreed with the District

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[2] This Court has recognized a federal common-law claim for breach of a CBA under LMRA § 301(a). See, *e. g.*, *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 456 (1957).

[3] The CBA's ratification date is important to Granite Rock's underlying suit for strike damages. If the District Court correctly concluded that the CBA was ratified on July 2, Granite Rock could argue on remand that the July work stoppage violated the CBA's no-strike clause.

Court's determination that the date of the CBA's ratification was a matter for judicial resolution. See *id.*, at 1176–1178. The Court of Appeals reasoned that the parties' dispute over this issue was governed by the CBA's arbitration clause because the clause clearly covered the related strike claims, the "national policy favoring arbitration" required that any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability, and, in any event, Granite Rock had "implicitly" consented to arbitrate the ratification-date dispute "by suing under the contract." *Id.*, at 1178 (internal quotation marks omitted). We granted certiorari. 557 U. S. 933 (2009).

II

It is well settled in both commercial and labor cases that whether parties have agreed to "submi[t] a particular dispute to arbitration" is typically an "'issue for judicial determination.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002) (quoting *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986)); see *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 546–547 (1964). It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide. See, *e. g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary . . . principles that govern the formation of contracts"); *AT&T Technologies*, *supra*, at 648–649 (explaining the settled rule in labor cases that "'arbitration is a matter of contract'" and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 444, n. 1 (2006) (distinguishing treatment of the generally nonarbitral question whether an arbitration agreement was "ever concluded" from the question whether a

contract containing an arbitration clause was illegal when formed, which question we held to be arbitrable in certain circumstances).

These principles would neatly dispose of this case if the formation dispute here were typical. But it is not. It is based on when (not whether) the CBA that contains the parties' arbitration clause was ratified and thereby formed.[4] And at the time the District Court considered Local's demand to send this issue to an arbitrator, Granite Rock, the party resisting arbitration, conceded both the formation and the validity of the CBA's arbitration clause.

These unusual facts require us to reemphasize the proper framework for deciding when disputes are arbitrable under our precedents. Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute.* See *First Options*, *supra*, at 943; *AT&T Technologies*, *supra*, at 648–649. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. See, *e. g.*, *Rent-A-Center, West, Inc.* v. *Jackson*, *ante*, at 68–70. Where there is no provision validly committing them to an arbitrator, see *ante*, at 71, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed.

A

The parties agree that it was proper for the District Court to decide whether their ratification dispute was arbitrable.[5]

[4] Although a union ratification vote is not always required for the provisions in a CBA to be considered validly formed, the parties agree that ratification was such a predicate here. See App. 349–351.

[5] Because neither party argues that the arbitrator should decide this question, there is no need to apply the rule requiring "'clear and unmistakable'" evidence of an agreement to arbitrate arbitrability. *First Options*

They disagree about whether the District Court answered the question correctly. Local contends that the District Court erred in holding that the CBA's ratification date was an issue for the court to decide. The Court of Appeals agreed, holding that the District Court's refusal to send that dispute to arbitration violated two principles of arbitrability set forth in our precedents. See 546 F. 3d, at 1177–1178. The first principle is that where, as here, parties concede that they have agreed to arbitrate *some* matters pursuant to an arbitration clause, the "law's permissive policies in respect to arbitration" counsel that "'any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.'" *First Options, supra,* at 945 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985)); see 546 F. 3d, at 1177, n. 4, 1178 (citing this principle and the "national policy favoring arbitration" in concluding that arbitration clauses "are to be construed very broadly" (internal quotation marks omitted)). The second principle the Court of Appeals invoked is that this presumption of arbitrability applies even to disputes about the enforceability of the entire contract containing the arbitration clause, because at least in cases governed by the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq.*,[6] courts must

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of Chicago, Inc. v. *Kaplan,* 514 U. S. 938, 944 (1995) (quoting *AT&T Technologies, Inc.* v. *Communications Workers,* 475 U. S. 643, 649 (1986); alterations omitted).

[6] We, like the Court of Appeals, discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases. See, *e. g., id.,* at 650. Indeed, the rule that arbitration is strictly a matter of consent—and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it—is the cornerstone of the framework the Court announced in the *Steelworkers Trilogy* for deciding arbitrability disputes in LMRA cases. See *Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564, 567–568 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574, 582 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593, 597 (1960).

treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope "'[u]nless the [validity] challenge is to the arbitration clause itself'" or the party "disputes the formation of [the] contract," 546 F. 3d, at 1176 (quoting *Buckeye*, 546 U. S., at 445–446); 546 F. 3d, at 1177, and n. 4 (explaining that it would treat the parties' arbitration clause as enforceable with respect to the ratification-date dispute because no party argued that the "clause is invalid in any way").

Local contends that our precedents, particularly those applying the "'federal policy favoring arbitration of labor disputes,'" permit no other result. Brief for Respondent Local, p. 15 (quoting *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 377 (1974)); see Brief for Respondent Local, at 10–13, 16–25. Local, like the Court of Appeals, overreads our precedents. The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly "a matter of consent," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989), and thus "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration," *First Options*, 514 U. S., at 943 (emphasis added).[7] Applying this principle, our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. *Ibid.* Where a party contests

[7] See also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–220 (1985); *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974); *AT&T Technologies*, *supra*, at 648; *Warrior & Gulf*, *supra*, at 582; *United States* v. *Moorman*, 338 U. S. 457, 462 (1950).

either or both matters, "the court" must resolve the disagreement. *Ibid.*

Local nonetheless interprets some of our opinions to depart from this framework and to require arbitration of certain disputes, particularly labor disputes, based on policy grounds even where evidence of the parties' agreement to arbitrate the dispute in question is lacking. See Brief for Respondent Local, at 16 (citing cases emphasizing the policy favoring arbitration generally and the "impressive policy considerations favoring arbitration" in LMRA cases (internal quotation marks omitted)). That is not a fair reading of the opinions, all of which compelled arbitration of a dispute only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable. See, *e. g.*, *First Options*, *supra*, at 944–945. That *Buckeye* and some of our cases applying a presumption of arbitrability to certain disputes do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was needed.

In *Buckeye*, the formation of the parties' arbitration agreement was not at issue because the parties agreed that they had "concluded" an agreement to arbitrate and memorialized it as an arbitration clause in their loan contract. 546 U. S., at 444, n. 1. The arbitration clause's scope was also not at issue, because the provision expressly applied to "'[a]ny claim, dispute, or controversy . . . arising from or relating to . . . the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement.'" *Id.*, at 442. The parties resisting arbitration (customers who agreed to the broad arbitration clause as a condition of using Buckeye's loan service) claimed only that a usurious interest provision in the loan agreement invalidated the entire contract, including the arbitration clause, and thus precluded the Court from relying on the clause as evidence of the parties' consent to arbitrate

matters within its scope. See *id.*, at 443. In rejecting this argument, we simply applied the requirement in § 2 of the FAA that courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself, see *id.*, at 443–445 (citing 9 U. S. C. § 2; *Southland Corp.* v. *Keating*, 465 U. S. 1, 4–5 (1984); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 402–404 (1967)), or claims that the agreement to arbitrate was "[n]ever concluded," 546 U. S., at 444, n. 1; see also *Rent-A-Center, ante*, at 70–71, and n. 2.

Our cases invoking the federal "policy favoring arbitration" of commercial and labor disputes apply the same framework. They recognize that, except where "the parties clearly and unmistakably provide otherwise," *AT&T Technologies*, 475 U. S., at 649, it is "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning" a particular matter, *id.*, at 651. They then discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted. See *id.*, at 651–652; *Prima Paint Corp.*, *supra*, at 396–398; *Gateway Coal*, *supra*, at 374–377; *Drake Bakeries Inc.* v. *Bakery Workers*, 370 U. S. 254, 256–257 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241–242 (1962); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 576 (1960).[8]

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[8] That our labor arbitration precedents apply this rule is hardly surprising. As noted above, see n. 6, *supra*, the rule is the foundation for the arbitrability framework this Court announced in the *Steelworkers Trilogy*. Local's assertion that *Warrior & Gulf* suggests otherwise is misplaced. Although *Warrior & Gulf* contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbi-

Local is thus wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside our settled framework for deciding arbitrability. The presumption simply assists in resolving arbitrability disputes within that framework. Confining the presumption to this role reflects its foundation in "the federal policy favoring arbitration." As we have explained, this "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt*, 489 U. S., at 478 (internal quotation marks and citation omitted). Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." *First Options*, 514 U. S., at 943; see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); *AT&T Technologies*, 475 U. S.,

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trable whenever they are not expressly excluded from an arbitration clause, 363 U. S., at 578–582, the opinion elsewhere emphasizes that even in LMRA cases, "courts" must construe arbitration clauses because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *id.*, at 582 (applying this rule and finding the dispute at issue arbitrable only after determining that the parties' arbitration clause could be construed under standard principles of contract interpretation to cover it).

Our use of the same rules in FAA cases is also unsurprising. The rules are suggested by the statute itself. Section 2 of the FAA requires courts to enforce valid and enforceable arbitration agreements according to their terms. And § 4 provides in pertinent part that where a party invokes the jurisdiction of a federal court over a matter that the court could adjudicate but for the presence of an arbitration clause, "[t]he court shall hear the parties" and "direc[t] the parties to proceed to arbitration in accordance with the terms of the agreement" except "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue," in which case "the court shall proceed summarily to the trial thereof." 9 U. S. C. § 4.

at 650–651 (applying the same rule to the "presumption of arbitrability for labor disputes"). Nor have we held that courts may use policy considerations as a substitute for party agreement. See, *e. g.*, *id.*, at 648–651; *Volt*, *supra*, at 478. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute. See *First Options*, *supra*, at 944–945 (citing *Mitsubishi*, 473 U. S., at 626); *Howsam*, 537 U. S., at 83–84; *AT&T Technologies*, *supra*, at 650 (citing *Warrior & Gulf*, *supra*, at 582–583); *Drake Bakeries*, *supra*, at 259–260. This simple framework compels reversal of the Court of Appeals' judgment because it requires judicial resolution of two questions central to Local's arbitration demand: when the CBA was formed, and whether its arbitration clause covers the matters Local wishes to arbitrate.

B

We begin by addressing the grounds on which the Court of Appeals reversed the District Court's decision to decide the parties' ratification-date dispute, which the parties characterize as a formation dispute because a union vote ratifying the CBA's terms was necessary to form the contract. See App. 351.[9] For purposes of determining arbitrability,

[9] The parties' dispute about the CBA's ratification date presents a formation question in the sense above, and is therefore not on all fours with, for example, the formation disputes we referenced in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 444, n. 1 (2006), which concerned whether, not when, an agreement to arbitrate was "concluded." That said, the manner in which the CBA's ratification date relates to Local's arbitration demand makes the ratification-date dispute in this case one that requires judicial resolution. See *infra*, at 304–309.

when a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute.[10]

This formation-date question requires judicial resolution here because it relates to Local's arbitration demand in such a way that the District Court was required to decide the CBA's ratification date in order to determine whether the parties consented to arbitrate the matters covered by the demand.[11] The parties agree that the CBA's arbitration clause pertains only to disputes that "arise under" the agreement. Accordingly, to hold the parties' ratification-date dispute arbitrable, the Court of Appeals had to decide whether that dispute could be characterized as "arising under" the CBA. In answering this question in the affirmative, both Local and the Court of Appeals tied the arbitrability of the ratification-date issue—which Local raised as a defense to Granite Rock's strike claims—to the arbitrability of the strike claims themselves. See *id.*, at 347. They did so because the CBA's arbitration clause, which pertains only to disputes "arising under" the CBA and thus presupposes the

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[10] Our conclusions about the significance of the CBA's ratification date to the specific arbitrability question before us do not disturb the general rule that parties may agree to arbitrate past disputes or future disputes based on past events.

[11] In reaching this conclusion we need not, and do not, decide whether every dispute over a CBA's ratification date would require judicial resolution. We recognize that ratification disputes in labor cases may often qualify as "formation disputes" for contract law purposes because contract law defines formation as acceptance of an offer on specified terms, and in many labor cases ratification of a CBA is necessary to satisfy this formation requirement. See App. 349–351. But it is not the mere labeling of a dispute for contract law purposes that determines whether an issue is arbitrable. The test for arbitrability remains whether the parties consented to arbitrate the dispute in question.

CBA's existence, would seem plainly to cover a dispute that "arises under" a specific substantive provision of the CBA, but does not so obviously cover disputes about the CBA's own formation. Accordingly, the Court of Appeals relied upon the ratification dispute's relationship to Granite Rock's claim that Local breached the CBA's no-strike clause (a claim the Court of Appeals viewed as clearly "arising under" the CBA) to conclude that "the arbitration clause is certainly 'susceptible of an interpretation' that covers" Local's formation-date defense. 546 F. 3d, at 1177, n. 4.

The Court of Appeals overlooked the fact that this theory of the ratification dispute's arbitrability fails if the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock's strike claims. The unions began their strike on July 6, 2004, and Granite Rock filed its suit on July 9. If, as Local asserts, the CBA containing the parties' arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to "arise under," and thus no valid basis for the Court of Appeals' conclusion that Granite Rock's July 9 claims arose under the CBA and were thus arbitrable along with, by extension, Local's formation-date defense to those claims.[12] See *ibid.* For the foregoing reasons, resolution of the parties' dispute about whether the CBA was ratified in July or August was central to deciding Local's arbitration demand. Accordingly, the Court of Appeals erred in holding that it was not necessary for the District Court to determine the CBA's ratification date in order to decide whether the parties agreed to arbitrate Granite Rock's no-strike claim or the ratification-date dispute Local raised as a defense to that claim.

Local seeks to address this flaw in the Court of Appeals' decision by arguing that in December 2004 the parties exe-

[12] This analysis pertains only to the Court of Appeals' decision, which did not engage the 11th-hour retroactivity argument Local raised in its merits brief in this Court, and that we address below.

cuted a document that rendered the CBA effective as of May 1, 2004 (the date the prior CBA expired), and that this effective-date language rendered the CBA's arbitration clause (but not its no-strike clause) applicable to the July strike period notwithstanding Local's view that the agreement was ratified in August (which ratification date Local continues to argue controls the period during which the no-strike clause applies). See Brief for Respondent Local, at 26–27; Tr. of Oral Arg. 32, 37–39. The Court of Appeals did not rule on the merits of this claim (*i. e.*, it did not decide whether the CBA's effective-date language indeed renders some or all of the agreement's provisions retroactively applicable to May 2004), and we need not do so either. Even accepting Local's assertion that it raised this retroactivity argument in the District Court, see Brief for Respondent Local, at 26,[13] Local did not raise this argument in the Court of Appeals. Nor, more importantly, did Local's brief in opposition to Granite Rock's petition for certiorari raise the argument as an alternative ground on which this Court could or should affirm the Court of Appeals' judgment finding the ratification-date dispute arbitrable for the reasons discussed above. Accordingly, the argument is properly "deemed waived." This Court's Rule 15.2; *Carcieri* v. *Salazar*, 555 U. S. 379, 396 (2009).[14]

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[13] This claim is questionable because Local's February 2005 references to the agreement "now in effect" are not obviously equivalent to the express retroactivity argument Local asserts in its merits brief in this Court. See Brief for Respondent Local, at 26–27.

[14] JUSTICE SOTOMAYOR's conclusion that we should nonetheless excuse Local's waiver and consider the retroactivity argument, see *post*, at 318–319 (opinion concurring in part and dissenting in part), is flawed. This Court's Rule 15.2 reflects the fact that our adversarial system assigns both sides responsibility for framing the issues in a case. The importance of enforcing the Rule is evident in cases where, as here, excusing a party's noncompliance with it would require this Court to decide, in the first instance, a question whose resolution could affect this and other cases in a manner that the district court and court of appeals did not have an oppor-

C

Although the foregoing is sufficient to reverse the Court of Appeals' judgment, there is an additional reason to do so: The dispute here, whether labeled a formation dispute or not, falls outside the scope of the parties' arbitration clause on grounds the presumption favoring arbitration cannot cure. Section 20 of the CBA provides in relevant part that "[a]ll disputes *arising under this agreement* shall be resolved in accordance with the [Grievance] procedure," which includes arbitration. App. 434 (emphasis added); see also *id.*, at 434–437. The parties' ratification-date dispute cannot properly be characterized as falling within the (relatively narrow, cf., *e. g.*, *Drake Bakeries Inc.*, 370 U. S., at 256–257) scope of this provision for at least two reasons. First, we do not think the question whether the CBA was validly ratified on July 2, 2004—a question that concerns the CBA's very existence—can fairly be said to "arise under" the CBA. Second, even if the "arising under" language could in isolation be construed to cover this dispute, § 20's remaining provisions all but foreclose such a reading by describing that section's arbitration requirement as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation. See App. 434–437 (requiring arbitration of disputes "arising under" the CBA, but only after the union and employer have exhausted mandatory mediation, and limiting any arbitration decision under this provision to those "within the scope and terms of this agreement and . . . specifically limited to the matter submitted").

The Court of Appeals' contrary conclusion does not find support in the text of § 20. The Court of Appeals' only effort to grapple with that text misses the point because it focuses on whether Granite Rock's claim to enforce the

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tunity to consider, and that the parties' arguments before this Court may not fully address.

CBA's *no-strike* provisions could be characterized as "arising under" the agreement. See 546 F. 3d, at 1177, n. 4. Even assuming *that* claim can be characterized as "arising under" the CBA, it is not the issue here. The issue is whether the formation-date defense that Local raised in response to Granite Rock's no-strike suit can be characterized as "arising under" the CBA. It cannot for the reasons we have explained, namely, the CBA provision requiring arbitration of disputes "arising under" the CBA is not fairly read to include a dispute about when the CBA came into existence. The Court of Appeals erred in failing to address this question and holding instead that the arbitration clause is "susceptible of an interpretation" that covers Local's formation-date defense to Granite Rock's suit "[b]ecause Granite Rock is suing 'under' the alleged new CBA" and "[a]rbitration clauses are to be construed very broadly." *Ibid.;* see also *id.*, at 1178.

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Local's remaining argument in support of the Court of Appeals' judgment is similarly unavailing. Local reiterates the Court of Appeals' conclusion that Granite Rock "implicitly" consented to arbitration when it sued to enforce the CBA's no-strike and arbitrable grievance provisions. See Brief for Respondent Local, at 17–18. We do not agree that by seeking an injunction against the strike so the parties could arbitrate the labor grievance that gave rise to it, Granite Rock also consented to arbitrate the ratification- (formation-) date dispute we address above. See 564 F. 3d, at 1178. It is of course true that when Granite Rock sought that injunction it viewed the CBA (and all of its provisions) as enforceable. But Granite Rock's decision to sue for compliance with the CBA's grievance procedures on strike-related matters does not establish an agreement, "implicit" or otherwise, to arbitrate an issue (the CBA's formation date) that Granite Rock did not raise, and that Granite Rock has always (and rightly, see Part II–C, *supra*) characterized as beyond the scope of

the CBA's arbitration clause. The mere fact that Local raised the formation-date dispute as a defense to Granite Rock's suit does not make that dispute attributable to Granite Rock in the waiver or estoppel sense the Court of Appeals suggested, see 546 F. 3d, at 1178, much less establish that Granite Rock agreed to arbitrate it by suing to enforce the CBA as to other matters. Accordingly, we hold that the parties' dispute over the CBA's formation date was for the District Court, not an arbitrator, to resolve, and remand for proceedings consistent with that conclusion.

III

We turn now to the claims available on remand. The parties agree that Granite Rock can bring a breach-of-contract claim under LMRA § 301(a) against Local as a CBA signatory, and against IBT as Local's agent or alter ego. See Brief for Respondent IBT 10–13; Reply Brief for Petitioner 12–13, and n. 11.[15] The question is whether Granite Rock may also bring a federal tort claim under § 301(a) for IBT's alleged interference with the CBA.[16] Brief for Peti-

[15] Although the parties concede the general availability of such a claim against IBT, they dispute whether Granite Rock abandoned its agency or alter ego allegations in the course of this litigation. Compare Brief for Respondent IBT 10 with Reply Brief for Petitioner 12–13, n. 11. Granite Rock concedes that it has abandoned its claim that IBT acted as Local's undisclosed principal in orchestrating the ratification response to the July 2, 2004, CBA. See Plaintiff Granite Rock's Memorandum of Points and Authorities in Opposition to Defendant IBT's Motion To Dismiss in No. 5:04–cv–02767–JW (ND Cal., Aug. 7, 2006), Doc. 178, pp. 6, 8 (hereinafter Points and Authorities). But Granite Rock insists that it preserved its argument that Local served as IBT's agent or alter ego when Local denied ratification and engaged in unauthorized strike activity in July 2004. Nothing in the record before us unequivocally refutes this assertion. See App. 306, 311–315, 318; Points and Authorities 6, n. 3. Accordingly, nothing in this opinion forecloses the parties from litigating these claims on remand.

[16] IBT argues that we should dismiss this question as improvidently granted because Granite Rock abandoned its tortious interference claim when it declared its intention to seek only contractual (as opposed to puni-

tioner 32. The Court of Appeals joined virtually all other Circuits in holding that it would not recognize such a claim under § 301(a).

Granite Rock asks us to reject this position as inconsistent with federal labor law's goal of promoting industrial peace and economic stability through judicial enforcement of CBAs, as well as with our precedents holding that a federal common law of labor contracts is necessary to further this goal. See *id.*, at 31; see also, *e. g.*, *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 451 (1957). Explaining that IBT's conduct in this case undermines the very core of the bargaining relationship federal labor laws exist to protect, Granite Rock argues that a federal common-law tort remedy for IBT's conduct is necessary because other potential avenues for deterring and redressing such conduct are either unavailable or insufficient. See Brief for Petitioner 32–33; Reply Brief for Petitioner 19–20. On the unavailable side of the ledger Granite Rock lists state-law tort claims, some of which this Court has held § 301(a) pre-empts, as well as administrative (unfair labor practices) claims, which Granite Rock says the National Labor Relations Board (NLRB) cannot entertain against international unions that (like IBT) are not part of the certified local bargaining unit they allegedly control. On the insufficient side of the ledger Granite Rock lists federal common-law breach-of-contract claims, which Granite Rock says are difficult to prove against non-CBA signatories like IBT because international unions structure their relationships with local unions in a way that makes agency or alter ego difficult to establish. Based on these assessments, Granite Rock suggests that this case presents us with the

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tive) damages on the claim. See Brief for Respondent IBT 16. We reject this argument, which confuses Granite Rock's decision to forgo the pursuit of punitive damages on its claim with a decision to abandon the claim itself. The two are not synonymous, and IBT cites no authority for the proposition that Granite Rock must allege more than economic damages to state a claim on which relief could be granted.

choice of either recognizing the federal common-law tort claim Granite Rock seeks or sanctioning conduct inconsistent with federal labor statutes and our own precedents. See Brief for Petitioner 13–14.

We do not believe the choice is as stark as Granite Rock implies. It is of course true that we have construed "[s]ection 301 [to] authoriz[e] federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470 (1960) (citing *Lincoln Mills*, *supra*). But we have also emphasized that in developing this common law we "did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *Howard Johnson Co.* v. *Hotel Employees*, 417 U. S. 249, 255 (1974). The balance federal statutes strike between employer and union relations in the collective-bargaining arena is carefully calibrated, see, *e. g.*, *NLRB* v. *Drivers*, 362 U. S. 274, 289–290 (1960), and as the parties' briefs illustrate, creating a federal common-law tort cause of action would require a host of policy choices that could easily upset this balance, see Brief for Respondent IBT 42–44; Reply Brief for Petitioner 22–25. It is thus no surprise that virtually all Courts of Appeals have held that federal courts' authority to "create a federal common law *of collective bargaining agreements* under section 301" should be confined to "a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is . . . a grant of jurisdiction only to enforce contracts." *Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F. 3d 1176, 1180 (CA7 1993). We see no reason for a different result here because it would be premature to recognize the federal common-law tort Granite Rock requests in this case even assuming that § 301(a) authorizes us to do so.

In reaching this conclusion, we emphasize that the question before us is a narrow one. It is not whether the conduct Granite Rock challenges is remediable, but whether we should augment the claims already available to Granite Rock

by creating a new federal common-law cause of action under § 301(a). That we decline to do so does not mean that we approve of IBT's alleged actions. Granite Rock describes a course of conduct that does indeed seem to strike at the heart of the collective-bargaining process federal labor laws were designed to protect. As the record in this case demonstrates, however, a new federal tort claim is not the only possible remedy for this conduct. Granite Rock's allegations have prompted favorable judgments not only from a federal jury, but also from the NLRB. In proceedings that predated those in which the District Court entered judgment for Granite Rock on the CBA's formation date,[17] the NLRB concluded that a "complete agreement" was reached on July 2, and that Local and IBT violated federal labor laws by attempting to delay the CBA's ratification pending execution of a separate agreement favorable to IBT. See *In re Teamsters Local 287,* 347 N. L. R. B. 339, 340–341, and n. 1 (2006) (applying the remedial order on the 2004 conduct to both Local and IBT on the grounds that IBT did not disaffiliate from the AFL–CIO until July 25, 2005).

These proceedings, and the proceedings that remain to be conducted on remand, buttress our conclusion that Granite Rock's case for a new federal common-law cause of action is based on assumptions about the adequacy of other avenues of relief that are at least questionable because they have not been fully tested in this case and thus their efficacy is simply not before us to evaluate. Notably, Granite Rock (like IBT and the Court of Appeals) assumes that federal common law provides the only possible basis for the type of tort claim it wishes to pursue. See Brief for Respondent IBT 33–34;

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[17] Although the NLRB and federal jury reached different conclusions with respect to the CBA's ratification date, the discrepancy has little practical significance because the NLRB's remedial order against Local and IBT gives "retroactive effect to the terms of the [CBA of] July 2, 2004, as if ratified on that date." *In re Teamsters Local 287,* 347 N. L. R. B. 339, 340 (2006).

Reply Brief for Petitioner 16. But Granite Rock did not litigate below, and thus does not present us with occasion to address, whether state law might provide a remedy. See, *e. g.*, *Steelworkers* v. *Rawson*, 495 U. S. 362, 369–371 (1990); *Textron Lycoming Reciprocating Engine Div., AVCO Corp.* v. *Automobile Workers*, 523 U. S. 653, 656, 658 (1998). Nor did Granite Rock fully explore the breach-of-contract and administrative causes of action it suggests are insufficient to remedy IBT's conduct. For example, far from establishing that an agency or alter ego claim against IBT would be unsuccessful, the record in this case suggests it might be easier to prove than usual if, as the NLRB's decision observes, IBT and Local were affiliated in 2004 in a way relevant to Granite Rock's claims. See *In re Teamsters Local 287*, *supra*, at 340, n. 6. Similarly, neither party has established that the NLRB itself could not issue additional relief against IBT. IBT's *amicus* argues that the "overlap between Granite Rock's § 301 claim against the IBT and the NLRB General Counsel's unfair labor practice complaint against Local 287 brings into play the [National Labor Relations Act] rule that an international union commits an unfair labor practice by causing its affiliated local unions to 'impose extraneous non-bargaining unit considerations into the collective bargaining process.' " Brief for American Federation of Labor and Congress of Industrial Organizations 30–31 (quoting *Paperworkers Local 620*, 309 N. L. R. B. 44 (1992)). The fact that at least one Court of Appeals has recognized the viability of such a claim, see *Kobell* v. *United Paperworkers Int'l Union*, 965 F. 2d 1401, 1407–1409 (CA6 1992), further persuades us that Granite Rock's arguments do not justify recognition of a new federal tort claim under § 301(a).

* * *

We reverse the Court of Appeals' judgment on the arbitrability of the parties' formation-date dispute, affirm its judgment dismissing Granite Rock's claims against IBT to the

extent those claims depend on the creation of a new federal common-law tort cause of action under § 301(a), and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

I join Part III of the Court's opinion, which holds that petitioner Granite Rock's tortious interference claim against respondent International Brotherhood of Teamsters (IBT) is not cognizable under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185(a). I respectfully dissent, however, from the Court's conclusion that the arbitration provision in the collective-bargaining agreement (CBA) between Granite Rock and IBT Local 287 does not cover the parties' dispute over whether Local 287 breached the CBA's no-strike clause. In my judgment, the parties clearly agreed in the CBA to have this dispute resolved by an arbitrator, not a court.

The legal principles that govern this case are simpler than the Court's exposition suggests. Arbitration, all agree, "is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574, 582 (1960). Before ordering parties to arbitrate, a court must therefore confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute. See *ante,* at 299–300. In determining the scope of an arbitration agreement, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Technologies, Inc.* v. *Communications Workers,* 475 U. S. 643, 650 (1986) (quoting *Warrior,* 363 U. S., at 582–583);

see also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 550, n. 4 (1964) ("[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that an interpretation that covers the asserted dispute . . . be favored" (emphasis deleted; internal quotation marks omitted)).[1]

The application of these established precepts to the facts of this case strikes me as equally straightforward: It is undisputed that Granite Rock and Local 287 executed a CBA in December 2004. The parties made the CBA retroactively "effect[ive] from May 1, 2004," the day after the expiration of their prior collective-bargaining agreement. App. to Pet. for Cert. A–190. Among other things, the CBA prohibited strikes and lockouts. *Id.*, at A–181. The CBA authorized either party, in accordance with certain grievance procedures, to "refe[r] to arbitration" "[a]ll disputes arising under this agreement," except for three specified "classes of disputes" not implicated here. *Id.*, at A–176 to A–179.

Granite Rock claims that Local 287 breached the CBA's no-strike clause by engaging in a work stoppage in July 2004. Local 287 contests this claim. Specifically, it contends that it had no duty to abide by the no-strike clause in July because it did not vote to ratify the CBA until August. As I see it, the parties' disagreement as to whether the no-strike

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[1] When the question is "'*who* (primarily) should decide arbitrability'" (as opposed to "'*whether* a particular merits-related dispute is arbitrable'"), "the law reverses the presumption." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944–945 (1995). In other words, "[u]nless the parties clearly and unmistakably provide otherwise," it is presumed that courts, not arbitrators, are responsible for resolving antecedent questions concerning the scope of an arbitration agreement. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986). As the majority correctly observes, *ante*, at 297–298, n. 5, this case does not implicate the reversed presumption because both parties accept that a court, not an arbitrator, should resolve their current disagreement about whether their underlying dispute is arbitrable.

clause proscribed the July work stoppage is plainly a "dispu[e] arising under" the CBA and is therefore subject to arbitration as Local 287 demands. Indeed, the parties' no-strike dispute is indistinguishable from myriad other disputes that an employer and union might have concerning the interpretation and application of the substantive provisions of a collective-bargaining agreement. These are precisely the sorts of controversies that labor arbitrators are called upon to resolve every day.

The majority seems to agree that the CBA's arbitration provision generally encompasses disputes between Granite Rock and Local 287 regarding the parties' compliance with the terms of the CBA, including the no-strike clause. The majority contends, however, that Local 287's "formation-date defense" raises a preliminary question of contract formation that must be resolved by a court rather than an arbitrator. *Ante*, at 305. The majority's reasoning appears to be the following: If Local 287 did not ratify the CBA until August, then there is "no valid basis" for applying the CBA's arbitration provision to events that occurred in July. *Ibid.*

The majority's position is flatly inconsistent with the language of the CBA. The parties expressly chose to make the agreement effective from May 1, 2004. As a result, "the date on which [the] agreement was ratified" does not, as the majority contends, determine whether the parties' dispute about the permissibility of the July work stoppage falls within the scope of the CBA's arbitration provision. *Ante*, at 304. When it comes to answering the arbitrability question, it is entirely irrelevant whether Local 287 ratified the CBA in August (as it contends) or in July (as Granite Rock contends). In either case, the parties' dispute—which postdates May 1—clearly "aris[es] under" the CBA, which is all the arbitration provision requires to make a dispute referable to an arbitrator. Cf. *Litton Financial Printing Div., Litton Business Systems, Inc.* v. *NLRB*, 501 U. S. 190, 201 (1991) (recognizing that "a collective-bargaining agreement

might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement").[2]

Given the CBA's express retroactivity, the majority errs in treating Local 287's ratification-date defense as a "formation dispute" subject to judicial resolution. *Ante*, at 303. The defense simply goes to the merits of Granite Rock's claim: Local 287 maintains that the no-strike clause should not be construed to apply to the July work stoppage because it had not ratified the CBA at the time of that action. Cf. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995) (distinguishing a disagreement that "makes up the *merits* of the dispute" from a disagreement "about the *arbitrability* of the dispute"). Accordingly, the defense is necessarily a matter for the arbitrator, not the court. See *AT&T*, 475 U. S., at 651 ("[I]t is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement"). Indeed, this Court has been emphatic that "courts . . . have no business weighing the merits of the grievance." *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960). "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the [arbitration provisions] of collective bargaining agreements, it usurps a function . . . entrusted to the arbitration tribunal." *Id.*, at 569; see also *AT&T*, 475 U. S., at 649 ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims"); *Warrior*, 363 U. S., at 582, 585 ("[T]he judicial inquiry under [LMRA] § 301

[2] Notably, at the time they executed the CBA in December 2004, the parties were well aware that they disagreed about the legitimacy of the July work stoppage. Yet they made the CBA retroactive to May and declined to carve out their no-strike dispute from the arbitration provision, despite expressly excluding three other classes of disputes from arbitration. Cf. *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584–585 (1960) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance"; "the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement").

Attempting to sidestep this analysis, the majority declares that Local 287 waived its retroactivity argument by failing in the courts below to challenge Granite Rock's consistent characterization of the parties' dispute as one of contract formation. See *ante*, at 306. As a result of Local 287's omission, the District Court and Court of Appeals proceeded under the understanding that this case presented a formation question. It was not until its merits brief in this Court that Local 287 attempted to correct this mistaken premise by pointing to the parties' execution of the December 2004 CBA with its May 2004 effective date. This Court's Rules "admonis[h] [counsel] that they have an obligation to the Court to point out in the brief in opposition [to certiorari], and not later, any perceived misstatement made in the petition [for certiorari]"; nonjurisdictional arguments not raised at that time "may be deemed waived." This Court's Rule 15.2. Although it is regrettable and inexcusable that Local 287 did not present its argument earlier, I do not see it as one we can ignore. The question presented in this case presupposes that "it is disputed whether any binding contract exists." Brief for Petitioner i. Because it is instead undisputed that the parties executed a binding contract in December 2004 that was effective as of May 2004, we can scarcely pretend that the parties have a formation dispute. Consideration of this fact is "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (quoting *Vance* v. *Terrazas*, 444 U. S. 252, 258, n. 5 (1980); this Court's Rule 14.1(a)). Indeed, by declining to consider the plain terms of the parties' agreement, the majority offers little more than "an opinion advising what the law would be upon

a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937). In view of the CBA's effective date, I would hold that the parties agreed to arbitrate the no-strike dispute, including Local 287's ratification-date defense, and I would affirm the judgment below on this alternative ground. Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court").

Syllabus

MAGWOOD *v.* PATTERSON, WARDEN, ET AL.

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

No. 09–158. Argued March 24, 2010—Decided June 24, 2010

Petitioner Magwood was sentenced to death for murder. After the Alabama courts denied relief on direct appeal and in postconviction proceedings, he sought federal habeas relief. The District Court conditionally granted the writ as to his sentence, mandating that he be released or resentenced. The state trial court sentenced him to death a second time. He filed another federal habeas application, challenging this new sentence on the grounds that he did not have fair warning at the time of his offense that his conduct would permit a death sentence under Alabama law, and that his attorney rendered ineffective assistance during the resentencing proceeding. The District Court once again conditionally granted the writ. The Eleventh Circuit reversed, holding in relevant part that Magwood's challenge to his new death sentence was an unreviewable "second or successive" challenge under 28 U. S. C. § 2244(b) because he could have raised his fair-warning claim in his earlier habeas application.

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

555 F. 3d 968, reversed and remanded.

JUSTICE THOMAS delivered the opinion of the Court, except as to Part IV–B, concluding that because Magwood's habeas application challenges a new judgment for the first time, it is not "second or successive" under § 2244(b). Pp. 330–337, 338–343.

(a) This case turns on when a claim should be deemed to arise in a "second or successive habeas corpus application." §§ 2244(b)(1), (2). The State contends that § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), should be read to bar claims that a prisoner had a prior opportunity to present. Under this "one opportunity" rule, Magwood's fair-warning claim was "second or successive" because he had an opportunity to raise it in his first application but did not. Magwood counters that § 2244(b) should not apply to a first application challenging a new judgment intervening between habeas applications. This Court agrees. The phrase "second or successive" is not defined by AEDPA and it is a "term of art." *Slack* v. *McDaniel*, 529 U. S. 473, 486. To determine its meaning, the Court looks first to the statutory context. Section 2244(b)'s limitations apply only to a "habeas corpus application under section 2254," *i. e.*, an application

on "behalf of a person in custody pursuant to the judgment of a State court," § 2254(b)(1). Both § 2254(b)'s text and the relief it provides indicate that "second or successive" must be interpreted with respect to the judgment challenged. A § 2254 petitioner "seeks invalidation . . . of the judgment authorizing [his] confinement," *Wilkinson* v. *Dotson*, 544 U. S. 74, 83. If a conditional writ is granted, "the State may seek a *new* judgment (through a new trial or a new sentencing proceeding)." *Ibid.* The State errs in contending that, if § 2254 is relevant at all, "custody" and not "judgment," is the proper reference because unlawful "custody" is the "substance" requirement for habeas relief. This argument is unpersuasive. Section 2254 articulates the kind of custody that may be challenged under § 2254. Because § 2254 applies only to custody pursuant to a state-court judgment, that "judgment" is inextricable and essential to relief. It is a requirement that distinguishes § 2254 from other statutes permitting constitutional relief. See, *e. g.*, §§ 2255, 2241. The State's "custody"-based rule is also difficult to justify because applying "second or successive" to any subsequent application filed before a prisoner's release would require a prisoner who remains in continuous custody for an unrelated conviction to satisfy § 2244(b)'s strict rules to challenge the unrelated conviction *for the first time.* Nothing in the statutory text or context supports such an anomalous result. Pp. 330–334.

(b) This Court is also not convinced by the State's argument that a "one opportunity" rule would be consistent with the statute and should be adopted because it better reflects AEDPA's purpose of preventing piecemeal litigation and gamesmanship. AEDPA uses "second or successive" to modify "application," not "claim" as the State contends, and this Court has refused to adopt an interpretation of § 2244(b) that would "elid[e] the difference between an 'application' and a 'claim,'" *Artuz* v. *Bennett*, 531 U. S. 4, 9. The State's reading also reflects a more fundamental error. It would undermine or render superfluous much of § 2244(b)(2). In some circumstances, it would increase the restrictions on review by applying pre-AEDPA abuse-of-the-writ rules where § 2244(b)(2) imposes no restrictions. In others, it would decrease the restrictions on review by applying more lenient pre-AEDPA abuse-of-the-writ rules where § 2244(b) mandates stricter requirements. Pp. 334–336.

(c) This Court's interpretation of § 2244(b) is consistent with its precedents. Because none of the pre-AEDPA cases that the State invokes, *e. g.*, *Wong Doo* v. *United States*, 265 U. S. 239, applies "second or successive" to an application challenging a new judgment, these cases shed no light on the question presented here. Nor do post-AEDPA cases contradict the approach adopted here. Only *Burton* v. *Stewart*, 549

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U. S. 147, comes close to addressing the threshold question whether an application is "second or successive" if it challenges a new judgment, and that decision confirms that the existence of a new judgment is dispositive. In holding that both of the petitioner's habeas petitions had challenged the same judgment, this Court in *Burton* expressly recognized that had there been a new judgment intervening between the habeas petitions, the result might have been different. Here, there is such an intervening judgment. This is Magwood's first application challenging that intervening judgment. Magwood challenges not the trial court's error in his first sentencing, but the court's new error when it conducted a full resentencing and reviewed the aggravating evidence afresh. Pp. 336–337, 338–342.

(d) Because Magwood has not attempted to challenge his underlying conviction, the Court has no occasion to address the State's objection that this reading of § 2244(b) allows a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, new sentence, but also his original, undisturbed conviction. Nor does the Court address whether Magwood's fair-warning claim is procedurally defaulted or whether the Eleventh Circuit erred in rejecting his ineffective-assistance-of-counsel claim. P. 342.

THOMAS, J., delivered the opinion of the Court, except as to Part IV–B. SCALIA, J., joined in full, and STEVENS, BREYER, and SOTOMAYOR, JJ., joined, except as to Part IV–B. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and SOTOMAYOR, JJ., joined, *post*, p. 343. KENNEDY, J., filed a dissenting opinion, in which ROBERTS, C. J., and GINSBURG and ALITO, JJ., joined, *post*, p. 343.

Jeffrey L. Fisher, by appointment of the Court, 558 U. S. 1108, argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Amy Howe*, *Kevin K. Russell*, *James A. Power, Jr.*, *Marguerite Del Valle*, and *Thomas C. Goldstein*.

Corey L. Maze, Solicitor General of Alabama, argued the cause for respondents. With him on the brief were *Troy King*, Attorney General, and *Beth Jackson Hughes* and *J. Clayton Crenshaw*, Assistant Attorneys General.*

**John H. Blume, Keir M. Weyble, Timothy K. Ford, Henry A. Martin,* and *Jonathan D. Hacker* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

[Footnote is continued on p. 323]

JUSTICE THOMAS delivered the opinion of the Court, except as to Part IV–B.

Petitioner Billy Joe Magwood was sentenced to death for murdering a sheriff. After the Alabama courts denied relief on direct appeal and in postconviction proceedings, Magwood filed an application for a writ of habeas corpus in Federal District Court, challenging both his conviction and his sentence. The District Court conditionally granted the writ as to the sentence, mandating that Magwood either be released or resentenced. The state trial court conducted a new sentencing hearing and again sentenced Magwood to death. Magwood filed an application for a writ of habeas corpus in federal court challenging this new sentence. The District Court once again conditionally granted the writ, finding constitutional defects in the new sentence. The Court of Appeals for the Eleventh Circuit reversed, holding in relevant part that Magwood's challenge to his new death sentence was an unreviewable "second or successive" challenge under 28 U. S. C. § 2244(b) because he could have mounted the same challenge to his original death sentence. We granted certiorari, and now reverse. Because Magwood's habeas applica-

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A brief of *amici curiae* urging affirmance was filed for the State of South Carolina et al. by *Henry D. McMaster*, Attorney General of South Carolina, *John W. McIntosh*, Chief Deputy Attorney General, *Donald J. Zelenka*, Assistant Deputy Attorney General, *Melody J. Brown*, Assistant Attorney General, and *Dan Schweitzer*, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming.

tion[1] challenges a new judgment for the first time, it is not "second or successive" under § 2244(b).

I

After a conviction for a drug offense, Magwood served several years in the Coffee County Jail in Elba, Alabama, under the watch of Sheriff C. F. "Neil" Grantham. During his incarceration, Magwood, who had a long history of mental illness, became convinced that Grantham had imprisoned him without cause, and vowed to get even upon his release. Magwood followed through on his threat. On the morning of March 1, 1979, shortly after his release, he parked outside the jail and awaited the sheriff's arrival. When Grantham exited his car, Magwood shot him and fled the scene.

Magwood was indicted by a grand jury for the murder of an on-duty sheriff, a capital offense under Ala. Code § 13–11–2(a)(5) (1975).[2] He was tried in 1981. The prosecution asked the jury to find Magwood guilty of aggravated murder as charged in the indictment, and sought the death penalty. Magwood pleaded not guilty by reason of insanity; however, the jury found him guilty of capital murder under § 13–11–2(a)(5), and imposed the sentence of death based on the aggravation charged in the indictment. In accordance with Alabama law, the trial court reviewed the basis for the jury's decision. See §§ 13–11–3, 13–11–4. Although the court did not find the existence of any statutory "aggravating circumstance" under § 13–11–6, the court relied on *Ex parte Kyzer*,

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[1] Although 28 U. S. C. § 2244(b) refers to a habeas "application," we use the word "petition" interchangeably with the word "application," as we have in our prior cases.

[2] At the time of the murder, Ala. Code § 13–11–2(a) provided: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment . . . ." The offenses included "murder of any . . . sheriff . . . while . . . on duty or because of some official or job-related act." § 13–11–2(a)(5). The same statute set forth a list of "aggravating circumstances," § 13–11–6, but the trial court found that none existed in Magwood's case.

399 So. 2d 330 (Ala. 1981), to find that murder of a sheriff while "on duty or because of some official or job-related act," § 13–11–2(a)(5), is a capital felony that, by definition, involves aggravation sufficient for a death sentence.[3] The trial court found that Magwood's young age (27 at the time of the offense) and lack of significant criminal history qualified as mitigating factors, but found no mitigation related to Magwood's mental state. Weighing the aggravation against the two mitigating factors, the court approved the sentence of death. The Alabama courts affirmed. *Magwood* v. *State*, 426 So. 2d 918, 929 (Ala. Crim. App. 1982); *Ex parte Magwood*, 426 So. 2d 929, 932 (Ala. 1983). We denied certiorari. *Magwood* v. *Alabama*, 462 U. S. 1124 (1983). After the Alabama Supreme Court set an execution date of July 22, 1983, Magwood filed a *coram nobis* petition and an application for a stay of execution. The trial court held a hearing on the petition and denied relief on July 18, 1983.[4]

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[3] As relevant here, *Kyzer* did away with the prior Alabama rule that an aggravating component of a capital felony could not double as an aggravating factor supporting a capital sentence. In *Kyzer*, the defendant had been sentenced to death for the intentional murder of "two or more human beings" under § 13–11–2(a)(10). 399 So. 2d, at 332. The crime of murder, so defined, was aggravated by its serial nature, just as Magwood's crime of murder, as defined under § 13–11–2(a)(5), was aggravated by the fact that he killed an on-duty sheriff because of the sheriff's job-related acts. In *Kyzer*, the Alabama Supreme Court ultimately remanded for a new trial but, in order to guide the lower court on remand, addressed whether the aggravation in the charged crime, see § 13–11–2(a)(10), was sufficient to impose a sentence of death even without a finding of any "aggravating circumstance" enumerated in § 13–11–6. *Id.*, at 337. The court ruled that if the defendant was convicted under § 13–11–2(a)(10), "the jury and the trial judge at the sentencing hearing may find the aggravation averred in the indictment as the aggravating circumstance, even though the aggravation is not listed in § 13–11–6 as an aggravating circumstance." *Id.*, at 339 (internal quotation marks omitted).

[4] The Alabama Court of Criminal Appeals subsequently affirmed the denial of Magwood's *coram nobis* petition, *Magwood* v. *State*, 449 So. 2d 1267 (1984), and the Alabama Supreme Court denied Magwood's motion to file an out-of-time appeal from that decision, *Ex parte Magwood*, 453 So. 2d 1349 (1984).

Eight days before his scheduled execution, Magwood filed an application for a writ of habeas corpus under 28 U. S. C. § 2254, and the District Court granted a stay of execution. After briefing by the parties, the District Court upheld Magwood's conviction but vacated his sentence and conditionally granted the writ based on the trial court's failure to find statutory mitigating circumstances relating to Magwood's mental state.[5] *Magwood* v. *Smith*, 608 F. Supp. 218, 225–226, 229 (MD Ala. 1985). The Court of Appeals affirmed. *Magwood* v. *Smith*, 791 F. 2d 1438, 1450 (CA11 1986).

In response to the conditional writ, the state trial court held a new sentencing proceeding in September 1986. This time, the judge found that Magwood's mental state, as well as his age and lack of criminal history, qualified as statutory mitigating circumstances. As before, the court found that Magwood's capital felony under § 13–11–2(a)(5) included sufficient aggravation to render him death eligible. In his proposed findings, Magwood's attorney agreed that Magwood's offense rendered him death eligible, but argued that a death sentence would be inappropriate in light of the mitigating factors. The trial court imposed a penalty of death, stating on the record that the new "judgment and sentence [were] the result of a complete and new assessment of all of the evidence, arguments of counsel, and law." Sentencing Tr., R. Tab 1, p. R–25. The Alabama courts affirmed, *Magwood* v. *State*, 548 So. 2d 512, 516 (Ala. Crim. App. 1988); *Ex parte Magwood*, 548 So. 2d 516, 516 (Ala. 1988), and this Court denied certiorari, *Magwood* v. *Alabama*, 493 U. S. 923 (1989).

Magwood filed a petition for relief under Alabama's former Temporary Rule of Criminal Procedure 20 (1987) (now Ala.

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[5] See Ala. Code § 13–11–7 ("Mitigating circumstances shall be the following: . . . (2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; . . . (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired").

Rule Crim. Proc. 32) (Rule 20 petition) claiming, *inter alia*, that his death sentence exceeded the maximum sentence authorized by statute; that his death sentence violated the Fifth, Eighth, and Fourteenth Amendments because it rested upon an unforeseeable interpretation of the capital sentencing statute; and that his attorney rendered ineffective assistance of counsel during resentencing. The trial court denied relief. It held that the statutory basis for Magwood's death sentence had been affirmed on direct appeal and could not be relitigated. The trial court also held that Magwood's attorney played no substantive role in the resentencing and had no obligation to dispute the aggravation, given that the District Court had required only that the trial court consider additional mitigating factors.

Magwood appealed the denial of his Rule 20 petition, arguing, *inter alia,* that his sentence was unconstitutional because he did not have fair warning that his offense could be punished by death, and that he received constitutionally ineffective assistance of counsel at resentencing. See Record in Appeal No. 92–843 (Ala. Crim. App.), Tab 25, pp. 23–24, 53–61.

The Alabama Court of Criminal Appeals affirmed, citing its decision on direct appeal as to the propriety of the death sentence. *Magwood* v. *State*, 689 So. 2d 959, 965 (1996) (citing *Kyzer, supra*, and *Jackson* v. *State*, 501 So. 2d 542 (Ala. Crim. App. 1986)).[6] The Alabama Supreme Court denied certiorari, 689 So. 2d, at 959, as did this Court, *Magwood* v. *Alabama*, 522 U. S. 836 (1997).

In April 1997, Magwood sought leave to file a second or successive application for a writ of habeas corpus challenging his 1981 judgment of conviction. See § 2244(b)(3)(A) (requiring authorization from the Court of Appeals to file a sec-

[6] In *Jackson* v. *State*, 501 So. 2d, at 544, the Alabama Court of Criminal Appeals held that *Kyzer* supported a death sentence for a defendant who was convicted for an offense committed before *Kyzer* was decided but was resentenced after that decision.

ond or successive application). The Court of Appeals denied his request. *In re Magwood*, 113 F. 3d 1544 (CA11 1997). He simultaneously filed a petition for a writ of habeas corpus challenging his new death sentence, which the District Court conditionally granted. *Magwood* v. *Culliver*, 481 F. Supp. 2d 1262, 1295 (MD Ala. 2007). In that petition, Magwood again argued that his sentence was unconstitutional because he did not have fair warning at the time of his offense that his conduct would be sufficient to warrant a death sentence under Alabama law, and that his attorney rendered ineffective assistance during the resentencing proceeding.

Before addressing the merits of Magwood's fair-warning claim, the District Court *sua sponte* considered whether the application was barred as a "successive petition" under § 2244, and concluded that it was not. *Id.*, at 1283–1284 ("[H]abeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge the underlying conviction and original sentence" (citing 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 28.3b(i), p. 1412 (5th ed. 2005) (hereinafter Hertz & Liebman) ("When a petitioner files a second or subsequent petition to challenge a criminal judgment *other than* the one attacked in an earlier petition, it cannot be said that the two petitions are 'successive' " (emphasis in original)))).

The District Court rejected the State's argument that Magwood had procedurally defaulted the fair-warning claim by failing to present it adequately to the state courts, noting that Magwood had presented the claim both in his Rule 20 petition and on appeal from the denial of that petition. 481 F. Supp. 2d, at 1285–1286; *supra*, at 326–327. Addressing the merits, the District Court ruled that Magwood's death sentence was unconstitutional because "at the time of the offense conduct, Magwood did not have fair notice that he could be sentenced to death absent at least one aggravating circumstance enumerated in former 1975 Ala. Code § 13–11–6." 481 F. Supp. 2d, at 1285. The District Court also

found the state court's grounds for rejecting Magwood's ineffective-assistance claim unreasonable in light of clearly established federal law, noting that Magwood's attorney in fact had engaged substantively in the "complete and new" resentencing, and although the attorney could not be expected to object on state-law grounds foreclosed by precedent, he was clearly ineffective for failing to raise the federal fair-warning claim. *Id.*, at 1294 (internal quotation marks omitted).

The Court of Appeals reversed in relevant part. 555 F. 3d 968 (CA11 2009). It concluded that the first step in determining whether § 2244(b) applies is to "separate the new claims challenging the resentencing from the old claims that were or should have been presented in the prior application." *Id.*, at 975 (internal quotation marks omitted). Under the Court of Appeals' approach, any claim that "challenge[s] the new, amended component of the sentence" should be "regarded as part of a first petition," and any claim that "challenge[s] any component of the original sentence that was not amended" should be "regarded as part of a second petition." *Ibid.* Applying this test, the court held that because Magwood's fair-warning claim challenged the trial court's reliance on the same (allegedly improper) aggravating factor that the trial court had relied upon for Magwood's original sentence, his claim was governed by § 2244(b)'s restrictions on "second or successive" habeas applications. *Id.*, at 975–976. The Court of Appeals then dismissed the claim because Magwood did not argue that it was reviewable under one of the exceptions to § 2244(b)'s general rule requiring dismissal of claims first presented in a successive application.[7] See *id.*, at 976.

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[7] The court treated Magwood's ineffective-assistance claim as new and free of the restrictions of § 2244(b)(2), but reversed on the merits: "While there was a possible objection, Alabama's highest court had said in *Kyzer* that a § 13–11–2 aggravating factor could be used as an aggravating circumstance. We are not prepared to require counsel to raise an argument that has already been decided adversely to his client's position by a state's highest court in order to avoid being found ineffective." 555 F. 3d, at 977–978.

We granted certiorari to determine whether Magwood's application challenging his 1986 death sentence, imposed as part of resentencing in response to a conditional writ from the District Court, is subject to the constraints that § 2244(b) imposes on the review of "second or successive" habeas applications. 558 U. S. 1023 (2009).

II

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2244(b) provides in relevant part:

> "(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."

This case turns on the meaning of the phrase "second or successive" in § 2244(b). More specifically, it turns on when a claim should be deemed to arise in a "second or successive habeas corpus application." §§ 2244(b)(1), (2). If an appli-

cation is "second or successive," the petitioner must obtain leave from the court of appeals before filing it with the district court. See § 2244(b)(3)(A). The district court must dismiss any claim presented in an authorized second or successive application unless the applicant shows that the claim satisfies certain statutory requirements. See § 2244(b)(4). Thus, if Magwood's application was "second or successive," the District Court should have dismissed it in its entirety because he failed to obtain the requisite authorization from the Court of Appeals. If, however, Magwood's application was not second or successive, it was not subject to § 2244(b) at all, and his fair-warning claim was reviewable (absent procedural default).

The State contends that although § 2244(b), as amended by AEDPA, applies the phrase "second or successive" to "application[s]," it "is a claim-focused statute," Brief for Respondents 22–24, and "[c]laims, not applications, are barred by § 2244(b)," *id.*, at 24 (citing *Artuz* v. *Bennett*, 531 U. S. 4, 9 (2000)). According to the State, the phrase should be read to reflect a principle that "a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack." See Brief for Respondents 25–26 (citing *Beyer* v. *Litscher*, 306 F. 3d 504, 508 (CA7 2002); internal quotation marks omitted). The State asserts that under this "one opportunity" rule, Magwood's fair-warning claim was successive because he had an opportunity to raise it in his first application, but did not do so. See Brief for Respondents 25–26.

Magwood, in contrast, reads § 2244(b) to apply only to a "second or successive" application challenging the same state-court *judgment*. According to Magwood, his 1986 resentencing led to a new judgment, and his first application challenging that new judgment cannot be "second or successive" such that § 2244(b) would apply. We agree.

We begin with the text. Although Congress did not define the phrase "second or successive," as used to mod-

ify "habeas corpus application under section 2254," §§2244(b)(1)–(2), it is well settled that the phrase does not simply "refe[r] to all §2254 applications filed second or successively in time," *Panetti* v. *Quarterman*, 551 U. S. 930, 944 (2007); see *id.*, at 947 (creating an "exceptio[n]" to §2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application); *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 643 (1998) (treating a second application as part of a first application where it was premised on a newly ripened claim that had been dismissed from the first application "as premature"); *Slack* v. *McDaniel*, 529 U. S. 473, 478, 487 (2000) (declining to apply §2244(b) to a second application where the District Court dismissed the first application for lack of exhaustion).[8]

We have described the phrase "second or successive" as a "term of art." *Id.*, at 486. To determine its meaning, we look first to the statutory context. The limitations imposed by §2244(b) apply only to a "habeas corpus application under section 2254," that is, an "application for a writ of habeas corpus on behalf of a person in custody pursuant to *the judgment* of a State court," §2254(b)(1) (emphasis added). The reference to a state-court judgment in §2254(b) is significant because the term "application" cannot be defined in a vacuum. A §2254 petitioner is applying for something: His petition "seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement," *Wilkinson* v. *Dotson*, 544 U. S. 74, 83 (2005) (emphasis added). If his petition results in a district court's granting of the writ, "the State may seek a *new* judgment (through a new trial or a new sentencing proceeding)." *Ibid.* (emphasis in original). Thus, both §2254(b)'s text and the relief it provides indicate

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[8] In *Slack* v. *McDaniel*, we applied pre-AEDPA law, but "d[id] not suggest the definition of second or successive would be different under AEDPA." 529 U. S., at 486. Courts have followed *Slack* in post-AEDPA cases, and the State agrees it is relevant to the question presented here. See Brief for Respondents 36, n. 13.

that the phrase "second or successive" must be interpreted with respect to the judgment challenged.

The State disagrees, contending that if the cross-reference to § 2254 is relevant, we should focus not on the statute's reference to a "judgment" but on its reference to "custody," Brief for Respondents 53; compare §§ 2254(a), (b) (establishing rules for review of "[a]n application for a writ of habeas corpus" on "behalf of a person in custody pursuant to the *judgment* of a State court" (emphasis added)) with § 2254(a) (specifying that an application may be entertained "only on the ground that [the petitioner] is *in custody* in violation of the Constitution or laws or treaties of the United States" (emphasis added)). The State explains that unlawful "custody" is the key "'substance requirement'" of § 2254, whereas being held pursuant to a state-court "judgment" is merely a "'status requirement.'" Brief for Respondents 53 (quoting 1 Hertz & Liebman § 8.1, at 391).

We find this argument unpersuasive. Section 2254 articulates the kind of confinement that may be challenged on the ground that the petitioner is being held "in violation of the Constitution or laws or treaties of the United States." § 2254(a). The requirement of custody *pursuant to a state-court judgment* distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts, or Rev. Stat. § 1979, 42 U. S. C. § 1983, which allows federal-court suits against state and local officials. Custody is crucial for § 2254 purposes, but it is inextricable from the judgment that authorizes it.

The State's "custody"-based rule is difficult to justify for another reason. Under the State's approach, applying the phrase "second or successive" to any subsequent application filed before a prisoner's release would mean that a prisoner who remains in continuous custody for a completely unrelated conviction would have to satisfy the strict rules for review under § 2244(b) to challenge his unrelated conviction

for the first time. Nothing in the statutory text or context supports, much less requires, such an anomalous result. See, *e. g.*, *Beyer*, 306 F. 3d, at 507 ("[A] prisoner is entitled to one free-standing collateral attack per judgment, rather than one attack per stretch of imprisonment"); cf. *Dotson*, *supra*, at 85 (SCALIA, J., concurring) ("[W]hen a habeas petitioner challenges only one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others").[9]

III

Appearing to recognize that Magwood has the stronger textual argument, the State argues that we should rule based on the statutory purpose. According to the State, a "one opportunity" rule is consistent with the statutory text, and better reflects AEDPA's purpose of preventing piecemeal litigation and gamesmanship.

We are not persuaded. AEDPA uses the phrase "second or successive" to modify "application." See §§ 2244(b)(1), (2). The State reads the phrase to modify "claims." See, *e. g.*, Brief for Respondents 51 ("Congress' intent for AEDPA was to eradicate successive claims"). We cannot replace the actual text with speculation as to Congress' intent. We have previously found Congress' use of the word "application" significant, and have refused to adopt an interpretation of § 2244(b) that would "elid[e] the difference between an 'application' and a 'claim,'" *Artuz*, 531 U. S., at 9; see also *Gonzalez* v. *Crosby*, 545 U. S. 524, 530 (2005) ("[F]or purposes of § 2244(b), an 'application' for habeas relief is a filing that contains one or more 'claims'"). Therefore, although we agree with the State that many of the rules under § 2244(b) focus

[9] Our focus on the judgment accords with current filing requirements. See Habeas Corpus Rule 2(b) (requiring any petitioner to "ask for relief from the state-court judgment being contested"); Rule 2(e) (prescribing that any "petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court").

on claims, that does not entitle us to rewrite the statute to make the phrase "second or successive" modify claims as well.[10]

The State's reading leads to a second, more fundamental error. Under the State's "one opportunity" rule, the phrase "second or successive" would apply to any claim that the petitioner had a full and fair opportunity to raise in a prior application. And the phrase "second or successive" would *not* apply to a claim that the petitioner did *not* have a full and fair opportunity to raise previously.

This reading of § 2244(b) would considerably undermine—if not render superfluous—the exceptions to dismissal set forth in § 2244(b)(2). That section describes circumstances when a claim not presented earlier may be considered: intervening and retroactive case law, or newly discovered facts suggesting "that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). In either circumstance, a petitioner cannot be said to have had a prior opportunity to raise the claim, so under the State's rule the claim would not be successive and § 2244(b)(2) would not apply to it at all. This would be true even if the claim were raised in a second application challenging the same judgment.[11]

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[10] The dissent recognizes that the phrase "second or successive" applies to an *application* as a whole, see *post*, at 344–346 (opinion of KENNEDY, J.), but departs in other significant ways from the statutory text, see *infra*, at 336–337.

[11] This case does not require us to determine whether § 2244(b) applies to every application filed by a prisoner in custody pursuant to a state-court judgment if the prisoner challenged the *same* state-court judgment once before. Three times we have held otherwise. See *Slack* v. *McDaniel*, 529 U. S. 473, 487 (2000); *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 643 (1998); *Panetti* v. *Quarterman*, 551 U. S. 930, 945 (2007).

The dissent's claim that our reading of § 2244(b) calls one of those decisions, *Panetti*, into doubt, see *post*, at 350, is unfounded. The question in this case is whether a first application challenging a new sentence in an intervening judgment is second or successive. It is not whether an application challenging the same state-court judgment must always be second or successive.

In addition to duplicating the exceptions under § 2244(b) in some circumstances, the State's rule would dilute them in others. Whereas the exception to dismissal of fact-based claims not presented in a prior application applies only if the facts provide clear and convincing evidence "that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2244(b)(2)(B)(ii), under the State's rule, all that matters is that the facts "could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(i). We decline to adopt a reading that would thus truncate § 2244(b)(2)'s requirements.

IV

A

We are not persuaded by the State or the dissent that the approach we take here contradicts our precedents. The State invokes several pre-AEDPA cases denying review of claims in second or successive applications where the petitioners did not avail themselves of prior opportunities to present the claims. See *Wong Doo* v. *United States*, 265 U. S. 239 (1924); *Antone* v. *Dugger*, 465 U. S. 200 (1984) *(per curiam); Woodard* v. *Hutchins*, 464 U. S. 377 (1984) *(per curiam); Delo* v. *Stokes*, 495 U. S. 320 (1990) *(per curiam); McCleskey* v. *Zant*, 499 U. S. 467 (1991). These cases, the State contends, show that Magwood's fair-warning claim should be dismissed as second or successive because he could have raised—but did not raise—the claim in his first application.

But none of these pre-AEDPA decisions applies the phrase "second or successive" to an application challenging a new judgment. Therefore, the decisions cast no light on the question before the Court today: whether abuse-of-the-writ rules, as modified by AEDPA under § 2244(b)(2), apply at all to an application challenging a new judgment. The State's misplaced reliance on those cases stems from its failure

to distinguish between § 2244(b)'s threshold inquiry into whether an application is "second or successive," and its subsequent inquiry into whether claims in a successive application must be dismissed.

B

The dissent similarly errs by interpreting the phrase "second or successive" by reference to our longstanding doctrine governing abuse of the writ. AEDPA modifies those abuse-of-the-writ principles and creates new statutory rules under § 2244(b). These rules apply only to "second or successive" applications. The dissent contends that this reading renders AEDPA inapplicable to a broad range of abusive claims that would have been barred under prior rules. Yet, the dissent fails to cite any case in which this Court has dismissed a claim as successive or abusive if the petitioner raised it in an application challenging a new judgment.

The dissent's conclusion that our reading of § 2254 "unmoor[s] the phrase 'second or successive' from its textual and historical underpinnings," *post*, at 350, is unwarranted. Pre-AEDPA usage of the phrase "second or successive" is consistent with our reading. A review of our habeas precedents shows that pre-AEDPA cases cannot affirmatively define the phrase "second or successive" as it appears in AEDPA. Congress did not even apply the phrase "second or successive" to applications filed by state prisoners until it enacted AEDPA. The phrase originally arose in the federal context, see § 2255 (1946 ed., Supp. II), and applied only to applications raising previously *adjudicated* claims, see *Sanders* v. *United States*, 373 U. S. 1, 12 (1963). After this Court interpreted the law to permit dismissal of "abusive" claims—as distinguished from "successive" claims, see *ibid.*—Congress codified restrictions on both types of claims in § 2244(b), but still without using the phrase "second or successive." See § 2244(b) (1964 ed., Supp. IV) (providing rules governing applications filed by state as well as federal prisoners). It was not until 1996 that AEDPA incorporated the

phrase "second or successive" into § 2244(b). In light of this complex history of the phrase "second or successive," we must rely upon the current text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations.[12]

C

Nor do our *post*-AEDPA cases contradict our approach. Only one, *Burton* v. *Stewart*, 549 U. S. 147 (2007) *(per curiam)*, comes close to addressing the threshold question whether an application is "second or successive" if it challenges a new judgment. And that case confirms that the existence of a new judgment is dispositive. In *Burton*, the petitioner had been convicted and sentenced in state court in 1994. See *id.*, at 149. He successfully moved for resentencing based on vacatur of an unrelated prior conviction. *Id.*, at 150. The state appellate court affirmed the conviction but remanded for a second resentencing. *Ibid.* In March 1998, the trial court entered an amended judgment and new sentence. *Id.*, at 151. In December 1998, with state review of his new sentence still pending, the petitioner filed a § 2254 application challenging his 1994 conviction. The District Court denied it on the merits, the Court of Appeals affirmed, and we denied certiorari. *Ibid.*

In 2002, after exhausting his state sentencing appeal, the petitioner filed a § 2254 petition challenging only his 1998 sentence. The District Court denied relief on the merits, and the Court of Appeals affirmed. We reversed, holding that the petition challenging the sentence should have been

[12] The dissent speculates about issues far beyond the question before the Court. See, *e. g.*, *post*, at 350–351 (suggesting that our judgment-based reading of § 2244(b) calls into question precedents recognizing habeas petitions challenging the denial of good-time credits or parole). We address only an application challenging a new state-court judgment for the first time. We do not purport to constrain the scope of § 2254 as we have previously defined it.

dismissed as an unauthorized "second or successive" application. *Id.*, at 153; see § 2244(b)(3)(A). We rejected the petitioner's argument "that his 1998 and 2002 petitions challenged different judgments." *Id.*, at 155; see *id.*, at 156–157. Although the petitioner had styled his first petition as a challenge to the 1994 conviction and his second petition as a challenge to the 1998 sentence, we concluded that both attacked the same "judgment" because the 1998 sentence was already in place when the petitioner filed his first application for federal habeas relief. See *id.*, at 156. In other words, the judgment he challenged in his 1998 application was "the *same one* challenged in the subsequent 2002 petition"; it "was the judgment pursuant to which [the petitioner] was being detained." *Ibid.* (emphasis added). We expressly recognized that the case might have been different had there been a "new judgment intervening between the two habeas petitions." *Ibid.* There was no such judgment in *Burton*, but there is such an intervening judgment here.

This is Magwood's *first* application challenging that intervening judgment. The errors he alleges are *new.* It is obvious to us—and the State does not dispute—that his claim of ineffective assistance at resentencing turns upon new errors. But, according to the State, his fair-warning claim does not, because the state court made the same mistake before. We disagree. An error made a second time is still a new error. That is especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh. See Sentencing Tr., R. Tab 1, at R–25 ("The Court in f[or]mulating the present judgment has *considered* the original record of the trial and sentence. . . . The present judgment and sentence has been the result of a *complete and new assessment* of all of the evidence, arguments of counsel, and law" (emphasis added)).[13]

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[13] Cf. *Walker* v. *Roth*, 133 F. 3d 454, 455 (CA7 1997) ("None of these new claims were raised in his first petition, nor could they have been; [the petitioner] is attempting to challenge the constitutionality of a proceeding

D

The dissent's concern that our rule will allow "petitioners to bring abusive claims so long as they have won any victory pursuant to a prior federal habeas petition," *post*, at 356, is greatly exaggerated. A petitioner may not raise in federal court an error that he failed to raise properly in state court in a challenge to the judgment reflecting the error. If a petitioner does not satisfy the procedural requirements for bringing an error to the state court's attention—whether in trial, appellate, or habeas proceedings, as state law may require—procedural default will bar federal review. See *Coleman* v. *Thompson*, 501 U. S. 722, 729–730 (1991); *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (stating that the petitioner's "failure to present three of his federal habeas claims to the [state court] in a timely fashion has resulted in a procedural default of those claims"). In this case, the State argued that Magwood procedurally defaulted his fair-warning claim by failing to raise it properly in his collateral challenge to the 1986 judgment, and sought dismissal on that ground. Only after ruling that Magwood did not procedurally default the claim did the District Court *sua sponte* consider whether § 2244(b) barred review.[14] We leave that procedural-default ruling to the Court of Appeals to review in the first instance. Here, we underscore only that procedural-default rules continue to constrain review of claims in all applications, whether the applications are "second or successive" or not.[15]

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which obviously occurred after he filed, and obtained relief, in his first habeas petition").

[14] See 481 F. Supp. 2d 1262, 1267 (MD Ala. 2007) ("This court split the proceedings on the current petition into two stages: stage I (determining whether the claims were procedurally defaulted) and stage II (considering the merits of the claims that were not procedurally defaulted)"). Few of Magwood's claims survived the initial cut.

[15] The dissent's concern that such a petitioner may "reraise every argument against a sentence that was rejected by the federal courts during the first round of federal habeas review," *post*, at 354, is similarly hyper-

Ironically, in an effort to effectuate what they believe is Congress' intent not to give any unfair benefit to habeas petitioners, the State and the dissent propose an alternative rule that would "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro* v. *United States*, 540 U. S. 375, 381 (2003). Many examples can be given, but one suffices to illustrate this point. Suppose that a petitioner files an application raising 10 meritorious claims challenging his conviction. The district court grants a conditional writ based on one of them, without reaching the remaining nine. Upon retrial, the state court commits the same 10 legal mistakes. (These are new errors, but no more new than the sentencing error in Magwood's case.) Is an application presenting those same 10 claims—now based on the errors in the new judgment—"second or successive"? Under the opportunity-based rule advanced by the State and the dissent, the answer must be yes. All 10 claims would have to be dismissed. See § 2244(b)(1) (requiring dismissal of any claim presented in a prior application). The State attempts to avoid this "procedural anomal[y]," *id.*, at 380, by suggesting that we treat the nine unadjudicated claims as part of a first application, because they were never adjudicated on the merits. Cf. *Slack*, 529 U. S., at 478–481; *Martinez-Villareal*, 523 U. S., at 643–645. As for the *adjudicated* claim, "[r]espondents assume that state judges will follow instructions imposed by federal courts," and if not, "that federal courts will consider a petitioner's claim that the state court violated due process by failing to honor the federal court's mandate." Brief for Respondents 42. We see no need to engage in such novel and complex rationalizations. AEDPA's text commands a more straightforward rule: where, unlike in *Burton*, there is a "new judgment intervening between the two habeas petitions," 549 U. S., at 156, an application challenging

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bolic. It will not take a court long to dispose of such claims where the court has already analyzed the legal issues.

the resulting new judgment is not "second or successive" at all.

V

The State objects that our reading of § 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction. The State believes this result follows because a sentence and conviction form a single "judgment" for purposes of habeas review. This case gives us no occasion to address that question, because Magwood has not attempted to challenge his underlying conviction.[16] We base our conclusion on the text, and that text is not altered by consequences the State speculates will follow in another case.[17]

* * *

For these reasons, we conclude that Magwood's first application challenging his new sentence under the 1986 judgment is not "second or successive" under § 2244(b). The Court of Appeals erred by reading § 2244(b) to bar review of the fair-warning claim Magwood presented in that application. We do not address whether the fair-warning claim is procedurally defaulted. Nor do we address Magwood's contention that the Court of Appeals erred in rejecting his ineffective-assistance claim by not addressing whether his attorney should have objected under federal law.

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[16] Several Courts of Appeals have held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the "portion of a judgment that arose as a result of a previous successful action." *Lang* v. *United States*, 474 F. 3d 348, 351–352 (CA6 2007) (citing decisions); see also *Walker*, 133 F. 3d, at 455; *Esposito* v. *United States*, 135 F. 3d 111, 113–114 (CA2 1997) *(per curiam)*.

[17] In any case, we cannot agree with the dissent that our reading of § 2244(b) gives a windfall to "a defendant who succeeds on even the most minor and discrete issue." *Post*, at 354. AEDPA permits relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a).

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

It is so ordered.

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

I join the Court's well-reasoned opinion with the exception of Part IV–B. The Court neither purports to alter nor does alter our holding in *Panetti* v. *Quarterman*, 551 U. S. 930 (2007). See *ante*, at 335, n. 11. In *Panetti*, we "declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, *even when* the later filings address a state-court judgment *already challenged in a prior § 2254 application.*" 551 U. S., at 944 (emphasis added). In this case, by contrast, we determine how 28 U. S. C. § 2244(b) applies to a habeas petition that is the *first* petition to address a *new* "state-court judgment" that has not "already [been] challenged in a prior § 2254 application." And, for the reasons provided by the Court, such a "first" petition is not "second or successive." Of course, as the dissent correctly states, if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*'s holding that an "application" containing a "claim" that "the petitioner had no fair opportunity to raise" in his first habeas petition is not a "second or successive" application. *Post*, at 346 (opinion of KENNEDY, J.). Contrary to the dissent's assertion, *post*, at 349–350, the Court's decision today and our decision in *Panetti* fit comfortably together.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE ALITO join, dissenting.

The Court today decides that a state prisoner who succeeds in his first federal habeas petition on a discrete sen-

tencing claim may later file a second petition raising numerous previously unraised claims, even if that petition is an abuse of the writ of habeas corpus. The Court, in my respectful submission, reaches this conclusion by misreading precedents on the meaning of the phrase "second or successive" in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court then rewrites AEDPA's text but refuses to grapple with the logical consequences of its own editorial judgment. A straightforward application of the principles articulated in *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), consistent with the conclusions of all of the Courts of Appeals that have considered this issue, dictates the opposite result. The design and purpose of AEDPA is to avoid abuses of the writ of habeas corpus, in recognition of the potential for the writ's intrusive effect on state criminal justice systems. But today's opinion, with considerable irony, is not only a step back from AEDPA protection for States but also a step back even from abuse-of-the-writ principles that were in place before AEDPA. So this respectful dissent becomes necessary.

I

Absent two exceptions that are inapplicable here, the relevant statutory provision in AEDPA provides:

> "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed . . . ." 28 U. S. C. §2244(b)(2).

The question before the Court is whether petitioner Billy Joe Magwood filed "a second or successive" application by raising a claim in his second habeas petition that he had available and yet failed to raise in his first petition.

The term "second or successive" is a habeas "term of art." *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000). It incorporates the pre-AEDPA abuse-of-the-writ doctrine. *Panetti*, 551 U. S., at 947. Before today, that legal principle was estab-

lished by the decisions of this Court. See, *e. g.*, *ibid.; Slack*, *supra*, at 486. Under that rule, to determine whether an application is "second or successive," a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application. *Panetti*, *supra*, at 947. Applying this analytical framework puts applications into one of three categories.

First, if the petitioner had a full and fair opportunity to raise the claim in the prior application, a second-in-time application that seeks to raise the same claim is barred as "second or successive." This is consistent with pre-AEDPA cases applying the abuse-of-the-writ doctrine and the bar on "second or successive" applications. See, *e. g.*, *Wong Doo* v. *United States*, 265 U. S. 239, 241 (1924) (second application barred where petitioner had a "full opportunity to offer proof" of the same claim in his first habeas application); *Woodard* v. *Hutchins*, 464 U. S. 377, 379 (1984) (Powell, J., concurring, writing for a majority of the Court) (second application barred for claims that "could and should have been raised in [the] first petition"); *Delo* v. *Stokes*, 495 U. S. 320, 321 (1990) *(per curiam)* (subsequent application barred for a claim that "could have been raised in his first petition for federal habeas corpus"). As *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991), explained, "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." See also Habeas Corpus Rule 2(c) (instructing habeas petitioners to "specify all the grounds for relief available to [them]" and to "state the facts supporting each ground"); *Schlup* v. *Delo*, 513 U. S. 298, 317–323 (1995) (describing adoption in habeas, through legislation and judicial decision, of modified res judicata (claim preclusion) doctrine); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4406, p. 138 (2d ed. 2002) (claim preclusion aspect of res judicata doctrine bars

"matters that [were not, but] ought to have been raised" in prior litigation).

Second, if the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not "second or successive," and § 2244(b)(2)'s bar does not apply. This can occur where the claim was not yet ripe at the time of the first petition, see, *e. g.*, *Panetti*, *supra*, at 947, or where the alleged violation occurred only after the denial of the first petition, such as the State's failure to grant the prisoner parole as required by state law, see, *e. g.*, *Hill* v. *Alaska*, 297 F. 3d 895, 898–899 (CA9 2002); *Crouch* v. *Norris*, 251 F. 3d 720, 723–725 (CA8 2001); *In re Cain*, 137 F. 3d 234, 236 (CA5 1998). And to respond to the Court's concern, see *ante*, at 341, if the applicant in his second petition raises a claim that he raised in his first petition but the district court left unaddressed at its own discretion, the second application would not be "second or successive." Reraising a previously unaddressed claim is not abusive by any definition. If the Court believes there are "[m]any examples" where abuse-of-the-writ principles unfairly close the door to state prisoners seeking federal habeas review, *ibid.*, one would think the Court would be able to come up with an example. It does not do so.

Third, a "mixed petition"—raising both abusive and nonabusive claims—would be "second or successive." In that circumstance the petitioner would have to obtain authorization from the court of appeals to proceed with the nonabusive claims. See § 2244(b)(3); see also 28 J. Moore et al., Federal Practice § 671.10[2][b] (3d ed. 2010). After the court of appeals makes its determination, a district court may consider nonabusive claims that the petitioner had no fair opportunity to present in his first petition and dismiss the abusive claims. See § 2244(b)(4).

The operation of the above rule is exemplified by the Court's decision in *Panetti*. Panetti's claim that he was mentally incompetent to be executed under *Ford* v. *Wain-*

wright, 477 U. S. 399 (1986), did not become ripe until after the denial of his first habeas petition. When the *Ford* claim became ripe, Panetti filed a second habeas petition, raising his *Ford* claim for the first time. In concluding that this second habeas petition was not a "second or successive" application, this Court explained that "second or successive" did not "refe[r] to all § 2254 applications filed second or successively in time," but was rather a term of art that "takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]." 551 U. S., at 943–944. The Court relied on AEDPA's purpose of "'further[ing] the principles of comity, finality, and federalism,'" *id.*, at 945 (quoting *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003)), an aversion to the "empty formality requiring prisoners to file unripe" claims, 551 U. S., at 946, and this Court's pre-AEDPA cases regarding the abuse-of-the-writ doctrine, *id.*, at 947. *Panetti* thus looked to the nature of the claim raised in the second-in-time habeas petition to determine that the application was not "second or successive." *Ibid.*

The above principles apply to a situation, like the present one, where the petitioner in his first habeas proceeding succeeds in obtaining a conditional grant of relief, which allows the state court to correct an error that occurred at the original sentencing. Assume, as alleged here, that in correcting the error in a new sentencing proceeding, the state court duplicates a different mistake that also occurred at the first sentencing. The second application is "second or successive" with respect to that claim because the alleged error "could and should have" been raised in the first petition. *Woodard*, 464 U. S., at 379 (opinion of Powell, J.). Put another way, under abuse-of-the-writ principles, a petitioner loses his right to challenge the error by not raising a claim at the first opportunity after his claim becomes ripe. On the other hand, if the petitioner raises a claim in his second habeas petition that could not have been raised in the earlier petition—perhaps because the error occurred for the first

time during resentencing—then the application raising the claim is not "second or successive" and § 2244(b)(2)'s bar does not apply.

Although the above-cited authorities are adequate to show that the application in this case is "second or successive," it must be noted that no previous case from this Court has dealt with the precise sequence of events here: A petitioner attempts to bring a previously unraised claim after a second resentencing proceeding that followed a grant of federal habeas relief. The conclusion that such an application is barred as "second or successive" unless the claim was previously unavailable is consistent with the approach of every Court of Appeals that has considered the issue, although some of those cases highlight subtleties that are not relevant under abuse-of-the-writ principles. See, *e. g.*, *Pratt* v. *United States*, 129 F. 3d 54, 62–63 (CA1 1997); *Galtieri* v. *United States*, 128 F. 3d 33, 37–38 (CA2 1997); *United States* v. *Orozco-Ramirez*, 211 F. 3d 862, 871 (CA5 2000); *Lang* v. *United States*, 474 F. 3d 348, 351–353 (CA6 2007). While most of these cases arose in the context of federal prisoners' challenges to their convictions or sentences under 28 U. S. C. § 2255, the "second or successive" bar under § 2244(b) applies to § 2255 motions. See § 2255(h) (2006 ed., Supp. II).

In the present case the Court should conclude that Magwood has filed a "second or successive habeas corpus application." In 1983, he filed a first federal habeas petition raising nine claims, including that the trial court improperly failed to consider two mitigating factors when it imposed Magwood's death sentence. The District Court granted Magwood's petition and ordered relief only on the mitigating factor claim. The state trial court then held a new sentencing proceeding, in which it considered all of the mitigating factors and reimposed the death penalty. In 1997, Magwood brought a second habeas petition, this time raising an argument that could have been, but was not, raised in his first petition. The argument was that he was not eligible for the

death penalty because he did not have fair notice that his crime rendered him death eligible. There is no reason that Magwood could not have raised the identical argument in his first habeas petition. Because Magwood had a full and fair opportunity to adjudicate his death-eligibility claim in his first petition in 1983, his 1997 petition raising this claim is barred as "second or successive."

II

The Court reaches the opposite result by creating an ill-defined exception to the "second or successive" application bar. The Court, in my respectful view, makes two critical errors. First, it errs in rejecting *Panetti*'s claim-based approach to determining whether an application is "second or successive." Second, it imposes an atextual exception to § 2244(b)'s bar against "second or successive" applications, requiring that the second-in-time application be brought against the same judgment. This second error is underscored by the fact that the Court refuses to deal with the logical implications of its newly created rule.

A

The Court concludes that because AEDPA refers to "second or successive" applications rather than "second or successive" claims, the nature of the claims raised in the second application is irrelevant. See *ante*, at 334–335 ("[A]lthough we agree with the State that many of the rules under § 2244(b) focus on claims, that does not entitle us to rewrite the statute to make the phrase 'second or successive' modify claims as well"). This is incorrect. As explained above, *Panetti* establishes that deciding whether an application itself is "second or successive" requires looking to the nature of the claim that the application raises to determine whether the petitioner had a full and fair opportunity to raise that claim in his earlier petition. Indeed, the only way *Panetti* could have concluded that the application there was not "sec-

ond or successive" was to look at the underlying claim the application raised. 551 U. S., at 947.

While the Court asserts it is not calling *Panetti* into doubt, see *ante*, at 335, n. 11, it does not even attempt to explain how its analysis is consistent with that opinion, cf. 551 U. S., at 964 (THOMAS, J., dissenting) ("Before AEDPA's enactment, the phrase 'second or successive' meant the same thing it does today—any subsequent federal habeas application challenging a state-court judgment"). The best that can be said is the Court is limiting its new doctrine so it has no applicability to previously unexhausted *Ford* claims, confining the holding of *Panetti* to the facts of that case. 551 U. S., at 968 (THOMAS, J., dissenting) ("Today's decision thus stands only for the proposition that *Ford* claims somehow deserve a special (and unjustified) exemption from the statute's plain import").

Failing to consider the nature of the claim when deciding whether an application is barred as "second or successive" raises other difficulties. Consider a second-in-time habeas petition challenging an alleged violation that occurred entirely after the denial of the first petition; for example, a failure to grant a prisoner parole at the time promised him by state law or the unlawful withdrawal of good-time credits. See *supra*, at 346. Under the Court's rule, it would appear that a habeas application challenging those alleged violations would be barred as "second or successive" because it would be a second-in-time application challenging custody pursuant to the same judgment. That result would be inconsistent with abuse-of-the-writ principles and might work a suspension of the writ of habeas corpus.

B

Having unmoored the phrase "second or successive" from its textual and historical underpinnings, the Court creates a new puzzle for itself: If the nature of the claim is not what makes an application "second or successive," then to

what should a court look? Finding no reference point in § 2244(b)'s text, the Court searches in AEDPA for a different peg.

The Court believes that it finds its peg in a different provision:

> "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a).

But this provision does not purport to create any prerequisites to § 2244(b)'s bar against "second or successive" applications. The accepted reading of the quoted language is that this is a mere "status requirement." See 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 8.1, p. 391 (5th ed. 2005). The provision stands for the simple proposition that a petitioner must be held "pursuant to the judgment of a State court" to be able to file any § 2254(b) petition in the first place. That reading also explains why federal habeas petitions can attack not only the judgment pursuant to which the petitioner is being held but also "the duration of sentence . . . and . . . the conditions under which that sentence is being served," including rules such as "the basis of parole" and "good time" credits. *Id.*, § 9.1, at 475–481.

The Court's reading of the phrase "pursuant to the judgment of a State court" as a limitation on § 2244(b)(2)'s "second or successive" application bar is artificial. The Court would amend § 2244(b)(2) to read: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application *[against the same judgment]* shall be dismissed." This is not what § 2244(b)(2) says.

The Court wholly glosses over another significant problem with its atextual analysis. The Court relies upon the notion

that "[a]n error made a second time is still a new error." *Ante*, at 339. But in making this statement, the Court can mean one of two very different things:

First, it could mean that any error logically encompassed in a reentered judgment is a "new" error. A criminal "judgment" generally includes both the conviction and the sentence. See, *e. g.*, Fed. Rule Crim. Proc. 32(k)(1) (a criminal judgment "must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence"); *Teague* v. *Lane*, 489 U. S. 288, 314, n. 2 (1989) ("As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant"). This well-established principle applies in the federal habeas context, where petitioner is "in custody pursuant to the judgment." § 2254(b). A person cannot be held in custody "pursuant to" a sentence, but only pursuant to "the" (*e. g.*, one) judgment, which includes both the conviction and sentence. See *Burton* v. *Stewart*, 549 U. S. 147, 156–157 (2007) *(per curiam)* (explaining that AEDPA's statute of limitations did not run until the judgment—"both his conviction *and* sentence became final" (internal quotation marks omitted)).

Under this principle, the Court's holding today would allow a challenger in Magwood's position to raise any challenge to the guilt phase of the criminal judgment against him in his second application, since a "new" judgment—consisting of both the conviction and sentence—has now been reentered and all of the errors have (apparently) occurred anew. As an illustration, the state trial court here reentered the following judgment after resentencing: "IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that Billy Joe Magwood is guilty of the offense of aggravated murder . . . and that Billy Joe Magwood is sentenced to death." App. to Pet. for Cert. 106a. This would mean that Magwood's attorney could dig through anything that occurred from *voir dire* to the cross-examination of witnesses to the jury's guilty verdict, and raise any alleged errors for

the first time in his second habeas application, all because the trial court did not properly consider two mitigating factors during Magwood's first sentencing proceeding.

Second, and alternatively, the Court could retreat even further from the statutory text and conclude that only some parts of the reentered judgment are open to challenge by way of a second habeas application. Magwood, for example, argues that he can only challenge previously unraised errors made during sentencing. Brief for Petitioner 21, n. 8. Indeed, Magwood goes further and suggests that even the sentencing would not be reopened in a case where a court's order leads the trial court to revise only the defendant's term of supervised release. *Id.*, at 28, n. 11. If the Court is adopting this some-parts-of-the-criminal-judgment exception to the "second or successive" application bar, it is unclear why the error that Magwood now raises is a "new error" at all. After all, Magwood did not challenge his death eligibility in his first habeas petition but only disputed that he should not get the death penalty, as a matter of discretion, if the trial court properly weighed all of the aggravating and mitigating factors. The state trial court conducted this reweighing and had no reason to reconsider the uncontested finding that Magwood is death eligible. It is hard to see how the trial court's failure to reconsider *sua sponte* its previous death-eligibility finding is a "new error," any more than its failure to reconsider the various errors that may have taken place at the guilt phase would have been new errors.

The Court contends the approach dictated by *Panetti* "considerably undermine[s]—if not render[s] superfluous," *ante*, at 335, the exceptions in § 2244(b)(2), which allow a petitioner to bring a claim in a "second or successive" application based on certain factual discoveries or based on a new Supreme Court precedent that has been applied retroactively. The Court seems to be saying that applying *Panetti*'s rule would make the exceptions superfluous, because any claim that

would satisfy the exceptions would necessarily satisfy the more general rule derived from the abuse-of-the-writ doctrine. But the Court misconceives the scope of the rule that an application is only "second or successive" if it raises for the first time a claim that could have been raised before. A second petition raising a claim that could have been raised in a prior petition, even though strengthened by a new decision from this Court or based upon newly discovered evidence, is still "second or successive." Thus this subsequent application would only be permitted if it qualified under the pertinent subsection (b)(2) exception. In fact, it is the Court's approach that limits the relevance of the subsection (b)(2) exceptions. Under the Court's theory, the "second or successive" bar does not apply at all to applications filed by petitioners in Magwood's situation, and thus the subsection (b)(2) exceptions would have no operation in that context.

III

The Court's approach disregards AEDPA's "'principles of comity, finality, and federalism.'" *Panetti*, 551 U. S., at 945 (quoting *Miller-El*, 537 U. S., at 337). Under the Court's newly created exception to the "second or successive" application bar, a defendant who succeeds on even the most minor and discrete issue relating to his sentencing would be able to raise 25 or 50 new sentencing claims in his second habeas petition, all based on arguments he failed to raise in his first petition. "[I]f reexamination of [a] convictio[n] in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *McCleskey*, 499 U. S., at 492.

The Court's novel exception would also allow the once-successful petitioner to reraise every argument against a sentence that was rejected by the federal courts during the first round of federal habeas review. As respondents explain, under the Court's theory, "a post-resentencing peti-

tioner could simply staple a new cover page with the words, '§ 2254 Petition Attacking New Judgment,' to his previously adjudicated petition." Brief for Respondents 47. Because traditional res judicata principles do not apply to federal habeas proceedings, see *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924), this would force federal courts to address twice (or thrice, or more) the same claims of error. The State and the victims would have to bear anew the "significant costs of federal habeas corpus review," *McCleskey*, *supra*, at 490–491, all because the petitioner previously succeeded on a wholly different, discrete, and possibly unrelated claim.

The Court's suggestion that "[i]t will not take a court long to dispose of such claims where the court has already analyzed the legal issues," *ante*, at 341, n. 15, misses the point. This reassurance will be cold comfort to overworked state district attorneys, who will now have to waste time and resources writing briefs analyzing dozens of claims that should be barred by abuse-of-the-writ principles. It is difficult to motivate even the most dedicated professionals to do their best work, day after day, when they have to deal with the dispiriting task of responding to previously rejected or otherwise abusive claims. But that is exactly what the Court is mandating, under a statute that was designed to require just the opposite result. If the analysis in this dissent is sound it is to be hoped that the States will document the ill effects of the Court's opinion so that its costs and deficiencies are better understood if this issue, or a related one, can again come before the Court.

The Court's new exception will apply not only to death penalty cases like the present one, where the newly raised claim appears arguably meritorious. It will apply to all federal habeas petitions following a prior successful petition, most of which will not be in death cases and where the abusive claims the Court now permits will wholly lack merit. And, in this vein, it is striking that the Court's decision means that States subject to federal habeas review hence-

forth receive less recognition of a finality interest than the Federal Government does on direct review of federal criminal convictions. See *United States* v. *Parker*, 101 F. 3d 527, 528 (CA7 1996) (Posner, C. J.) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it").

The Court's approach also turns AEDPA's bar against "second or successive" applications into a one-way ratchet that favors habeas petitioners. Unless today's decision is read to unduly limit *Panetti*, see *supra*, at 350, AEDPA still incorporates recognized exceptions to the abuse-of-the-writ doctrine to allow petitioners to bring their previously unavailable and unripe claims, see *ante*, at 343 (BREYER, J., concurring in part and concurring in judgment). But after today's holding, AEDPA now "modifie[s]," *ante*, at 337, abuse-of-the-writ principles and allows petitioners to bring abusive claims so long as they have won any victory pursuant to a prior federal habeas petition. The Court thus reads AEDPA as creating a new loophole that habeas petitioners can exploit to challenge their sentences based on grounds they previously neglected to raise. This is inconsistent with the understanding that AEDPA adds "new restrictions on successive petitions" and "further restricts the availability of relief to habeas petitioners." *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996).

* * *

Had Magwood been unsuccessful in his first petition, all agree that claims then available, but not raised, would be barred. But because he prevailed in his attack on one part of his sentencing proceeding the first time around, the Court rules that he is free, postsentencing, to pursue claims on federal habeas review that might have been raised earlier. The Court is mistaken in concluding that Congress, in enacting a statute aimed at placing new restrictions on successive petitions, would have intended this irrational result.

Magwood had every chance to raise his death-eligibility claim in his first habeas petition. He has abused the writ by raising this claim for the first time in his second petition. His application is therefore "second or successive." I would affirm the judgment of the Court of Appeals.

Syllabus

SKILLING *v.* UNITED STATES

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

No. 08–1394. Argued March 1, 2010—Decided June 24, 2010

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into the seventh highest-revenue-grossing company in America. Petitioner Jeffrey Skilling, a longtime Enron officer, was Enron's chief executive officer from February until August 2001, when he resigned. Less than four months later, Enron crashed into bankruptcy, and its stock plummeted in value. After an investigation uncovered an elaborate conspiracy to prop up Enron's stock prices by overstating the company's financial well-being, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the chain of command, indicting Skilling and two other top Enron executives. These three defendants, the indictment charged, engaged in a scheme to deceive investors about Enron's true financial performance by manipulating its publicly reported financial results and making false and misleading statements. Count 1 of the indictment charged Skilling with, *inter alia,* conspiracy to commit "honest-services" wire fraud, 18 U. S. C. §§ 371, 1343, 1346, by depriving Enron and its shareholders of the intangible right of his honest services. Skilling was also charged with over 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.

In November 2004, Skilling moved for a change of venue, contending that hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors. He submitted hundreds of news reports detailing Enron's downfall, as well as affidavits from experts he engaged portraying community attitudes in Houston in comparison to other potential venues. The District Court denied the motion, concluding that pretrial publicity did not warrant a presumption that Skilling would be unable to obtain a fair trial in Houston. Despite incidents of intemperate commentary, the court observed, media coverage, on the whole, had been objective and unemotional, and the facts of the case were neither heinous nor sensational. Moreover, the court asserted, effective *voir dire* would detect juror bias.

In the months before the trial, the court asked the parties for questions it might use to screen prospective jurors. Rejecting the Government's sparer inquiries in favor of Skilling's more probing and specific

questions, the court converted Skilling's submission, with slight modifications, into a 77-question, 14-page document. The questionnaire asked prospective jurors about their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise. The court then mailed the questionnaire to 400 prospective jurors and received responses from nearly all of them. It granted hardship exemptions to about 90 individuals, and the parties, with the court's approval, further winnowed the pool by excusing another 119 for cause, hardship, or physical disability. The parties agreed to exclude, in particular, every prospective juror who said that a preexisting opinion about Enron or the defendants would prevent her from being impartial.

In December 2005, three weeks before the trial date, one of Skilling's codefendants, Richard Causey, pleaded guilty. Skilling renewed his change-of-venue motion, arguing that the juror questionnaires revealed pervasive bias and that news accounts of Causey's guilty plea further tainted the jury pool. The court again declined to move the trial, ruling that the questionnaires and *voir dire* provided safeguards adequate to ensure an impartial jury. The court also denied Skilling's request for attorney-led *voir dire* on the ground that potential jurors were more forthcoming with judges than with lawyers. But the court promised to give counsel an opportunity to ask followup questions, agreed that venire members should be examined individually about pretrial publicity, and allotted the defendants jointly two extra peremptory challenges.

Voir dire began in January 2006. After questioning the venire as a group, the court examined prospective jurors individually, asking each about her exposure to Enron-related news, the content of any stories that stood out in her mind, and any questionnaire answers that raised a red flag signaling possible bias. The court then permitted each side to pose followup questions and ruled on the parties' challenges for cause. Ultimately, the court qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel 12 jurors and 4 alternates. After a four-month trial, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts.

On appeal, Skilling raised two arguments relevant here. First, he contended that pretrial publicity and community prejudice prevented him from obtaining a fair trial. Second, he alleged that the jury improperly convicted him of conspiracy to commit honest-services wire fraud. As to the former, the Fifth Circuit initially determined that the

volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice. Stating, however, that the presumption is rebuttable, the court examined the *voir dire*, found it "proper and thorough," and held that the District Court had empaneled an impartial jury. The Court of Appeals also rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. It did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague.

Held:

1. Pretrial publicity and community prejudice did not prevent Skilling from obtaining a fair trial. He did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. Pp. 377–399.

(a) The District Court did not err in denying Skilling's requests for a venue transfer. Pp. 377–385.

(1) Although the Sixth Amendment and Article III, § 2, cl. 3, provide for criminal trials in the State and district where the crime was committed, these place-of-trial prescriptions do not impede transfer of a proceeding to a different district if extraordinary local prejudice will prevent a fair trial. Pp. 377–378.

(2) The foundation precedent for the presumption of prejudice from which the Fifth Circuit's analysis proceeded is *Rideau* v. *Louisiana*, 373 U. S. 723. Wilbert Rideau robbed a small-town bank, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession, which, without his knowledge, was filmed and televised three times to large local audiences shortly before trial. After the Louisiana trial court denied Rideau's change-of-venue motion, he was convicted, and the conviction was upheld on direct appeal. This Court reversed. "[T]o the tens of thousands of people who saw and heard it," the Court explained, the interrogation "in a very real sense *was* Rideau's trial—at which he pleaded guilty." *Id.*, at 726. "[W]ithout pausing to examine . . . the *voir dire*," the Court held that the "kangaroo court proceedings" trailing the televised confession violated due process. *Id.*, at 726–727. The Court followed *Rideau* in two other cases in which media coverage manifestly tainted criminal prosecutions. However, it later explained that those decisions "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Murphy* v. *Florida*, 421 U. S. 794, 798–799. Thus, prominence does not necessarily produce prejudice, and juror *impartiality* does not require *ignorance.*

See, *e. g.*, *Irvin* v. *Dowd*, 366 U. S. 717, 722. A presumption of prejudice attends only the extreme case. Pp. 378–381.

(3) Important differences separate Skilling's prosecution from those in which the Court has presumed juror prejudice. First, the Court has emphasized the size and characteristics of the community in which the crime occurred. In contrast to the small-town setting in *Rideau*, for example, the record shows that Houston is the Nation's fourth most populous city. Given the large, diverse pool of residents eligible for jury duty, any suggestion that 12 impartial individuals could not be empaneled in Houston is hard to sustain. Second, although news stories about Skilling were not kind, they contained no blatantly prejudicial information such as Rideau's dramatically staged admission of guilt. Third, unlike *Rideau* and other cases in which trial swiftly followed a widely reported crime, over four years elapsed between Enron's bankruptcy and Skilling's trial. Although reporters covered Enron-related news throughout this period, the decibel level of media attention diminished somewhat in the years following Enron's collapse. Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government. It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption. Pp. 381–384.

(4) The Fifth Circuit presumed juror prejudice based primarily on the magnitude and negative tone of the media attention directed at Enron. But "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 554. Here, news stories about Enron did not present the kind of vivid, unforgettable information the Court has recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact. Nor did Enron's sheer number of victims trigger a presumption. Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron, the extensive screening questionnaire and followup *voir dire* yielded jurors whose links to Enron were either nonexistent or attenuated. Finally, while Causey's well-publicized decision to plead guilty shortly before trial created a danger of juror prejudice, the District Court took appropriate steps to mitigate that risk. Pp. 384–385.

(b) No actual prejudice contaminated Skilling's jury. The Court rejects Skilling's assertions that *voir dire* did not adequately detect and defuse juror prejudice and that several seated jurors were biased. Pp. 385–399.

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(1) No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*. Jury selection is "particularly within the province of the trial judge." *Ristaino* v. *Ross*, 424 U. S. 589, 594–595 (internal quotation marks omitted). When pretrial publicity is at issue, moreover, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." *Mu'Min* v. *Virginia*, 500 U. S. 415, 427. The Court considers the adequacy of jury selection in Skilling's case attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality. Pp. 385–387.

(2) Skilling failed to show that his *voir dire* fell short of constitutional requirements. The jury-selection process was insufficient, Skilling maintains, because *voir dire* lasted only five hours, most of the District Court's questions were conclusory and failed adequately to probe jurors' true feelings, and the court consistently took prospective jurors at their word once they claimed they could be fair, no matter any other indications of bias. This Court's review of the record, however, yields a different appraisal. The District Court initially screened venire members by eliciting their responses to a comprehensive questionnaire drafted in large part by Skilling. That survey helped to identify prospective jurors excusable for cause and served as a springboard for further questions; *voir dire* thus was the culmination of a lengthy process. Moreover, inspection of the questionnaires and *voir dire* of the seated jurors reveals that, notwithstanding the flaws Skilling lists, the selection process secured jurors largely uninterested in publicity about Enron and untouched by the corporation's collapse. Whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway. Relying on *Irvin* v. *Dowd*, 366 U. S., at 727–728, Skilling asserts the District Court should not have accepted jurors' promises of fairness. But a number of factors show that the District Court had far less reason than the trial court in *Irvin* to discredit jurors' assurances of impartiality: News stories about Enron contained nothing resembling the horrifying information rife in reports about Leslie Irvin's rampage of robberies and murders; Houston shares little in common with the rural community in which Irvin's trial proceeded; circulation figures for Houston media sources were far lower than the 95% saturation level recorded in *Irvin*; and Skilling's seated jurors exhibited nothing like the display of bias shown in *Irvin*. In any event, the District Court did not simply take venire members at their word. It questioned each juror individually to uncover concealed bias. This face-to-face op-

portunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and news sources, gave the court a sturdy foundation to assess fitness for jury service. Pp. 387–395.

(3) Skilling's allegation that several jurors were openly biased also fails. In reviewing such claims, the deference due to district courts is at its pinnacle: "A trial court's findings of juror impartiality may be overturned only for manifest error." *Mu'Min*, 500 U. S., at 428 (internal quotation marks omitted). Skilling, moreover, unsuccessfully challenged only one of the seated jurors for cause, "strong evidence that he was convinced the [other] jurors were not biased and had not formed any opinions as to his guilt." *Beck* v. *Washington*, 369 U. S. 541, 557–558. A review of the record reveals no manifest error regarding the empaneling of Jurors 11, 20, and 63, each of whom indicated, *inter alia*, that he or she would be fair to Skilling and would require the Government to prove its case. Four other jurors Skilling claims he would have excluded with extra peremptory strikes, Jurors 38, 67, 78, and 84, exhibited no signs of prejudice this Court can discern. Pp. 395–399.

2. Section 1346, which proscribes fraudulent deprivations of "the intangible right of honest services," is properly confined to cover only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within the Court's confinement of § 1346's proscription. Pp. 399–414.

(a) To place Skilling's claim that § 1346 is unconstitutionally vague in context, the Court reviews the origin and subsequent application of the honest-services doctrine. Pp. 399–402.

(1) In a series of decisions beginning in the 1940's, the Courts of Appeals, one after another, interpreted the mail-fraud statute's prohibition of "any scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights. See, *e. g.*, *Shushan* v. *United States*, 117 F. 2d 110, which stimulated the development of the "honest-services" doctrine. Unlike traditional fraud, in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services doctrine targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. Even if the scheme occasioned a money or property gain for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." Most often these cases involved bribery of public officials, but over time, the courts increasingly recognized that the doctrine applied to a private employee who breached his allegiance to his employer, often by accept-

ing bribes or kickbacks. By 1982, all Courts of Appeals had embraced the honest-services theory of fraud. Pp. 399–401.

(2) In 1987, this Court halted the development of the intangible-rights doctrine in *McNally* v. *United States*, 483 U. S. 350, 360, which held that the mail-fraud statute was "limited in scope to the protection of property rights." "If Congress desires to go further," the Court stated, "it must speak more clearly." *Ibid.* Pp. 401–402.

(3) Congress responded the next year by enacting § 1346, which provides: "For the purposes of th[e] chapter [of the U. S. Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." P. 402.

(b) Section 1346, properly confined to core cases, is not unconstitutionally vague. Pp. 402–413.

(1) To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357. The void-for-vagueness doctrine embraces these requirements. Skilling contends that § 1346 meets neither of the two due process essentials. But this Court must, if possible, construe, not condemn, Congress' enactments. See, *e. g.*, *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 571. Alert to § 1346's potential breadth, the Courts of Appeals have divided on how best to interpret the statute. Uniformly, however, they have declined to throw out the statute as irremediably vague. This Court agrees that § 1346 should be construed rather than invalidated. Pp. 402–404.

(2) The Court looks to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. Congress, it bears emphasis, enacted § 1346 on the heels of *McNally* and drafted the statute using that decision's terminology. See 483 U. S., at 355, 362. Pp. 404–405.

(3) To preserve what Congress certainly intended § 1346 to cover, the Court pares the pre-*McNally* body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. In parsing the various pre-*McNally* decisions, the Court acknowledges that Skilling's vagueness challenge has force, for honest-services decisions were not models of clarity or consistency. It has long been the Court's practice, however,

before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. See, *e. g.*, *Hooper* v. *California*, 155 U. S. 648, 657. Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core because the pre-*McNally* cases are inconsistent and hopelessly unclear. This Court rejected an argument of the same tenor in *Letter Carriers*, 413 U. S., at 571–572. Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these decisions do not cloud the fact that the vast majority of cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. Indeed, *McNally* itself presented a paradigmatic kickback fact pattern. 483 U. S., at 352–353, 360. In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Because reading the statute to proscribe a wider range of offensive conduct would raise vagueness concerns, the Court holds that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law. Pp. 405–409.

(4) The Government urges the Court to go further by reading § 1346 to proscribe another category of conduct: undisclosed self-dealing by a public official or private employee. Neither of the Government's arguments in support of this position withstands close inspection. Contrary to the first, *McNally* itself did not center on nondisclosure of a conflicting financial interest, but rather involved a classic kickback scheme. See 483 U. S., at 352–353, 360. Reading § 1346 to proscribe bribes and kickbacks—and nothing more—satisfies Congress' undoubted aim to reverse *McNally* on its facts. Nor is the Court persuaded by the Government's argument that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for some conflict-of-interest schemes, they reached no consensus on which schemes qualified. Given the relative infrequency of those prosecutions and the intercircuit inconsistencies they produced, the Court concludes that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases. Further dispelling doubt on this point is the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland* v. *United States*, 531 U. S. 12, 25 (internal quotation marks omitted). The Court therefore resists the Government's less constrained construction of § 1346 absent Congress' clear instruction otherwise. "If Congress desires to go further," the Court reiterates, "it must speak more clearly than it has." *McNally*, 483 U. S., at 360. Pp. 409–411.

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(5) Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. A prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks presents neither a fair-notice nor an arbitrary-prosecution problem. See *Kolender*, 461 U. S., at 357. As to fair notice, it has always been clear that bribes and kickbacks constitute honest-services fraud, *Williams* v. *United States*, 341 U. S. 97, 101, and the statute's *mens rea* requirement further blunts any notice concern, see, *e. g.*, *Screws* v. *United States*, 325 U. S. 91, 101–104. As to arbitrary prosecutions, the Court perceives no significant risk that the honest-services statute, as here interpreted, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing and defining similar crimes. Pp. 412–413.

(c) Skilling did not violate § 1346, as the Court interprets the statute. The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health to his own profit, but the Government never alleged that he solicited or accepted side payments from a third party in exchange for making these misrepresentations. Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. See *Yates* v. *United States*, 354 U. S. 298. This determination, however, does not necessarily require reversal of the conspiracy conviction, for errors of the *Yates* variety are subject to harmless-error analysis. The Court leaves the parties' dispute about whether the error here was harmless for resolution on remand, along with the question whether reversal on the conspiracy count would touch any of Skilling's other convictions. Pp. 413–414.

554 F. 3d 529, affirmed in part, vacated in part, and remanded.

GINSBURG, J., delivered the opinion of the Court, Part I of which was joined by ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., Part II of which was joined by ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., and Part III of which was joined by ROBERTS, C. J., and STEVENS, BREYER, ALITO, and SOTOMAYOR, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, and in which KENNEDY, J., joined except as to Part III, *post*, p. 415. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 425. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and BREYER, JJ., joined, *post*, p. 427.

Sri Srinivasan argued the cause for petitioner. With him on the briefs were *Walter Dellinger*, *Jonathan D. Hacker*, *Irving L. Gornstein*, *Daniel M. Petrocelli*, *M. Randall Oppenheimer*, *Matthew T. Kline*, and *David J. Marroso*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Kagan*, *Acting Assistant Atttorney General Raman*, former *Assistant Attorney General Breuer*, *Nina Goodman*, *David A. O'Neil*, *Joel Gershowitz*, and *Kevin Gingras*.*

JUSTICE GINSBURG delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion two questions arising from the prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes committed before the corporation's collapse. First, did pretrial publicity and community prejudice prevent Skilling from obtaining a fair trial? Second, did the jury improperly convict Skilling of conspiracy to commit "honest-services" wire fraud, 18 U. S. C. §§ 371, 1343, 1346?

Answering no to both questions, the Fifth Circuit affirmed Skilling's convictions. We conclude, in common with the Court of Appeals, that Skilling's fair-trial argument fails;

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Lawrence S. Robbins*, *Daniel R. Walfish*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the National Association of Criminal Defense Lawyers by *John D. Cline*, *Barbara E. Bergman*, and *Thomas A. Hagemann;* and for the Texas Criminal Defense Lawyers Association et al. by *Jeffrey T. Green* and *Sarah O'Rourke Schrup*.

Briefs of *amici curiae* were filed for ABC, Inc., et al. by *David A. Schulz*, *Steven D. Zansberg*, *Richard A. Bernstein*, *Peter Scheer*, *Eve Burton*, *Jonathan Donnellan*, *Stephen J. Burns*, *Lucy A. Dalglish*, *Gregg P. Leslie*, and *Eric N. Lieberman;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra*, *Timothy Sandefur*, *Timothy Lynch*, and *Ilya Shapiro;* and for Thomas Rybicki by *Edward L. Larsen*.

Skilling, we hold, did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. But we disagree with the Fifth Circuit's honest-services ruling. In proscribing fraudulent deprivations of "the intangible right of honest services," § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription. We therefore affirm in part and vacate in part.

I

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into one of the world's leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company's founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation's ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at $90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation's collapse, the U. S. Department of Justice formed an Enron Task Force, comprising prosecutors and Federal Bureau of Investigation agents from around the Nation. The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up

the corporation's chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

These three defendants, the indictment alleged,

> "engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading." App. ¶ 5, p. 277a.

Skilling and his co-conspirators, the indictment continued, "enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige." *Id.*, ¶ 14, at 280a.

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services." *Id.*, ¶ 87, at 318a.[1] The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.

In November 2004, Skilling moved to transfer the trial to another venue; he contended that hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors. To support this assertion, Skilling, aided by media experts, submitted hundreds of news reports detailing Enron's downfall; he also presented affidavits from

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[1] The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. § 1341 (mail fraud); § 1343 (wire fraud). The honest-services statute, § 1346, defines "the term 'scheme or artifice to defraud' " in these provisions to include "a scheme or artifice to deprive another of the intangible right of honest services."

the experts he engaged portraying community attitudes in Houston in comparison to other potential venues.

The U. S. District Court for the Southern District of Texas, in accord with rulings in two earlier instituted Enron-related prosecutions,[2] denied the venue-transfer motion. Despite "isolated incidents of intemperate commentary," the court observed, media coverage "ha[d] [mostly] been objective and unemotional," and the facts of the case were "neither heinous nor sensational." App. to Brief for United States 10a–11a.[3] Moreover, "courts ha[d] commonly" favored "effective voir dire . . . to ferret out any [juror] bias." *Id.*, at 18a. Pretrial publicity about the case, the court concluded, did not warrant a presumption that Skilling would be unable to obtain a fair trial in Houston. *Id.*, at 22a.

In the months leading up to the trial, the District Court solicited from the parties questions the court might use to screen prospective jurors. Unable to agree on a question-

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[2] See *United States* v. *Fastow*, 292 F. Supp. 2d 914, 918 (SD Tex. 2003); Order in *United States* v. *Hirko*, No. 4:03–cr–00093 (SD Tex., Nov. 24, 2004), Record, Doc. 484, p. 6. These rulings were made by two other judges of the same District. Three judges residing in the area thus independently found that defendants in Enron-related cases could obtain a fair trial in Houston.

[3] Painting a different picture of the media coverage surrounding Enron's collapse, JUSTICE SOTOMAYOR's opinion relies heavily on affidavits of media experts and jury consultants submitted by Skilling in support of his venue-transfer motion. *E. g.*, *post*, at 428, 429–430, 431 (opinion concurring in part and dissenting in part) (hereinafter dissent); *post*, at 431, n. 2, and 448, n. 10; *post*, at 451, and 459–460, n. 22. These Skilling-employed experts selected and emphasized negative statements in various news stories. But the District Court Judge did not find the experts' samples representative of the coverage at large; having "[m]eticulous[ly] review[ed] all of the evidence" Skilling presented, the court concluded that "incidents [of news reports using] less-than-objective language" were dwarfed by "the largely fact-based tone of most of the articles." App. to Brief for United States 7a, 10a, 11a. See also *post*, at 429 (acknowledging that "many of the stories were straightforward news items").

naire's format and content, Skilling and the Government submitted dueling documents. On venire members' sources of Enron-related news, for example, the Government proposed that they tick boxes from a checklist of generic labels such as "[t]elevision," "[n]ewspaper," and "[r]adio," Record 8415; Skilling proposed more probing questions asking venire members to list the specific names of their media sources and to report on "what st[ood] out in [their] mind[s]" of "all the things [they] ha[d] seen, heard or read about Enron," *id.*, at 8404–8405.

The District Court rejected the Government's sparer inquiries in favor of Skilling's submission. Skilling's questions "[we]re more helpful," the court said, "because [they] [we]re generally . . . open-ended and w[ould] allow the potential jurors to give us more meaningful information." *Id.*, at 9539. The court converted Skilling's submission, with slight modifications, into a 77-question, 14-page document that asked prospective jurors about, *inter alia*, their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise.[4]

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[4] Questions included the following: "What are your opinions about the compensation that executives of large corporations receive?"; "Have you, any family members, or friends ever worked for or applied for work with," "done business with," or "owned stock in Enron Corporation or any Enron subsidiaries and partnership?"; "Do you know anyone . . . who has been negatively affected or hurt in any way by what happened at Enron?"; "Do you have an opinion about the cause of the collapse of Enron? If YES, what is your opinion? On what do you base your opinion?"; "Have you heard or read about any of the Enron cases? If YES, please tell us the name of all sources from which you have heard or read about the Enron cases."; "Have you read any books or seen any movies about Enron? If YES, please describe."; "Are you angry about what happened with Enron? If YES, please explain."; "Do you have an opinion about . . . Jeffrey Skilling . . . [?] If YES, what is your opinion? On what do you base your

In November 2005, the District Court mailed the questionnaire to 400 prospective jurors and received responses from nearly all the addressees. The court granted hardship exemptions to approximately 90 individuals, *id.*, at 11773–11774, and the parties, with the court's approval, further winnowed the pool by excusing another 119 for cause, hardship, or physical disability, *id.*, at 11891, 13594. The parties agreed to exclude, in particular, "each and every" prospective juror who said that a pre-existing opinion about Enron or the defendants would prevent her from impartially considering the evidence at trial. *Id.*, at 13668.

On December 28, 2005, three weeks before the date scheduled for the commencement of trial, Causey pleaded guilty. Skilling's attorneys immediately requested a continuance, and the District Court agreed to delay the proceedings until the end of January 2006. *Id.*, at 14277. In the interim, Skilling renewed his change-of-venue motion, arguing that the juror questionnaires revealed pervasive bias and that news accounts of Causey's guilty plea further tainted the jury pool. If Houston remained the trial venue, Skilling urged that "jurors need to be questioned individually by both the Court *and* counsel" concerning their opinions of Enron and "publicity issues." *Id.*, at 12074.

The District Court again declined to move the trial. Skilling, the court concluded, still had not "establish[ed] that pretrial publicity and/or community prejudice raise[d] a presumption of inherent jury prejudice." *Id.*, at 14115. The questionnaires and *voir dire*, the court observed, provided

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opinion?"; "Based on anything you have heard, read, or been told[,] do you have any opinion about the guilt or innocence of . . . Jeffrey Skilling[?] If . . . YES . . . , please explain."; "[W]ould any opinion you may have formed regarding Enron or any of the defendants prevent you from impartially considering the evidence presented during the trial of . . . Jeffrey Skilling[?] If YES or UNSURE . . . , please explain."; "Is there anything else you feel is important for the court to know about you?" Record 13013–13026.

safeguards adequate to ensure an impartial jury. *Id.*, at 14115–14116.

Denying Skilling's request for attorney-led *voir dire*, the court said that in 17 years on the bench:

> "I've found . . . I get more forthcoming responses from potential jurors than the lawyers on either side. I don't know whether people are suspicious of lawyers—but I think if I ask a person a question, I will get a candid response much easier than if a lawyer asks the question." *Id.*, at 11805.

But the court promised to give counsel an opportunity to ask followup questions, *ibid.*, and it agreed that venire members should be examined individually about pretrial publicity, *id.*, at 11051–11053. The court also allotted the defendants jointly 14 peremptory challenges, 2 more than the standard number prescribed by Federal Rule of Criminal Procedure 24(b)(2) and (c)(4)(B). *Id.*, at 13673–13675.

Voir dire began on January 30, 2006. The District Court first emphasized to the venire the importance of impartiality and explained the presumption of innocence and the Government's burden of proof. The trial, the court next instructed, was not a forum "to seek vengeance against Enron's former officers," or to "provide remedies for" its victims. App. 823a. "The bottom line," the court stressed, "is that we want . . . jurors who . . . will faithfully, conscientiously and impartially serve if selected." *Id.*, at 823a–824a. In response to the court's query whether any prospective juror questioned her ability to adhere to these instructions, two individuals indicated that they could not be fair; they were therefore excused for cause, *id.*, at 816a, 819a–820a.

After questioning the venire as a group,[5] the District Court brought prospective jurors one by one to the bench

[5] Among other questions, the court asked whether sympathy toward the victims of Enron's collapse or a desire to see justice done would overpower prospective jurors' impartiality. App. 839a–840a.

for individual examination. Although the questions varied, the process generally tracked the following format: The court asked about exposure to Enron-related news and the content of any stories that stood out in the prospective juror's mind. Next, the court homed in on questionnaire answers that raised a red flag signaling possible bias. The court then permitted each side to pose followup questions. Finally, after the venire member stepped away, the court entertained and ruled on challenges for cause. In all, the court granted one of the Government's for-cause challenges and denied four; it granted three of the defendants' challenges and denied six. The parties agreed to excuse three additional jurors for cause and one for hardship.

By the end of the day, the court had qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel 12 jurors and 4 alternates.[6] Before the jury was sworn in, Skilling objected to the seating of six jurors. He did not contend that they were in fact biased; instead, he urged that he would have used peremptories to exclude them had he not exhausted his supply by striking

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[6] Selection procedures of similar style and duration took place in three Enron-related criminal cases earlier prosecuted in Houston—*United States* v. *Arthur Andersen LLP*, No. 4:02–cr–00121–1 (SD Tex.) (charges against Enron's outside accountants); *United States* v. *Bayly*, No. 4:03–cr–00363 (SD Tex.) (charges against Merrill Lynch and Enron executives for alleged sham sales of Nigerian barges); *United States* v. *Hirko*, No. 4:03–cr–00093 (SD Tex.) (fraud and insider-trading charges against five Enron Broadband Services executives). See Brief for United States 9 (In all three cases, the District Court "distributed a jury questionnaire to a pool of several hundred potential jurors; dismissed individuals whose responses to the questionnaire demonstrated bias or other disqualifying characteristics; and, after further questioning by the court and counsel, selected a jury from the remaining venire in one day."); Government's Memorandum of Law in Response to Defendants' Joint Motion to Transfer Venue in *United States* v. *Skilling*, No. 4:04–cr–00025 (SD Tex., Dec. 3, 2004), Record, Doc. 231, pp. 21–28 (describing in depth the jury-selection process in the *Arthur Andersen* and *Bayly* trials).

several venire members after the court refused to excuse them for cause. Supp. App. 3sa–4sa (Sealed).[7] The court overruled this objection.

After the jurors took their oath, the District Court told them they could not discuss the case with anyone or follow media accounts of the proceedings. "[E]ach of you," the court explained, "needs to be absolutely sure that your decisions concerning the facts will be based only on the evidence that you hear and read in this courtroom." App. 1026a.

Following a four-month trial and nearly five days of deliberation, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts. The District Court sentenced Skilling to 292 months' imprisonment, 3 years' supervised release, and $45 million in restitution.

On appeal, Skilling raised a host of challenges to his convictions, including the fair-trial and honest-services arguments he presses here. Regarding the former, the Fifth Circuit initially determined that the volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice. 554 F. 3d 529, 559 (2009).[8] The court also noted potential prejudice stemming from Causey's guilty plea and from the large number of victims in Houston—from the "[t]housands of Enron employ-

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[7] Skilling had requested an additional peremptory strike each time the District Court rejected a for-cause objection. The court, which had already granted two extra peremptories, see *supra*, at 373, denied each request.

[8] The Fifth Circuit described the media coverage as follows:

"Local newspapers ran many personal interest stories in which sympathetic individuals expressed feelings of anger and betrayal toward Enron. . . . Even the [*Houston*] *Chronicle*'s sports page wrote of Skilling's guilt as a foregone conclusion. Similarly, the *Chronicle*'s 'Pethouse Pet of the Week' section mentioned that a *pet* had 'enjoyed watching those Enron jerks being led away in handcuffs.' These are but a few examples of the *Chronicle*'s coverage." 554 F. 3d, at 559 (footnote omitted).

ees . . . [who] lost their jobs, and . . . saw their 401(k) accounts wiped out," to Houstonians who suffered spillover economic effects. *Id.*, at 559–560.

The Court of Appeals stated, however, that "the presumption [of prejudice] is rebuttable," and it therefore examined the *voir dire* to determine whether "the District Court empaneled an impartial jury." *Id.*, at 561 (internal quotation marks, italics, and some capitalization omitted). The *voir dire* was, in the Fifth Circuit's view, "proper and thorough." *Id.*, at 562. Moreover, the court noted, Skilling had challenged only one seated juror—Juror 11—for cause. Although Juror 11 made some troubling comments about corporate greed, the District Court "observed [his] demeanor, listened to his answers, and believed he would make the government prove its case." *Id.*, at 564. In sum, the Fifth Circuit found that the Government had overcome the presumption of prejudice and that Skilling had not "show[n] that any juror who actually sat was prejudiced against him." *Ibid.*

The Court of Appeals also rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. "[T]he jury was entitled to convict Skilling," the court stated, "on these elements": "(1) a material breach of a fiduciary duty . . . (2) that results in a detriment to the employer," including one occasioned by an employee's decision to "withhold material information, i. e., information that he had reason to believe would lead a reasonable employer to change its conduct." *Id.*, at 547. The Fifth Circuit did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague. Brief for Defendant-Appellant Skilling in No. 06–20885 (CA5), p. 65, n. 21.

Arguing that the Fifth Circuit erred in its consideration of these claims, Skilling sought relief from this Court. We granted certiorari, 558 U. S. 945 (2009), and now affirm in

part, vacate in part, and remand for further proceedings.[9] We consider first Skilling's allegation of juror prejudice, and next, his honest-services argument.

II

Pointing to "the community passion aroused by Enron's collapse and the vitriolic media treatment" aimed at him, Skilling argues that his trial "never should have proceeded in Houston." Brief for Petitioner 20. And even if it had been possible to select impartial jurors in Houston, "[t]he truncated voir dire . . . did almost nothing to weed out prejudices," he contends, so "[f]ar from rebutting the presumption of prejudice, the record below affirmatively confirmed it." *Id.*, at 21. Skilling's fair-trial claim thus raises two distinct questions. First, did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling's jury?[10]

A

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The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. By constitutional design, that trial occurs "in the State where the . . . Crimes . . .

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[9] We also granted certiorari and heard arguments this Term in two other cases raising questions concerning the honest-services statute's scope. See *Black* v. *United States*, No. 08–876; *Weyhrauch* v. *United States*, No. 08–1196. Today we vacate and remand those decisions in light of this opinion. *Black*, *post*, p. 465; *Weyhrauch*, *post*, p. 476.

[10] Assuming, as the Fifth Circuit found, that a presumption of prejudice arose in Houston, the question presented in Skilling's petition for certiorari casts his actual-prejudice argument as an inquiry into when, if ever, that presumption may be rebutted. See Pet. for Cert. i. Although we find a presumption of prejudice unwarranted in this case, we consider the actual-prejudice issue to be fairly subsumed within the question we agreed to decide. See this Court's Rule 14.1(a).

have been committed." Art. III, § 2, cl. 3. See also Amdt. 6 (right to trial by "jury of the State and district wherein the crime shall have been committed"). The Constitution's place-of-trial prescriptions, however, do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial—a "basic requirement of due process," *In re Murchison*, 349 U. S. 133, 136 (1955).[11]

2

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U. S. 454, 462 (1907) (opinion for the Court by Holmes, J.). When does the

[11] Venue transfer in federal court is governed by Federal Rule of Criminal Procedure 21, which instructs that a "court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." As the language of the Rule suggests, district-court calls on the necessity of transfer are granted a healthy measure of appellate-court respect. See *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240, 245 (1964). Federal courts have invoked the Rule to move certain highly charged cases, for example, the prosecution arising from the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City. See *United States* v. *McVeigh*, 918 F. Supp. 1467, 1474 (WD Okla. 1996). They have also exercised discretion to deny venue-transfer requests in cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing, see *United States* v. *Salameh*, No. S5 93 Cr. 0180 (KTD) (SDNY, Sept. 15, 1993); *United States* v. *Yousef*, No. S12 93 Cr. 180 (KTD) (SDNY, July 18, 1997), aff'd 327 F. 3d 56, 155 (CA2 2003), and the prosecution of John Walker Lindh, referred to in the press as the American Taliban, see *United States* v. *Lindh*, 212 F. Supp. 2d 541, 549–551 (ED Va. 2002). Skilling does not argue, distinct from his due process challenge, that the District Court abused its discretion under Rule 21 by declining to move his trial. We therefore review the District Court's venue-transfer decision only for compliance with the Constitution.

publicity attending conduct charged as criminal dim prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence? Because most cases of consequence garner at least some pretrial publicity, courts have considered this question in diverse settings. We begin our discussion by addressing the presumption of prejudice from which the Fifth Circuit's analysis in Skilling's case proceeded. The foundation precedent is *Rideau* v. *Louisiana,* 373 U. S. 723 (1963).

Wilbert Rideau robbed a bank in a small Louisiana town, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession. Without informing Rideau, no less seeking his consent, the police filmed the interrogation. On three separate occasions shortly before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. Rideau moved for a change of venue, arguing that he could not receive a fair trial in the parish where the crime occurred, which had a population of approximately 150,000 people. The trial court denied the motion, and a jury eventually convicted Rideau. The Supreme Court of Louisiana upheld the conviction.

We reversed. "What the people [in the community] saw on their television sets," we observed, "was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.*, at 725. "[T]o the tens of thousands of people who saw and heard it," we explained, the interrogation "in a very real sense *was* Rideau's trial—at which he pleaded guilty." *Id.*, at 726. We therefore "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire*," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. *Id.*, at 726–727.

We followed *Rideau*'s lead in two later cases in which media coverage manifestly tainted a criminal prosecution. In *Estes* v. *Texas,* 381 U. S. 532, 538 (1965), extensive public-

ity before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and "bombard[ed] . . . the community with the sights and sounds of" the pretrial hearing. The media's overzealous reporting efforts, we observed, "led to considerable disruption" and denied the "judicial serenity and calm to which [Billie Sol Estes] was entitled." *Id.*, at 536.

Similarly, in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), news reporters extensively covered the story of Sam Sheppard, who was accused of bludgeoning his pregnant wife to death. "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," thrusting jurors "into the role of celebrities." *Id.*, at 353, 355. Pretrial media coverage, which we characterized as "months [of] virulent publicity about Sheppard and the murder," did not alone deny due process, we noted. *Id.*, at 354. But Sheppard's case involved more than heated reporting pretrial: We upset the murder conviction because a "carnival atmosphere" pervaded the trial, *id.*, at 358.

In each of these cases, we overturned a "conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage"; our decisions, however, "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Murphy* v. *Florida*, 421 U. S. 794, 798–799 (1975).[12] See also, *e. g.*, *Patton* v. *Yount*, 467

[12] *Murphy* involved the robbery prosecution of the notorious Jack Murphy, a convicted murderer who helped mastermind the 1964 heist of the Star of India sapphire from New York's American Museum of Natural History. Pointing to "extensive press coverage" about him, Murphy moved to transfer venue. 421 U. S., at 796. The trial court denied the motion, and a jury convicted Murphy. We affirmed. Murphy's trial, we explained, was markedly different from the proceedings at issue in *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), which "entirely lack[ed] . . . the solemnity and sobriety to which a defendant is entitled in a system that

U. S. 1025 (1984).[13] Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*. *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961) (Jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *Reynolds* v. *United States*, 98 U. S. 145, 155–156 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."). A presumption of prejudice, our decisions indicate, attends only the extreme case.

3

Relying on *Rideau*, *Estes*, and *Sheppard*, Skilling asserts that we need not pause to examine the screening questionnaires or the *voir dire* before declaring his jury's verdict void. We are not persuaded. Important differences sepa-

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subscribes to any notion of fairness and rejects the verdict of a mob." 421 U. S., at 799. *Voir dire* revealed no great hostility toward Murphy; "[s]ome of the jurors had a vague recollection of the robbery with which [he] was charged and each had some knowledge of [his] past crimes, but none betrayed any belief in the relevance of [his] past to the present case." *Id.*, at 800 (footnote omitted).

[13] In *Yount*, the media reported on Jon Yount's confession to a brutal murder and his prior conviction for the crime, which had been reversed due to a violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). During *voir dire*, 77% of prospective jurors acknowledged they would carry an opinion into the jury box, and 8 of the 14 seated jurors and alternates admitted they had formed an opinion as to Yount's guilt. 467 U. S., at 1029–1030. Nevertheless, we rejected Yount's presumption-of-prejudice claim. The adverse publicity and community outrage, we noted, were at their height prior to Yount's first trial, four years before the second prosecution; time had helped "sooth[e] and eras[e]" community prejudice, *id.*, at 1034.

rate Skilling's prosecution from those in which we have presumed juror prejudice.[14]

First, we have emphasized in prior decisions the size and characteristics of the community in which the crime occurred. In *Rideau*, for example, we noted that the murder was committed in a parish of only 150,000 residents. Houston, in contrast, is the fourth most populous city in the Nation: At the time of Skilling's trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. App. 627a. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain. See *Mu'Min* v. *Virginia*, 500 U. S. 415, 429 (1991) (potential for prejudice mitigated by the size of the "metropolitan Washington [D. C.] statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year"); *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1044 (1991) (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals).[15]

Second, although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Rideau's dramati-

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[14] Skilling's reliance on *Estes* and *Sheppard* is particularly misplaced; those cases involved media interference with courtroom proceedings *during* trial. See *supra*, at 379–380. Skilling does not assert that news coverage reached and influenced his jury after it was empaneled.

[15] According to a survey commissioned by Skilling in conjunction with his first motion for a venue change, only 12.3% of Houstonians named him when asked to list Enron executives they believed guilty of crimes. App. 375a–376a. In response to the followup question "[w]hat words come to mind when you hear the name Jeff Skilling?", two-thirds of respondents failed to say a single negative word, *id.*, at 376a: 43% either had never heard of Skilling or stated that nothing came to mind when they heard his name, and another 23% knew Skilling's name was associated with Enron but reported no opinion about him, Record 3210–3211; see App. 417a–492a.

cally staged admission of guilt, for instance, was likely imprinted indelibly in the mind of anyone who watched it. Cf. *Parker* v. *Randolph*, 442 U. S. 62, 72 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him." (internal quotation marks omitted)). Pretrial publicity about Skilling was less memorable and prejudicial. No evidence of the smoking-gun variety invited prejudgment of his culpability. See *United States* v. *Chagra*, 669 F. 2d 241, 251–252, n. 11 (CA5 1982) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.").

Third, unlike cases in which trial swiftly followed a widely reported crime, *e. g.*, *Rideau*, 373 U. S., at 724, over four years elapsed between Enron's bankruptcy and Skilling's trial. Although reporters covered Enron-related news throughout this period, the decibel level of media attention diminished somewhat in the years following Enron's collapse. See App. 700a; *id.*, at 785a; *Yount*, 467 U. S., at 1032, 1034.

Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government.[16] In *Rideau*, *Estes*, and *Sheppard*, in marked contrast, the jury's verdict did not undermine in any way the supposition of juror bias. It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption. See, *e. g.*, *United States* v. *Arzola-Amaya*, 867 F. 2d 1504, 1514

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[16] As the United States summarizes, "[I]n *Hirko*, the jury deliberated for several days and did not convict any Enron defendant; in *Bayly*, which was routinely described as 'the first Enron criminal trial,' the jury convicted five defendants, . . . but acquitted a former Enron executive. At the sentencing phase of *Bayly*, the jury found a loss amount of slightly over $13 million, even though the government had argued that the true loss . . . was $40 million." Brief for United States 9–10 (citation omitted).

(CA5 1989) ("The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial.").

4

Skilling's trial, in short, shares little in common with those in which we approved a presumption of juror prejudice. The Fifth Circuit reached the opposite conclusion based primarily on the magnitude and negative tone of media attention directed at Enron. But "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 554 (1976). In this case, as just noted, news stories about Enron did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact.[17]

Nor did Enron's "sheer number of victims," 554 F. 3d, at 560, trigger a presumption of prejudice. Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron, the extensive screening questionnaire and followup *voir dire* were well suited to that task. And hindsight shows the efficacy of these devices; as we discuss *infra*, at 389–390, jurors' links to Enron were either nonexistent or attenuated.

Finally, although Causey's "well-publicized decision to plead guilty" shortly before trial created a danger of juror

[17] The Fifth Circuit, moreover, did not separate media attention aimed at Skilling from that devoted to Enron's downfall more generally. Data submitted by Skilling in support of his first motion for a venue transfer suggested that a slim percentage of Enron-related stories specifically named him. App. 572a. "[W]hen publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact." *United States* v. *Hueftle*, 687 F. 2d 1305, 1310 (CA10 1982).

prejudice, 554 F. 3d, at 559, the District Court took appropriate steps to reduce that risk. The court delayed the proceedings by two weeks, lessening the immediacy of that development. And during *voir dire*, the court asked about prospective jurors' exposure to recent publicity, including news regarding Causey. Only two venire members recalled the plea; neither mentioned Causey by name, and neither ultimately served on Skilling's jury. App. 888a, 993a. Although publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily—and, we are satisfied, it did not here—warrant an automatic presumption of prejudice.

Persuaded that no presumption arose,[18] we conclude that the District Court, in declining to order a venue change, did not exceed constitutional limitations.[19]

B

We next consider whether actual prejudice infected Skilling's jury. *Voir dire*, Skilling asserts, did not adequately detect and defuse juror bias. "[T]he record . . . affirmatively confirm[s]" prejudice, he maintains, because several seated jurors "prejudged his guilt." Brief for Petitioner 21. We disagree with Skilling's characterization of the *voir dire* and the jurors selected through it.

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[18] The parties disagree about whether a presumption of prejudice can be rebutted, and, if it can, what standard of proof governs that issue. Compare Brief for Petitioner 25–35 with Brief for United States 24–32, 35–36. Because we hold that no presumption arose, we need not, and do not, reach these questions.

[19] The dissent acknowledges that "the prospect of seating an unbiased jury in Houston was not so remote as to compel the conclusion that the District Court acted unconstitutionally in denying Skilling's motion to change venue." *Post*, at 445. The dissent's conclusion that Skilling did not receive a fair trial accordingly turns on its perception of the adequacy of the jury-selection process.

1

No hard-and-fast formula dictates the necessary depth or breadth of *voir dire.* See *United States* v. *Wood*, 299 U. S. 123, 145–146 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."). Jury selection, we have repeatedly emphasized, is "particularly within the province of the trial judge." *Ristaino* v. *Ross*, 424 U. S. 589, 594–595 (1976) (internal quotation marks omitted); see, *e. g.*, *Mu'Min*, 500 U. S., at 424; *Yount*, 467 U. S., at 1038; *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188–189 (1981) (plurality opinion); *Connors* v. *United States*, 158 U. S. 408, 408–413 (1895).

When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." *Mu'Min*, 500 U. S., at 427. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. See *Reynolds*, 98 U. S., at 156–157. In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury

service. We consider the adequacy of jury selection in Skilling's case, therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality.[20]

2

Skilling deems the *voir dire* insufficient because, he argues, jury selection lasted "just five hours," "[m]ost of the court's questions were conclusory[,] high-level, and failed adequately to probe jurors' true feelings," and the court "consistently took prospective jurors at their word once they claimed they could be fair, no matter what other indications of bias were present." Brief for Petitioner 10–11 (emphasis

[20] The dissent recognizes "the 'wide discretion' owed to trial courts when it comes to jury-related issues," *post*, at 447 (quoting *Mu'Min* v. *Virginia*, 500 U. S. 415, 427 (1991)), but its analysis of the District Court's *voir dire* sometimes fails to demonstrate that awareness. For example, the dissent faults the District Court for not questioning prospective jurors regarding their "knowledge of or feelings about" Causey's guilty plea. *Post*, at 453. But the court could reasonably decline to ask direct questions involving Causey's plea to avoid tipping off until-that-moment uninformed venire members that the plea had occurred. Cf. App. 822a (counsel for Skilling urged District Court to find a way to question venire members about Causey "without mentioning anything"). Nothing inhibited defense counsel from inquiring about venire members' knowledge of the plea; indeed, counsel posed such a question, *id.*, at 993a; cf. *post*, at 453, n. 14 (acknowledging that counsel "squeeze[d] in" an inquiry whether a venire member had "read about any guilty pleas in this case over the last month or two" (internal quotation marks omitted)). From this Court's lofty and "panoramic" vantage point, *post*, at 447, lines of *voir dire* inquiry that "might be helpful in assessing whether a juror is impartial" are not hard to conceive. *Mu'Min*, 500 U. S., at 425. "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id.*, at 425–426. According appropriate deference to the District Court, we cannot characterize jury selection in this case as fundamentally unfair. Cf. *supra*, at 374, n. 6 (same selection process was used in other Enron-related prosecutions).

deleted). Our review of the record, however, yields a different appraisal.[21]

As noted, *supra*, at 370–372, and n. 4, the District Court initially screened venire members by eliciting their responses to a comprehensive questionnaire drafted in large part by Skilling. That survey helped to identify prospective jurors excusable for cause and served as a springboard for further questions put to remaining members of the array. *Voir dire* thus was, in the court's words, the "culmination of a lengthy process." App. 841a; see 554 F. 3d, at 562, n. 51 ("We consider the . . . questionnaire in assessing the quality of *voir dire* as a whole.").[22] In other Enron-related prose-

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[21] In addition to focusing on the adequacy of *voir dire*, our decisions have also "take[n] into account . . . other measures [that] were used to mitigate the adverse effects of publicity." *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 565 (1976). We have noted, for example, the prophylactic effect of "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Id.*, at 564. Here, the District Court's instructions were unequivocal; the jurors, the court emphasized, were dutybound "to reach a fair and impartial verdict in this case based solely on the evidence [they] hear[d] and read in th[e] courtroom." App. 1026a. Peremptory challenges, too, "provid[e] protection against [prejudice]," *United States ex rel. Darcy* v. *Handy*, 351 U. S. 454, 462 (1956); the District Court, as earlier noted, exercised its discretion to grant the defendants two extra peremptories, App. 1020a; see *supra*, at 373.

[22] The dissent's analysis undervalues the 77-item questionnaire, a part of the selection process difficult to portray as "cursory," *post*, at 455, or "anemic," *post*, at 460. Notably, the "open-ended questions about [prospective jurors'] impressions of Enron or Skilling" that the dissent contends should have been asked, *post*, at 455, were asked—on the questionnaire, see *supra*, at 371–372, n. 4. Moreover, the District Court gave Skilling's counsel relatively free rein to ask venire members about their responses on the questionnaire. See, *e. g.*, App. 869a–870a; *id.*, at 878a, 911a, 953a. The questionnaire plus followup opportunity to interrogate potential jurors surely gave Skilling's counsel "clear avenue[s] for . . . permissible inquiry." But see *post*, at 456, n. 17. See also App. 967a (counsel for Skilling) ("Judge, for the record, if I don't ask any questions, it's because the Court and other counsel have covered it.").

cutions, we note, District Courts, after inspecting venire members' responses to questionnaires, completed the jury-selection process within one day. See *supra*, at 374, n. 6.[23]

The District Court conducted *voir dire*, moreover, aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias. At Skilling's urging, the court examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members. See *Mu'Min*, 500 U. S., at 425. To encourage candor, the court repeatedly admonished that there were "no right and wrong answers to th[e] questions." *E. g.*, App. 843a. The court denied Skilling's request for attorney-led *voir dire* because, in its experience, potential jurors were "more forthcoming" when the court, rather than counsel, asked the question. Record 11805. The parties, however, were accorded an opportunity to ask followup questions of every prospective juror brought to the bench for colloquy. Skilling's counsel declined to ask anything of more than half of the venire members questioned individually, including eight eventually selected for the jury, because, he explained, "the Court and other counsel have covered" everything he wanted to know. App. 967a.

Inspection of the questionnaires and *voir dire* of the individuals who actually served as jurors satisfies us that, notwithstanding the flaws Skilling lists, the selection process successfully secured jurors who were largely untouched by Enron's collapse.[24] Eleven of the seated jurors and alter-

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[23] One of the earlier prosecutions targeted the "Big Five" public accounting firm Arthur Andersen. See *supra*, at 374, n. 6. Among media readers and auditors, the name and reputation of Arthur Andersen likely sparked no less attention than the name and reputation of Jeffrey Skilling. Cf. *supra*, at 382, n. 15.

[24] In considering whether Skilling was tried before an impartial jury, the dissent relies extensively on venire members *not* selected for that jury. See, *e. g.*, *post*, at 432, n. 4 (quoting the questionnaires of 10 venire members; all were excused for cause before *voir dire* commenced, see Record 11891); *post*, at 433, n. 6 (quoting the questionnaires of 15 venire members;

nates reported no connection at all to Enron, while all other jurors reported at most an insubstantial link. See, *e. g.*, Supp. App. 101sa (Juror 63) ("I once met a guy who worked for Enron. I cannot remember his name.").[25] As for pretrial publicity, 14 jurors and alternates specifically stated that they had paid scant attention to Enron-related news. See, *e. g.*, App. 859a–860a (Juror 13) (would "[b]asically" start out knowing nothing about the case because "I just . . . didn't follow [it] a whole lot"); *id.*, at 969a (Juror 78) ("[Enron] wasn't anything that I was interested in reading [about] in detail. . . . I don't really know much about it.").[26] The re-

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none sat on Skilling's jury); *post*, at 436, n. 7 (quoting *voir dire* testimony of 6 venire members; none sat on Skilling's jury); *post*, at 453–458 (reporting at length *voir dire* testimony of Venire Members 17, 29, 61, 74, 75, and 101; none sat on Skilling's jury). Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function. Critically, as discussed *infra*, at 391–392, the seated jurors showed little knowledge of or interest in, and were personally unaffected by, Enron's downfall.

[25] See also Supp. App. 11sa (Juror 10) ("knew some casual co-workers that owned Enron stock"); *id.*, at 26sa (Juror 11) ("work[s] with someone who worked at Enron"); *id.*, at 117sa; App. 940a (Juror 64) (two acquaintances lost money due to Enron's collapse); Supp. App. 236sa (Juror 116) (work colleague lost money as a result of Enron's bankruptcy).

[26] See also App. 850a (Juror 10) ("I haven't followed [Enron-related news] in detail or to any extreme at all."); *id.*, at 856a (Juror 11) (did not "get into the details of [the Enron case]" and "just kind of tune[d] [it] out"); *id.*, at 873a (Juror 20) ("I was out of [the] state when [Enron collapsed], and then personal circumstances kept me from paying much attention."); *id.*, at 892a (Juror 38) (recalled "nothing in particular" about media coverage); *id.*, at 913a (Juror 50) ("I would hear it on the news and just let it filter in and out."); *id.*, at 935a (Juror 63) ("I don't really pay attention."); *id.*, at 940a–941a (Juror 64) (had "[n]ot really" been keeping up with and did not recall any news about Enron); *id.*, at 971a (Juror 84) (had not read "anything at all about Enron" because he did not "want to read that stuff" (internal quotation marks omitted)); *id.*, at 983a (Juror 90) ("seldom" read the Houston Chronicle and did not watch news programs); *id.*, at 995a–996a (Juror 99) (did not read newspapers or watch the news; "I don't know the details on what [this case] is or what made it what it is"); *id.*, at 1010a

maining two jurors indicated that nothing in the news influenced their opinions about Skilling.[27]

The questionnaires confirmed that, whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway.[28] Although many expressed sympathy for victims of Enron's bankruptcy and speculated that greed contributed to the corporation's collapse, these sentiments did not translate into animus toward Skilling. When asked whether they "ha[d] an opinion about . . . Jeffrey Skilling," none of the seated jurors and alternates checked the "yes" box.[29] And in response to the question whether "any opinion [they] may have formed regarding Enron or [Skil-

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(Juror 113) ("never really paid that much attention [to] it"); *id.*, at 1013a (Juror 116) (had "rea[d] a number of different articles," but "since it hasn't affected me personally," could not "specifically recall" any of them).

[27] *Id.*, at 944a (Juror 67) (had not read the Houston Chronicle in the three months preceding the trial and volunteered: "I don't form an opinion based on what . . . I hear on the news"); *id.*, at 974a–975a (Juror 87) (had not "formed any opinions" about Skilling's guilt from news stories).

[28] As the D. C. Circuit observed, reviewing the impact on jurors of media coverage of the Watergate scandal, "[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *United States* v. *Haldeman*, 559 F. 2d 31, 62–63, n. 37 (1976). See also *In re Charlotte Observer*, 882 F. 2d 850, 855–856 (CA4 1989) ("[R]emarkably in the eyes of many," "[c]ases such as those involving the Watergate defendants, the Abscam defendants, and . . . John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which . . . were satisfactorily disclosed to have been unaffected (indeed, in some instances blissfully unaware of or untouched) by that publicity."); Brief for ABC, Inc., et al. as *Amici Curiae* 25–31 (describing other examples).

[29] One juror did not check any box, explaining that she lived in another State when Enron went bankrupt and therefore "was not fully aware of all the facts regarding Enron's fall [and] the media coverage." Supp. App. 62sa (Juror 20). Two other jurors, Juror 10 and Juror 63, indicated in answer to a different question that they had an opinion about Skilling's guilt, but *voir dire* established they could be impartial. See *infra*, at 397–398, and 398, n. 33.

ling] [would] prevent" their impartial consideration of the evidence at trial, every juror—despite options to mark "yes" or "unsure"—instead checked "no."

The District Court, Skilling asserts, should not have "accept[ed] *at face value* jurors' promises of fairness." Brief for Petitioner 37. In *Irvin* v. *Dowd*, 366 U. S., at 727–728, Skilling points out, we found actual prejudice despite jurors' assurances that they could be impartial. Brief for Petitioner 26. JUSTICE SOTOMAYOR, in turn, repeatedly relies on *Irvin*, which she regards as closely analogous to this case. See *post*, at 448 (dissent). See also, *e. g.*, *post*, at 441–442, 458, 460, 464. We disagree with that characterization of *Irvin*.

The facts of *Irvin* are worlds apart from those presented here. Leslie Irvin stood accused of a brutal murder and robbery spree in a small rural community. 366 U. S., at 719. In the months before Irvin's trial, "a barrage" of publicity was "unleashed against him," including reports of his confessions to the slayings and robberies. *Id.*, at 725–726. This Court's description of the media coverage in *Irvin* reveals why the dissent's "best case" is not an apt comparison:

> "[S]tories revealed the details of [Irvin's] background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but [he] refused to confess. Finally, they announced [Irvin's] confession to the six murders and the fact of his indictment for four of them in Indiana. They reported [Irvin's] offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that [Irvin] had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the

> murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing [Irvin's] execution . . . . Another characterized [Irvin] as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories [Irvin] was described as the 'confessed slayer of six,' a parole violator and fraudulent-check artist. [Irvin's] court-appointed counsel was quoted as having received 'much criticism over being Irvin's counsel' and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted [to] the murder of [one victim] as well as 'the robbery-murder of [a second individual]; the murder of [a third individual], and the slaughter of three members of [a different family].'" *Ibid.*

"[N]ewspapers in which the[se] stories appeared were delivered regularly to approximately 95% of the dwellings in" the county where the trial occurred, which had a population of only 30,000; "radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents." *Id.*, at 725.

Reviewing Irvin's fair-trial claim, this Court noted that "the pattern of deep and bitter prejudice" in the community "was clearly reflected in the sum total of the *voir dire*": "370 prospective jurors or almost 90% of those examined on the point . . . entertained some opinion as to guilt," and "[8] out of the 12 [jurors] thought [Irvin] was guilty." *Id.*, at 727 (internal quotation marks omitted). Although these jurors declared they could be impartial, we held that, "[w]ith his life at stake, it is not requiring too much that [Irvin] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of

the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.*, at 728.

In this case, as noted *supra*, at 382–383, news stories about Enron contained nothing resembling the horrifying information rife in reports about Irvin's rampage of robberies and murders. Of key importance, Houston shares little in common with the rural community in which Irvin's trial proceeded, and circulation figures for Houston media sources were far lower than the 95% saturation level recorded in *Irvin*, see App. to Brief for United States 15a ("The *Houston Chronicle* . . . reaches less than one-third of occupied households in Houston." (internal quotation marks omitted)). Skilling's seated jurors, moreover, exhibited nothing like the display of bias shown in *Irvin*. See *supra*, at 389–392 (noting, *inter alia*, that none of Skilling's jurors answered "yes" when asked if they "ha[d] an opinion about . . . Skilling"). See also *post*, at 444 (dissent) (distinguishing *Mu'Min* from *Irvin* on similar bases: the "offense occurred in [a large] metropolitan . . . area," media "coverage was not as pervasive as in *Irvin* and did not contain the same sort of damaging information," and "the seated jurors uniformly disclaimed having ever formed an opinion about the case" (internal quotation marks omitted)). In light of these large differences, the District Court had far less reason than did the trial court in *Irvin* to discredit jurors' promises of fairness.

The District Court, moreover, did not simply take venire members who proclaimed their impartiality at their word.[30] As noted, all of Skilling's jurors had already affirmed on their questionnaires that they would have no trouble basing

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[30] The court viewed with skepticism, for example, Venire Member 104's promises that she could "abide by law," follow the court's instructions, and find Skilling not guilty if the Government did not prove its case, App. 1004a; "I have to gauge . . . demeanor, all the answers she gave me," the court stated, and "[s]he persuaded me that she could not be fair and impartial, so she's excused," *id.*, at 1006a.

a verdict only on the evidence at trial. Nevertheless, the court followed up with each individually to uncover concealed bias. This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service. See 554 F. 3d, at 562 (The District Court made "thorough" credibility determinations that "requir[ed] more than just the [venire members'] statements that [they] could be fair."). The jury's not-guilty verdict on nine insider-trading counts after nearly five days of deliberation, meanwhile, suggests the court's assessments were accurate. See *United States* v. *Haldeman*, 559 F. 2d 31, 60, n. 28 (CADC 1976). Skilling, we conclude, failed to show that his *voir dire* fell short of constitutional requirements.[31]

3

Skilling also singles out several jurors in particular and contends they were openly biased. See *United States* v. *Martinez-Salazar*, 528 U. S. 304, 316 (2000) ("[T]he seating of any juror who should have been dismissed for cause . . .

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[31] Skilling emphasizes that *voir dire* did not weed out every juror who suffered from Enron's collapse because the District Court failed to grant his for-cause challenge to Venire Member 29, whose retirement fund lost $50,000 due to ripple effects from the decline in the value of Enron stock. App. 880a. Critically, however, Venire Member 29 *did not sit on Skilling's jury*: Instead, Skilling struck her using a peremptory challenge. "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," we have held, "he has not been deprived of any . . . constitutional right." *United States* v. *Martinez-Salazar*, 528 U. S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" exemplifies "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." *Id.*, at 316.

require[s] reversal."). In reviewing claims of this type, the deference due to district courts is at its pinnacle: "A trial court's findings of juror impartiality may be overturned only for manifest error." *Mu'Min*, 500 U. S., at 428 (internal quotation marks omitted). Skilling, moreover, unsuccessfully challenged only one of the seated jurors for cause, "strong evidence that he was convinced the [other] jurors were not biased and had not formed any opinions as to his guilt." *Beck* v. *Washington*, 369 U. S. 541, 557–558 (1962). With these considerations in mind, we turn to Skilling's specific allegations of juror partiality.

Skilling contends that Juror 11—the only seated juror he challenged for cause—"expressed the most obvious bias." Brief for Petitioner 35. See also *post*, at 460–461 (dissent). Juror 11 stated that "greed on Enron's part" triggered the company's bankruptcy and that corporate executives, driven by avarice, "walk a line that stretches sometimes the legality of something." App. 854a–855a. But, as the Fifth Circuit accurately summarized, Juror 11

> "had 'no idea' whether Skilling had 'crossed that line,' and he 'didn't say that' every CEO is probably a crook. He also asserted that he could be fair and require the government to prove its case, that he did not believe everything he read in the paper, that he did not 'get into the details' of the Enron coverage, that he did not watch television, and that Enron was 'old news.'" 554 F. 3d, at 563–564.

Despite his criticism of greed, Juror 11 remarked that Skilling "earned [his] salar[y]," App. 857a, and said he would have "no problem" telling his co-worker, who had lost 401(k) funds due to Enron's collapse, that the jury voted to acquit, if that scenario came to pass, *id.*, at 854a. The District Court, noting that it had "looked [Juror 11] in the eye and . . . heard all his [answers]," found his assertions of impartiality credible. *Id.*, at 858a; cf. *supra*, at 394, n. 30. We agree with the

Court of Appeals that "[t]he express finding that Juror 11 was fair is not reversible error." 554 F. 3d, at 564.[32]

Skilling also objected at trial to the seating of six specific jurors whom, he said, he would have excluded had he not already exhausted his peremptory challenges. See *supra*, at 374–375. Juror 20, he observes, "said she was 'angry' about Enron's collapse and that she, too, had been 'forced to forfeit [her] own 401(k) funds to survive layoffs.'" Reply Brief 13. But Juror 20 made clear during *voir dire* that she did not "personally blame" Skilling for the loss of her retirement account. App. 875a. Having not "pa[id] much attention" to Enron-related news, she "quite honestly" did not "have enough information to know" whether Skilling was probably guilty, *id.*, at 873a, and she "th[ought] [she] could be" fair and impartial, *id.*, at 875a. In light of these answers, the District Court did not commit manifest error in finding Juror 20 fit for jury service.

The same is true of Juror 63, who, Skilling points out, wrote on her questionnaire "that [Skilling] 'probably knew [he] w[as] breaking the law.'" Reply Brief 13. During *voir dire*, however, Juror 63 insisted that she did not "really have an opinion [about Skilling's guilt] either way," App. 936a; she did not "know what [she] was thinking" when she completed the questionnaire, but she "absolutely" presumed Skilling innocent and confirmed her understanding that the Government would "have to prove" his guilt, *id.*, at 937a. In response to followup questions from Skilling's counsel, she again stated she would not presume that Skilling violated any laws and could "[a]bsolutely" give her word that she could be fair. *Id.*, at 937a–938a. "Jurors," we have recognized, "cannot be expected invariably to express themselves carefully or even consistently." *Yount*, 467 U. S., at 1039. See also *id.*, at 1040 ("It is here that the federal [appellate]

[32] Skilling's trial counsel and jury consultants apparently did not regard Juror 11 as so "obvious[ly] bias[ed]," Brief for Petitioner 35, as to warrant exercise of a peremptory challenge.

court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty."). From where we sit, we cannot conclude that Juror 63 was biased.

The four remaining jurors Skilling said he would have excluded with extra peremptory strikes exhibited no sign of prejudice we can discern. See App. 891a–892a (Juror 38) (remembered no media coverage about Enron and said nothing in her experience would prevent her from being fair and impartial); Supp. App. 131sa–133sa, 136sa (Juror 67) (had no connection to Enron and no anger about its collapse); App. 969a (Juror 78) (did not "know much about" Enron); Supp. App. 165sa; App. 971a (Juror 84) (had not heard or read anything about Enron and said she did not "know enough to answer" the question whether she was angry about the company's demise). Skilling's counsel declined to ask followup questions of any of these jurors and, indeed, told Juror 84 he had nothing to ask because she "gave all the right answers." *Id.*, at 972a. Whatever Skilling's reasons for wanting to strike these four individuals from his jury, he cannot credibly assert they displayed a disqualifying bias.[33]

In sum, Skilling failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him. Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially. "It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a ver-

[33] Although Skilling raised no objection to Juror 10 and Juror 87 at trial, his briefs in this Court impugn their impartiality. Brief for Petitioner 14–15; Reply Brief 13. Even if we allowed these tardy pleas, the *voir dire* testimony of the two jurors gives sufficient assurance that they were unbiased. See, *e. g.*, App. 850a–853a (Juror 10) (did not prejudge Skilling's guilt, indicated he could follow the court's instructions and make the Government prove its case, stated he could be fair to Skilling, and said he would "judge on the facts"); *id.*, at 974a (Juror 87) (had "not formed an opinion" on whether Skilling was guilty and affirmed she could adhere to the presumption of innocence).

dict based on the evidence presented in court." *Irvin*, 366 U. S., at 723. Taking account of the full record, rather than incomplete exchanges selectively culled from it, we find no cause to upset the lower courts' judgment that Skilling's jury met that measure. We therefore affirm the Fifth Circuit's ruling that Skilling received a fair trial.[34]

III

We next consider whether Skilling's conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, § 1346, Skilling maintains, is unconstitutionally vague. Alternatively, he contends that his conduct does not fall within the statute's compass.

A

To place Skilling's constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine.

1

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance "any scheme or artifice to defraud." See *McNally* v. *United States*, 483 U. S. 350, 356 (1987) (internal quotation marks omitted). In 1909, Congress amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.*" § 1341

[34] Our decisions have rightly set a high bar for allegations of juror prejudice due to pretrial publicity. See, *e. g.*, *Mu'Min*, 500 U. S. 415; *Patton* v. *Yount*, 467 U. S. 1025 (1984); *Murphy* v. *Florida*, 421 U. S. 794 (1975). News coverage of civil and criminal trials of public interest conveys to society at large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented. Trial judges generally take care so to instruct jurors, and the District Court did just that in this case. App. 1026a.

(emphasis added); see *id.*, at 357–358. Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights.

In an opinion credited with first presenting the intangible-rights theory, *Shushan* v. *United States*, 117 F. 2d 110 (1941), the Fifth Circuit reviewed the mail-fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. "It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to defraud," the Court of Appeals maintained. *Id.*, at 119. "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official," the court observed, "would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public." *Id.*, at 115.

The Fifth Circuit's opinion in *Shushan* stimulated the development of an "honest-services" doctrine. Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, see, *e. g.*, *United States* v. *Starr*, 816 F. 2d 94, 101 (CA2 1987), the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Cf. *McNally*, 483 U. S., at 360. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." See, *e. g.*, *United States* v. *Dixon*, 536 F. 2d 1388, 1400 (CA2 1976).

"Most often these cases . . . involved bribery of public officials," *United States* v. *Bohonus*, 628 F. 2d 1167, 1171 (CA9 1980), but courts also recognized private-sector honest-services fraud. In perhaps the earliest application of the theory to private actors, a District Court, reviewing a bribery scheme, explained:

> "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 678 (Mass. 1942).

Over time, "[a]n increasing number of courts" recognized that "a recreant employee"—public or private—"c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment," *United States* v. *McNeive*, 536 F. 2d 1245, 1249 (CA8 1976); by 1982, all Courts of Appeals had embraced the honest-services theory of fraud, Hurson, Limiting the Federal Mail Fraud Statute—A Legislative Approach, 20 Am. Crim. L. Rev. 423, 456 (1983).[35]

2

In 1987, this Court, in *McNally* v. *United States*, stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the

[35] In addition to upholding honest-services prosecutions, courts also increasingly approved use of the mail-fraud statute to attack corruption that deprived victims of other kinds of intangible rights, including election fraud and privacy violations. See, *e. g.*, *Cleveland* v. *United States*, 531 U. S. 12, 18, n. 2 (2000); *McNally* v. *United States*, 483 U. S. 350, 362–364, and nn. 1–4 (1987) (STEVENS, J., dissenting).

official partially controlled. 483 U. S., at 360. The prosecutor did not charge that, "in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance." *Ibid.* Instead, the prosecutor maintained that the kickback scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.*, at 353.

We held that the scheme did not qualify as mail fraud. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." *Id.*, at 360. "If Congress desires to go further," we stated, "it must speak more clearly." *Ibid.*

3

Congress responded swiftly. The following year, it enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally:* 'the intangible right of honest services.'" *Cleveland* v. *United States*, 531 U. S. 12, 19–20 (2000). In full, the honest-services statute stated:

> "For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." § 1346.

B

Congress, Skilling charges, reacted quickly but not clearly: He asserts that § 1346 is unconstitutionally vague. To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discrimina-

tory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). The void-for-vagueness doctrine embraces these requirements.

According to Skilling, § 1346 meets neither of the two due process essentials. First, the phrase "the intangible right of honest services," he contends, does not adequately define what behavior it bars. Brief for Petitioner 38–39. Second, he alleges, § 1346's "standardless sweep . . . allows policemen, prosecutors, and juries to pursue their personal predilections," thereby "facilitat[ing] opportunistic and arbitrary prosecutions." *Id.*, at 44 (quoting *Kolender*, 461 U. S., at 358).

In urging invalidation of § 1346, Skilling swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress' enactments. See, *e. g.*, *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 571 (1973). See also *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963) (stressing, in response to a vagueness challenge, "[t]he strong presumptive validity that attaches to an Act of Congress"). Alert to § 1346's potential breadth, the Courts of Appeals have divided on how best to interpret the statute.[36] Uniformly, however, they have declined to throw out the statute as irremediably vague.[37]

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[36] Courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law, compare, *e. g.*, *United States* v. *Brumley*, 116 F. 3d 728, 734–735 (CA5 1997) (en banc), with, *e. g.*, *United States* v. *Weyhrauch*, 548 F. 3d 1237, 1245–1246 (CA9 2008), vacated and remanded, *post*, p. 476; whether a defendant must contemplate that the victim suffer economic harm, compare, *e. g.*, *United States* v. *Sun-Diamond Growers of Cal.*, 138 F. 3d 961, 973 (CADC 1998), with, *e. g.*, *United States* v. *Black*, 530 F. 3d 596, 600–602 (CA7 2008), vacated and remanded, *post*, p. 465; and whether the defendant must act in pursuit of private gain, compare, *e. g.*, *United States* v. *Bloom*, 149 F. 3d 649, 655 (CA7 1998), with, *e. g.*, *United States* v. *Panarella*, 277 F. 3d 678, 692 (CA3 2002).

[37] See, *e. g.*, *United States* v. *Rybicki*, 354 F. 3d 124, 132 (CA2 2003) (en banc); *United States* v. *Hausmann*, 345 F. 3d 952, 958 (CA7 2003); *United States* v. *Welch*, 327 F. 3d 1081, 1109, n. 29 (CA10 2003); *United States* v. *Frega*, 179 F. 3d 793, 803 (CA9 1999); *Brumley*, 116 F. 3d, at 732–733;

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

1

There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. See Brief for Petitioner 39; Brief for United States 37–38; *post,* at 416, 422 (SCALIA, J., concurring in part and concurring in judgment). Congress enacted § 1346 on the heels of *McNally* and drafted the statute using that decision's terminology. See 483 U. S., at 355 ("intangible righ[t]"); *id.*, at 362 (STEVENS, J., dissenting) ("right to . . . honest services").[38] As the Second Circuit observed in its leading analysis of § 1346:

> "The definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others

United States v. *Frost*, 125 F. 3d 346, 370–372 (CA6 1997); *United States* v. *Waymer*, 55 F. 3d 564, 568–569 (CA11 1995); *United States* v. *Bryan*, 58 F. 3d 933, 941 (CA4 1995).

[38] Although verbal formulations varied slightly, the words employed by the Courts of Appeals prior to *McNally* described the same concept: "honest services," *e. g., United States* v. *Bruno*, 809 F. 2d 1097, 1105 (CA5 1987); "honest and faithful services," *e. g., United States* v. *Brown*, 540 F. 2d 364, 374 (CA8 1976); and "faithful and honest services," *e. g., United States* v. *Diggs*, 613 F. 2d 988, 998 (CADC 1979).

of *that* 'intangible right of honest services,' which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be." *United States* v. *Rybicki*, 354 F. 3d 124, 137–138 (2003) (en banc).[39]

2

Satisfied that Congress, by enacting § 1346, "meant to reinstate the body of pre-*McNally* honest-services law," *post*, at 422 (opinion of SCALIA, J.), we have surveyed that case law. See *infra*, at 407–408, 410. In parsing the Courts of Appeals decisions, we acknowledge that Skilling's vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. See Brief for Petitioner 39–42 (describing divisions of opinions). See also *post*, at 417–420 (opinion of SCALIA, J.). While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions—there was considerable disarray over the statute's application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto*. Brief for Petitioner 48 (Section 1346 "is intolerably and unconstitutionally vague."); Brief for Defendant-Appellant Skilling in No. 06–20885 (CA5), p. 65, n. 21 ("[S]ection 1346 should be invalidated as unlawfully vague on its face.").

It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. See,

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[39] We considered a similar Court-Congress interplay in *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337 (1991), which involved the interpretation of the term "seaman" in the Jones Act, 46 U. S. C. App. § 688 (2000 ed.). The Act, we recognized, "respond[ed] directly to" our decision in *The Osceola*, 189 U. S. 158 (1903), and "adopt[ed] without further elaboration the term used in" that case, so we "assume[d] that the Jones Act use[d] 'seaman' in the same way." 498 U. S., at 342.

e. g., *Hooper* v. *California*, 155 U. S. 648, 657 (1895) ("The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." (emphasis added)). See also *Boos* v. *Barry*, 485 U. S. 312, 330–331 (1988); *Schneider* v. *Smith*, 390 U. S. 17, 26 (1968).[40] We have accordingly instructed "the federal courts . . . to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible." *Boos*, 485 U. S., at 331; see *United States* v. *Harriss*, 347 U. S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague . . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.").

Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core; "the pre-*McNally* caselaw," he asserts, "is a

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[40] "This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979); *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 368–370 (1971); *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Winters* v. *New York*, 333 U. S. 507, 517 (1948); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577 (1929); *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346 (1928); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1924); *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408 (1909); *United States* v. *Coombs*, 12 Pet. 72, 76 (1838) (Story, J.); *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.). Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 569, 573 (1942) (statute made it criminal to address "any offensive, derisive or annoying word" to any person in a public place; vagueness obviated by state-court construction of the statute to cover only words having "a direct tendency to cause acts of violence" by the addressee (internal quotation marks omitted)).

hodgepodge of oft-conflicting holdings" that are "hopelessly unclear." Brief for Petitioner 39 (some capitalization and italics omitted). We have rejected an argument of the same tenor before. In *Civil Service Comm'n* v. *Letter Carriers*, federal employees challenged a provision of the Hatch Act that incorporated earlier decisions of the United States Civil Service Commission enforcing a similar law. "[T]he several thousand adjudications of the Civil Service Commission," the employees maintained, were "an impenetrable jungle"—"undiscoverable, inconsistent, [and] incapable of yielding any meaningful rules to govern present or future conduct." 413 U. S., at 571. Mindful that "our task [wa]s not to destroy the Act if we c[ould], but to construe it," we held that "the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement." *Id.*, at 571–572.

A similar observation may be made here. Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States* v. *Runnels*, 833 F. 2d 1183, 1187 (CA6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).[41] Indeed, the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. 483 U. S., at 352–353,

[41] JUSTICE SCALIA emphasizes divisions in the Courts of Appeals regarding the source and scope of fiduciary duties. *Post*, at 417–419. But these debates were rare in bribe and kickback cases. The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public, see, *e. g.*, *United States* v. *Mandel*, 591 F. 2d 1347 (CA4 1979); employee-employer, see, *e. g.*, *United States* v. *Bohonus*, 628 F. 2d 1167 (CA9 1980); and union official-union members, see, *e. g.*, *United States* v. *Price*, 788 F. 2d 234 (CA4 1986). See generally *Chiarella* v. *United States*, 445 U. S. 222, 233 (1980) (noting the "established doctrine that [a fiduciary] duty arises from a specific relationship between two parties").

360. Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.

As already noted, *supra*, at 400–401, the honest-services doctrine had its genesis in prosecutions involving bribery allegations. See *Shushan*, 117 F. 2d, at 115 (public sector); *Procter & Gamble Co.*, 47 F. Supp., at 678 (private sector). See also *United States* v. *Orsburn*, 525 F. 3d 543, 546 (CA7 2008). Both before *McNally* and after § 1346's enactment, Courts of Appeals described schemes involving bribes or kickbacks as "core . . . honest services fraud precedents," *United States* v. *Czubinski*, 106 F. 3d 1069, 1077 (CA1 1997); "paradigm case[s]," *United States* v. *deVegter*, 198 F. 3d 1324, 1327–1328 (CA11 1999); "[t]he most obvious form of honest services fraud," *United States* v. *Carbo*, 572 F. 3d 112, 115 (CA3 2009); "core misconduct covered by the statute," *United States* v. *Urciuoli*, 513 F. 3d 290, 294 (CA1 2008); "most [of the] honest services cases," *United States* v. *Sorich*, 523 F. 3d 702, 707 (CA7 2008); "typical," *United States* v. *Brown*, 540 F. 2d 364, 374 (CA8 1976); "clear-cut," *United States* v. *Mandel*, 591 F. 2d 1347, 1363 (CA4 1979); and "uniformly . . . cover[ed]," *United States* v. *Paradies*, 98 F. 3d 1266, 1283, n. 30 (CA11 1996). See also Tr. of Oral Arg. 43 (counsel for the Government) ("[T]he bulk of pre-*McNally* honest services cases" entailed bribes or kickbacks); Brief for Petitioner 49 ("Bribes and kickbacks were *the* paradigm [pre-*McNally*] cases," constituting "[t]he overwhelming majority of prosecutions for honest-services fraud.").

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.[42] To preserve the

[42] Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes. Cf. *Levin*

statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.[43]

3

The Government urges us to go further by locating within § 1346's compass another category of proscribed conduct: "undisclosed self-dealing by a public official or private employee—*i. e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." Brief for United States 43–44. "[T]he

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v. *Commerce Energy, Inc.*, 560 U. S. 413, 427 (2010) ("[C]ourts may attempt . . . to implement what the legislature would have willed had it been apprised of the constitutional infirmity."); *United States* v. *Booker*, 543 U. S. 220, 246 (2005) ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding.").

[43] JUSTICE SCALIA charges that our construction of § 1346 is "not interpretation but invention." *Post*, at 422. Stating that he "know[s] of no precedent for . . . 'paring down'" the pre-*McNally* case law to its core, *post*, at 422, he contends that the Court today "wield[s] a power we long ago abjured: the power to define new federal crimes," *post*, at 415. See also, *e. g.*, *post*, at 422, 423, 424. As noted *supra*, at 405–406, and n. 40, cases "paring down" federal statutes to avoid constitutional shoals are legion. These cases recognize that the Court does not *legislate*, but instead *respects the legislature*, by preserving a statute through a limiting interpretation. See *United States* v. *Lanier*, 520 U. S. 259, 267–268, n. 6 (1997) (This Court does not "create a common law crime" by adopting a "narrow[ing] construc[tion]." (internal quotation marks omitted)); *supra*, at 408 and this page, n. 42. Given that the Courts of Appeals uniformly recognized bribery and kickback schemes as honest-services fraud before *McNally*, 483 U. S. 350, and that these schemes composed the lion's share of honest-services cases, limiting § 1346 to these heartland applications is surely "fairly possible." *Boos* v. *Barry*, 485 U. S. 312, 331 (1988); cf. *Clark* v. *Martinez*, 543 U. S. 371, 380 (2005) (opinion for the Court by SCALIA, J.) (when adopting a limiting construction, "[t]he lowest common denominator, as it were, must govern"). So construed, the statute is not unconstitutionally vague. See *infra*, at 412–413; *post*, at 421. Only by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation would we act out of step with precedent.

theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest," the Government observes, and "Congress clearly intended to revive th[at] nondisclosure theory." *Id.*, at 44. Moreover, "[a]lthough not as numerous as the bribery and kickback cases," the Government asserts, "the pre-*McNally* cases involving undisclosed self-dealing were abundant." *Ibid.*

Neither of these contentions withstands close inspection. *McNally*, as we have already observed, *supra*, at 401–402, 407, involved a classic kickback scheme: A public official, in exchange for routing Kentucky's insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest. 483 U. S., at 352–353, 360. This was no mere failure to disclose a conflict of interest; rather, the official conspired with a third party so that both would profit from wealth generated by public contracts. See *id.*, at 352–353. Reading § 1346 to proscribe bribes and kickbacks—and nothing more—satisfies Congress' undoubted aim to reverse *McNally* on its facts.

Nor are we persuaded that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for "some schemes of nondisclosure and concealment of material information," *Mandel*, 591 F. 2d, at 1361, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.

Further dispelling doubt on this point is the familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland*, 531 U. S., at 25 (quoting *Rewis* v. *United States*, 401 U. S. 808,

812 (1971)). "This interpretive guide is especially appropriate in construing [§ 1346] because . . . mail [and wire] fraud [are] predicate offense[s] under [the Racketeer Influenced and Corrupt Organizations Act], 18 U. S. C. § 1961(1) (1994 ed., Supp. IV), and the money laundering statute, § 1956(c)(7)(A)." *Cleveland*, 531 U. S., at 25. Holding that honest-services fraud does not encompass conduct more wide ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government's less constrained construction absent Congress' clear instruction otherwise. *E. g.*, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952).

In sum, our construction of § 1346 "establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally*." Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch* v. *United States*, O. T. 2009, No. 08–1196, pp. 28–29. "If Congress desires to go further," we reiterate, "it must speak more clearly than it has." *McNally*, 483 U. S., at 360.[44]

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[44] If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official or private employee," Brief for United States 43, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. *Id.*, at 43–44. See also *id.*, at 40–41. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made, and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

4

Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions. See *Kolender*, 461 U. S., at 357. A prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks does not present a problem on either score.

As to fair notice, "whatever the school of thought concerning the scope and meaning of" § 1346, it has always been "as plain as a pikestaff that" bribes and kickbacks constitute honest-services fraud, *Williams* v. *United States*, 341 U. S. 97, 101 (1951), and the statute's *mens rea* requirement further blunts any notice concern, see, *e. g.*, *Screws* v. *United States*, 325 U. S. 91, 101–104 (1945) (plurality opinion). See also *Broadrick* v. *Oklahoma*, 413 U. S. 601, 608 (1973) ("[E]ven if the outermost boundaries of [a statute are] imprecise, any such uncertainty has little relevance . . . where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions."). Today's decision clarifies that no other misconduct falls within § 1346's province. See *United States* v. *Lanier*, 520 U. S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.").

As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. See, *e. g.*, 18 U. S. C. §§ 201(b), 666(a)(2); 41 U. S. C. § 52(2) ("The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favor-

able treatment in connection with [enumerated circumstances]."). [45] See also, *e. g.*, *United States* v. *Ganim*, 510 F. 3d 134, 147–149 (CA2 2007) (Sotomayor, J.) (reviewing honest-services conviction involving bribery in light of elements of bribery under other federal statutes); *United States* v. *Whitfield*, 590 F. 3d 325, 352–353 (CA5 2009); *United States* v. *Kemp*, 500 F. 3d 257, 281–286 (CA3 2007). A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.

C

It remains to determine whether Skilling's conduct violated § 1346. Skilling's honest-services prosecution, the Government concedes, was not "prototypical." Brief for United States 49. The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million." *Id.*, at 51.

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. See Record 41328 (May 11, 2006 Letter from the Government to the District Court) ("[T]he indictment does not allege, and the government's evidence did not show, that [Skilling] engaged in bribery."). It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.

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[45] Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.

Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. See *Yates* v. *United States*, 354 U. S. 298 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require reversal of the conspiracy conviction; we recently confirmed, in *Hedgpeth* v. *Pulido*, 555 U. S. 57 (2008) *(per curiam)*, that errors of the *Yates* variety are subject to harmless-error analysis. The parties vigorously dispute whether the error was harmless. Compare Brief for United States 52 ("[A]ny juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud.") with Reply Brief 30 (The Government "cannot show that the conspiracy conviction rested *only* on the securities-fraud theory, rather than the distinct, legally-flawed honest-services theory."). We leave this dispute for resolution on remand.[46]

Whether potential reversal on the conspiracy count touches any of Skilling's other convictions is also an open question. All of his convictions, Skilling contends, hinged on the conspiracy count and, like dominoes, must fall if it falls. The District Court, deciding Skilling's motion for bail pending appeal, found this argument dubious, App. 1141a–1142a, but the Fifth Circuit had no occasion to rule on it. That court may do so on remand.

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[46] The Fifth Circuit appeared to prejudge this issue, noting that, "if any of the three objects of Skilling's conspiracy offers a legally insufficient theory," it "must set aside his conviction." 554 F. 3d, at 543. That reasoning relied on the mistaken premise that *Hedgpeth* v. *Pulido*, 555 U. S. 57 (2008) *(per curiam)*, governs only cases on collateral review. See 554 F. 3d, at 543, n. 10. Harmless-error analysis, we clarify, applies equally to cases on direct appeal. Accordingly, the Fifth Circuit, on remand, should take a fresh look at the parties' harmless-error arguments.

* * *

For the foregoing reasons, we affirm the Fifth Circuit's ruling on Skilling's fair-trial argument, vacate its ruling on his conspiracy conviction, and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE KENNEDY joins except as to Part III, concurring in part and concurring in the judgment.

I agree with the Court that petitioner Jeffrey Skilling's challenge to the impartiality of his jury and to the District Court's conduct of the *voir dire* fails. I therefore join Parts I and II of the Court's opinion. I also agree that the decision upholding Skilling's conviction for so-called "honest-services fraud" must be reversed, but for a different reason. In my view, the specification in 18 U. S. C. § 1346 (2006 ed.) that "scheme or artifice to defraud" in the mail-fraud and wire-fraud statutes, §§ 1341 and 1343 (2006 ed., Supp. II), includes "a scheme or artifice to deprive another of the intangible right of honest services" is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is "not to destroy the Act . . . but to construe it," *ante*, at 407 (internal quotation marks omitted). But in transforming the prohibition of "honest-services fraud" into a prohibition of "bribery and kickbacks" it is wielding a power we long ago abjured: the power to define new federal crimes. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812).

I

A criminal statute must clearly define the conduct it proscribes, see *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972). A statute that is unconstitutionally vague cannot be saved by a more precise indictment, see *Lanzetta* v. *New*

Jersey, 306 U. S. 451, 453 (1939), nor by judicial construction that writes in specific criteria that its text does not contain, see *United States* v. *Reese*, 92 U. S. 214, 219–221 (1876). Our cases have described vague statutes as failing "to provide a person of ordinary intelligence fair notice of what is prohibited, or [as being] so standardless that [they] authoriz[e] or encourag[e] seriously discriminatory enforcement." *United States* v. *Williams*, 553 U. S. 285, 304 (2008). Here, Skilling argues that § 1346 fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits. Brief for Petitioner 38–39, 42–44. In my view Skilling is correct.

The Court maintains that "the intangible right of honest services" means the right not to have one's fiduciaries accept "bribes or kickbacks." Its first step in reaching that conclusion is the assertion that the phrase refers to "the doctrine developed" in cases decided by lower federal courts prior to our decision in *McNally* v. *United States*, 483 U. S. 350 (1987). *Ante*, at 404. I do not contest that. I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*—what the Court calls "the pre-*McNally* honest-services doctrine," *ante*, at 407. The problem is that that doctrine provides no "ascertainable standard of guilt," *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921), and certainly is not limited to "bribes or kickbacks."

Investigation into the meaning of "the pre-*McNally* honest-services doctrine" might logically begin with *McNally* itself, which rejected it. That case repudiated the many Court of Appeals holdings that had expanded the meaning of "fraud" in the mail-fraud and wire-fraud statutes beyond deceptive schemes to obtain property. 483 U. S., at 360. If the repudiated cases stood for a prohibition of "bribery and kickbacks," one would have expected those words to appear in the opinion's description of the cases. In fact,

they do not. *Not at all.* Nor did *McNally* even provide a consistent definition of the pre-existing theory of fraud it rejected. It referred variously to a right of citizens "to have the [State]'s affairs conducted honestly," *id.*, at 353, to "honest and impartial government," *id.*, at 355, to "good government," *id.*, at 356, and "to have public officials perform their duties honestly," *id.*, at 358. It described prior case law as holding that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud," *id.*, at 355.

But the pre-*McNally* Court of Appeals opinions were not limited to fraud by public officials. Some courts had held that those fiduciaries subject to the "honest services" obligation included private individuals who merely participated in public decisions, see, *e. g.*, *United States* v. *Gray*, 790 F. 2d 1290, 1295–1296 (CA6 1986) *(per curiam)* (citing *United States* v. *Margiotta*, 688 F. 2d 108, 122 (CA2 1982)), and even private employees who had no role in public decisions, see, *e. g.*, *United States* v. *Lemire*, 720 F. 2d 1327, 1335–1336 (CADC 1983); *United States* v. *Von Barta*, 635 F. 2d 999, 1007 (CA2 1980). Moreover, "to say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. . . . What obligations does he owe as a fiduciary?" *SEC* v. *Chenery Corp.*, 318 U. S. 80, 85–86 (1943). None of the "honest services" cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the "fraud" offense.

There was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law, see, *e. g.*, *United States* v. *Rabbitt*, 583 F. 2d 1014, 1026 (CA8 1978), or merely general principles, such as the "obligations of loyalty and fidelity" that inhere in the "employment relationship," *Lemire*, *supra*, at 1336. The decision *McNally* reversed had grounded the duty in general (not jurisdiction-specific) trust law, see *Gray*, *supra*,

at 1294, a *corpus juris* festooned with various duties. See, *e. g.*, Restatement (Second) of Trusts §§ 169–185 (1976). Another pre-*McNally* case referred to the general law of agency, *United States* v. *Ballard*, 663 F. 2d 534, 543, n. 22 (CA5 1981), modified on other grounds by 680 F. 2d 352 (1982), which imposes duties quite different from those of a trustee.[1] See Restatement (Second) of Agency §§ 377–398 (1957).

This indeterminacy does not disappear if one assumes that the pre-*McNally* cases developed a federal, common-law fiduciary duty; the duty remained hopelessly undefined. Some courts described it in astoundingly broad language. *Blachly* v. *United States*, 380 F. 2d 665 (CA5 1967), loftily declared that "[l]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Id.*, at 671 (quoting *Gregory* v. *United States*, 253 F. 2d 104, 109 (CA5 1958)). Other courts unhelpfully added that any scheme "contrary to public policy" was also condemned by the statute, *United States* v. *Bohonus*, 628 F. 2d 1167, 1171 (CA9 1980). See also *United States* v. *Mandel*, 591 F. 2d 1347, 1361 (CA4 1979) (any scheme that is "contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing"). Even opinions that did not indulge in such grandiloquence did not specify the duty at issue beyond loyalty or honesty, see, *e. g.*, *Von Barta*, *supra*, at 1005–1006. Moreover, the demands of the duty were said to be greater

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[1] The Court is untroubled by these divisions because "these debates were rare in bribe and kickback cases," in which "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute," *ante*, at 407, n. 41. This misses the point. The Courts of Appeals may have consistently found unlawful the acceptance of a bribe or kickback by one or another sort of fiduciary, but they have not consistently described (as the statute does not) any test for who is a fiduciary.

for public officials than for private employees, see, *e. g.*, *Lemire*, *supra*, at 1337, n. 13; *Ballard*, *supra*, at 541, n. 17, but in what respects (or by how much) was never made clear.

The indefiniteness of the fiduciary duty is not all. Many courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud. See, *e. g.*, *Von Barta*, *supra*, at 1006 (collecting cases); *United States* v. *George*, 477 F. 2d 508, 512 (CA7 1973). There was, unsurprisingly, some dispute about that, at least in the context of acts by persons owing duties to the public. See *United States* v. *Price*, 788 F. 2d 234, 237 (CA4 1986). And even among those courts that did require something additional where a public official was involved, there was disagreement as to what the addition should be. For example, in *United States* v. *Bush*, 522 F. 2d 641 (1975), the Seventh Circuit held that material misrepresentations and active concealment were enough, *id.*, at 647–648. But in *Rabbitt*, 583 F. 2d 1014, the Eighth Circuit held that actual harm to the State was needed, *id.*, at 1026.

Similar disagreements occurred with respect to private employees. Courts disputed whether the defendant must use his fiduciary position for his own gain. Compare *Lemire*, *supra*, at 1335 (yes), with *United States* v. *Bronston*, 658 F. 2d 920, 926 (CA2 1981) (no). One opinion upheld a mail-fraud conviction on the ground that the defendant's "failure to disclose his receipt of kickbacks and consulting fees from [his employer's] suppliers resulted in a breach of his fiduciary duties depriving his employer of his loyal and honest services." *United States* v. *Bryza*, 522 F. 2d 414, 422 (CA7 1975). Another opinion, however, demanded more than an intentional failure to disclose: "There must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Lemire*, *supra*, at 1337. Other courts required that the victim suffer some loss, see, *e. g.*, *Ballard*, *supra*, at 541–542—a proposition that, of course, other courts

rejected, see, *e. g.*, *United States* v. *Newman*, 664 F. 2d 12, 20 (CA2 1981); *United States* v. *O'Malley*, 535 F. 2d 589, 592 (CA10 1976). The Court's statement today that there was a deprivation of honest services even if "the scheme occasioned a money or property *gain* for the betrayed party," *ante*, at 400, is therefore true, except to the extent it is not.

In short, the first step in the Court's analysis—holding that "the intangible right of honest services" refers to "the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally*," *ante*, at 404—is a step out of the frying pan into the fire. The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.[2]

II

The Court is aware of all this. It knows that adopting by reference "the pre-*McNally* honest-services doctrine," *ante*, at 407, is adopting by reference nothing more precise than

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[2] Courts since § 1346's enactment have fared no better, reproducing some of the same disputes that predated *McNally*. See, *e. g.*, *Sorich* v. *United States*, 555 U. S. 1204, 1206 (2009) (SCALIA, J., dissenting from denial of certiorari) (collecting cases). We have previously found important to our vagueness analysis "the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out [a] statute in cases brought before them." *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). I am at a loss to explain why the Court barely mentions those conflicts today.

the referring term itself ("the intangible right of honest services"). Hence the *deus ex machina:* "[W]e pare that body of precedent down to its core," *ante,* at 404. Since the honest-services doctrine "had its genesis" in bribery prosecutions, and since several cases and counsel for Skilling referred to bribery and kickback schemes as "core" or "paradigm" or "typical" examples, or "[t]he most obvious form," of honest-services fraud, *ante,* at 408 (internal quotation marks omitted), and since two cases and counsel for the Government say that they formed the "vast majority," or "most" or at least "[t]he bulk" of honest-services cases, *ante,* at 407–408 (internal quotation marks omitted), THEREFORE it must be the case that they are *all* Congress meant by its reference to the honest-services doctrine.

Even if that conclusion followed from its premises, it would not suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the "honest services" obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question, "What is the criterion of guilt?"

But that is perhaps beside the point, because it is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented "the core" of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. But the doctrine itself is much more. Among all the pre-*McNally* smorgasbord offerings of varieties of

honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.

Thus, the Court's claim to "respec[t] the legislature," *ante*, at 409, n. 43 (emphasis deleted), is false. It is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that that prohibited much more (though precisely what more is uncertain) than bribery and kickbacks. Perhaps it is true that "Congress intended § 1346 to reach *at least* bribes and kickbacks," *ante*, at 408. That simply does not mean, as the Court now holds, that "§ 1346 criminalizes *only*" bribery and kickbacks, *ante*, at 409.

Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster. I know of no precedent for such "paring down,"[3] and it seems to me clearly beyond judicial power. This is not, as the Court claims, *ante*, at 406, simply a matter of adopting a "limiting construction" in the face of potential unconstitu-

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[3] The only alleged precedent the Court dares to describe is *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548 (1973). That case involved a provision of the Hatch Act incorporating prior adjudications of the Civil Service Commission. We upheld the provision against a vagueness challenge—not, however, by "paring down" the adjudications to a more narrow rule that we invented, but by concluding that what they held was not vague. See *id.*, at 571–574. The string of cases the Court lists, see *ante*, at 406, n. 40 (almost none of which addressed claims of vagueness), have nothing to do with "paring down." The one that comes closest, *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971), specified a time limit within which proceedings authorized by statute for the forfeiture of obscene imported materials had to be commenced and completed. That is not much different from "reading in" a reasonable-time requirement for obligations undertaken in contracts, and can hardly be described as a rewriting or "paring down" of the statute. The Court relied on legislative history anticipating that the proceedings would be prompt, *id.*, at 370–371, and noted that (unlike here) it was not "decid[ing] issues of policy," *id.*, at 372.

tionality. To do that, our cases have been careful to note, the narrowing construction must be "fairly possible," *Boos* v. *Barry*, 485 U. S. 312, 331 (1988), "reasonable," *Hooper* v. *California*, 155 U. S. 648, 657 (1895), or not "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As we have seen (and the Court does not contest), *no court* before *McNally* concluded that the "deprivation of honest services" meant *only* the acceptance of bribes or kickbacks. If it were a "fairly possible" or "reasonable" construction, not "contrary to the intent of Congress," one would think that *some* court would have adopted it. The Court does not even point to a *post-McNally* case that reads § 1346 to cover only bribery and kickbacks, and I am aware of none.

The canon of constitutional avoidance, on which the Court so heavily relies, see *ante*, at 405–406, states that "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); see also *United States* v. *Rumely*, 345 U. S. 41, 45 (1953) (describing the canon as decisive "in the choice of fair alternatives"). Here there is no choice to be made between two "fair alternatives." Until today, no one has thought (and there is no basis for thinking) that the honest-services statute prohibited only bribery and kickbacks.

I certainly agree with the Court that we must, "if we can," uphold, rather than "condemn," Congress's enactments, *ante*, at 403. But I do not believe we have the power, in order to uphold an enactment, to rewrite it. Congress enacted the entirety of the pre-*McNally* honest-services law, the content of which is (to put it mildly) unclear. In prior vagueness cases, we have resisted the temptation to make all things

right with the stroke of our pen. See, *e. g., Smith* v. *Goguen*, 415 U. S. 566, 575 (1974). I would show the same restraint today, and reverse Skilling's conviction on the basis that § 1346 provides no "ascertainable standard" for the conduct it condemns, *L. Cohen*, 255 U. S., at 89. Instead, the Court today adds to our functions the prescription of criminal law.

III

A brief word about the appropriate remedy. As I noted *supra*, at 416, Skilling has argued that § 1346 cannot be constitutionally applied to him because it affords no definition of the right whose deprivation it prohibits. Though this reasoning is categorical, it does not make Skilling's challenge a "facial" one, in the sense that it seeks invalidation of the statute in all its applications, as opposed to preventing its enforcement against him. I continue to doubt whether "striking down" a statute is ever an appropriate exercise of our Article III power. See *Chicago* v. *Morales*, 527 U. S. 41, 77 (1999) (SCALIA, J., dissenting). In the present case, the universality of the infirmity Skilling identifies in § 1346 may mean that if he wins, anyone else prosecuted under the statute will win as well, see *Smith*, *supra*, at 576–578. But Skilling only asks that *his* conviction be reversed, Brief for Petitioner 57–58, so *the remedy* he seeks is not facial invalidation.

I would therefore reverse Skilling's conviction under § 1346 on the ground that it fails to define the conduct it prohibits. The fate of the statute in future prosecutions—obvious from my reasoning in the case—would be a matter for *stare decisis*.

* * *

It is hard to imagine a case that more clearly fits the description of what Chief Justice Waite said could not be done, in a colorful passage oft-cited in our vagueness opinions, *United States* v. *Reese*, 92 U. S., at 221:

> "The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . .
>
> "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

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

I join the judgment of the Court and all but Part II of the Court's opinion. I write separately to address petitioner's jury-trial argument.

The Sixth Amendment guarantees criminal defendants a trial before "an impartial jury." In my view, this requirement is satisfied so long as no biased juror is actually seated at trial. Of course, evidence of pretrial media attention and widespread community hostility may play a role in the bias inquiry. Such evidence may be important in assessing the adequacy of *voir dire*, see, *e. g.*, *Mu'Min* v. *Virginia*, 500 U. S. 415, 428–432 (1991), or in reviewing the denial of requests to dismiss particular jurors for cause, see, *e. g.*, *Patton* v. *Yount*, 467 U. S. 1025, 1036–1040 (1984). There are occasions in which such evidence weighs heavily in favor of a change of venue. In the end, however, if no biased juror is actually seated, there is no violation of the defendant's right to an impartial jury. See *id.*, at 1031–1035, 1040; *Murphy* v. *Florida*, 421 U. S. 794, 800–801, 803 (1975); see also *Rivera* v.

Illinois, 556 U. S. 148, 157–159 (2009); *United States* v. *Martinez-Salazar*, 528 U. S. 304, 311, 316–317 (2000); *Smith* v. *Phillips*, 455 U. S. 209, 215–218 (1982).

Petitioner advances a very different understanding of the jury-trial right. Where there is extraordinary pretrial publicity and community hostility, he contends, a court must presume juror prejudice and thus grant a change of venue. Brief for Petitioner 25–34. I disagree. Careful *voir dire* can often ensure the selection of impartial jurors even where pretrial media coverage has generated much hostile community sentiment. Moreover, once a jury has been selected, there are measures that a trial judge may take to insulate jurors from media coverage during the course of the trial. What the Sixth Amendment requires is "an impartial jury." If the jury that sits and returns a verdict is impartial, a defendant has received what the Sixth Amendment requires.

The rule that petitioner advances departs from the text of the Sixth Amendment and is difficult to apply. It requires a trial judge to determine whether the adverse pretrial media coverage and community hostility in a particular case have reached a certain level of severity, but there is no clear way of demarcating that level or of determining whether it has been met.

Petitioner relies chiefly on three cases from the 1960's—*Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Rideau* v. *Louisiana*, 373 U. S. 723 (1963). I do not read those cases as demanding petitioner's suggested approach. As the Court notes, *Sheppard* and *Estes* primarily "involved media interference with courtroom proceedings *during* trial." *Ante*, at 382, n. 14; see also *post*, at 446 (SOTOMAYOR, J., concurring in part and dissenting in part). *Rideau* involved unique events in a small community.

I share some of JUSTICE SOTOMAYOR's concerns about the adequacy of the *voir dire* in this case and the trial judge's findings that certain jurors could be impartial. See *post*, at

458–462. But those highly fact-specific issues are not within the question presented. Pet. for Cert. i. I also do not understand the opinion of the Court as reaching any question regarding a change of venue under Federal Rule of Criminal Procedure 21.

Because petitioner, in my view, is not entitled to a reversal of the decision below on the jury-trial question that is before us, I join the judgment of the Court in full.

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in part and dissenting in part.

I concur in the Court's resolution of the honest-services fraud question and join Part III of its opinion. I respectfully dissent, however, from the Court's conclusion that Jeffrey Skilling received a fair trial before an impartial jury. Under our relevant precedents, the more intense the public's antipathy toward a defendant, the more careful a court must be to prevent that sentiment from tainting the jury. In this case, passions ran extremely high. The sudden collapse of Enron directly affected thousands of people in the Houston area and shocked the entire community. The accompanying barrage of local media coverage was massive in volume and often caustic in tone. As Enron's one-time chief executive officer (CEO), Skilling was at the center of the storm. Even if these extraordinary circumstances did not constitutionally compel a change of venue, they required the District Court to conduct a thorough *voir dire* in which prospective jurors' attitudes about the case were closely scrutinized. The District Court's inquiry lacked the necessary thoroughness and left serious doubts about whether the jury empaneled to decide Skilling's case was capable of rendering an impartial decision based solely on the evidence presented in the courtroom. Accordingly, I would grant Skilling relief on his fair-trial claim.

I

The majority understates the breadth and depth of community hostility toward Skilling and overlooks significant deficiencies in the District Court's jury selection process. The failure of Enron wounded Houston deeply. Virtually overnight, what had been the city's "largest, most visible, and most prosperous company," its "foremost social and charitable force," and "a source of civic pride" was reduced to a "shattered shell." App. ¶¶ 11, 13, pp. 649a–650a, 1152a. Thousands of the company's employees lost their jobs and saw their retirement savings vanish. As the effects rippled through the local economy, thousands of additional jobs disappeared, businesses shuttered, and community groups that once benefited from Enron's largesse felt the loss of millions of dollars in contributions. See, *e. g.*, 3 Supp. Record 1229, 1267; see also 554 F. 3d 529, 560 (CA5 2009) ("Accounting firms that serviced Enron's books had less work, hotels had more open rooms, restaurants sold fewer meals, and so on"). Enron's community ties were so extensive that the entire local U. S. Attorney's Office was forced to recuse itself from the Government's investigation into the company's fall. See 3 Supp. Record 608 (official press release).

With Enron's demise affecting the lives of so many Houstonians, local media coverage of the story saturated the community. According to a defense media expert, the Houston Chronicle—the area's leading newspaper—assigned as many as 12 reporters to work on the Enron story full time. App. 568a–569a. The paper mentioned Enron in more than 4,000 articles during the 3-year period following the company's December 2001 bankruptcy filing. Hundreds of these articles discussed Skilling by name. See 3 Supp. Record 2114. Skilling's expert, a professional journalist and academic with 30 years' experience, could not "recall another instance where a local paper dedicated as many resources to a single topic over such an extended period of time as the Houston Chronicle . . . dedicated to Enron." App. ¶ 32, at 570a.

Local television news coverage was similarly pervasive and, in terms of "editorial theme," "largely followed the Chronicle's lead." *Id.*, ¶ 11, at 559a; see also *id.*, at 717a. Between May 2002 and October 2004, local stations aired an estimated 19,000 news segments involving Enron, more than 1,600 of which mentioned Skilling. 3 Supp. Record 2116.

While many of the stories were straightforward news items, many others conveyed and amplified the community's outrage at the top executives perceived to be responsible for the company's bankruptcy. A Chronicle report on Skilling's 2002 testimony before Congress is typical of the coverage. It began, "Across Houston, Enron employees watched former chief executive Jeffrey Skilling's congressional testimony on television, turning incredulous, angry and then sarcastic by turns, as a man they knew as savvy and detail-oriented pleaded memory failure and ignorance about critical financial transactions at the now-collapsed energy giant." App. 1218a. "'He is lying; he knew everything,' said [an employee], who said she had seen Skilling frequently over her 18 years with the firm, where Skilling was known for his intimate grasp of the inner doings at the company. 'I am getting sicker by the minute.'" *Id.*, at 1219a. A companion piece quoted a local attorney who called Skilling an "idiot" who was "in denial"; he added, "I'm glad [Skilling's] not my client." *Id.*, at 592a–593a (internal quotation marks omitted).

Articles deriding Enron's senior executives were juxtaposed with pieces expressing sympathy toward and solidarity with the company's many victims. Skilling's media expert counted nearly a hundred victim-related stories in the Chronicle, including a "multi-page layout entitled 'The Faces of Enron,'" which poignantly described the gut-wrenching experiences of former employees who lost vast sums of money, faced eviction from their homes, could not afford Christmas gifts for their children, and felt "scared," "hurt," "humiliat[ed]," "helpless," and "betrayed." *Id.*, ¶ 71, at

585a–586a. The conventional wisdom that blame for Enron's devastating implosion and the ensuing human tragedy ultimately rested with Skilling and former Enron Chairman Kenneth Lay became so deeply ingrained in the popular imagination that references to their involvement even turned up on the sports pages: "If you believe the story about [Coach Bill Parcells] not having anything to do with the end of Emmitt Smith's Cowboys career, then you probably believe in other far-fetched concepts. Like Jeff Skilling having nothing to do with Enron's collapse." 3 Supp. Record 811.

When a federal grand jury indicted Skilling, Lay, and Richard Causey—Enron's former chief accounting officer—in 2004 on charges of conspiracy to defraud, securities fraud, and other crimes, the media placed them directly in their crosshairs. In the words of one article, "there was one thing those whose lives were touched by the once-exalted company all seemed to agree upon: The indictment of former Enron CEO Jeff Skilling was overdue." App. 1393a. Scoffing at Skilling's attempts to paint himself as "a 'victim' of his subordinates," *id.*, at 1394a, the Chronicle derided "the doofus defense" that Lay and Skilling were expected to offer, *id.*, at 1401a.[1] The Chronicle referred to the coming Skilling/Lay trial as "the main event" and "The Big One," which would

[1] See also App. 735a (describing Enron as "hardball fraud" and noting that "Enron prosecutors have approached the case more like an organized crime investigation than a corporate fraud prosecution," a "tactic [that] makes sense" given "the sheer pervasiveness of fraud, corruption and self-dealing"); *id.*, at 1403a ("Lay stood proudly in front of Enron's facade of success, while Skilling and his own prot[ege], [Andrew] Fastow, ginned up increasingly convoluted mechanisms for concealing the financial reality. . . . A court will decide the particulars, but yes, Ken Lay knew"); *id.*, at 1406a, 1409a (describing Enron's collapse as "failure as a result of fraud" and criticizing Skilling for using "vitriol [as] a smokescreen" and "bolting for the door" just before Enron's stock price plummeted); 3 Supp. Record 1711 (discussing the role of Skilling and Lay in "the granddaddy of all corporate frauds").

finally bring "the true measure of justice in the Enron saga." Record 40002; App. 1457a, 1460a.[2] On the day the superseding indictment charging Lay was issued, "the Chronicle dedicated three-quarters of its front page, 2 other full pages, and substantial portions of 4 other pages, all in the front or business sections, to th[e] story." *Id.*, ¶ 57, at 580a–581a.

Citing the widely felt sense of victimhood among Houstonians and the voluminous adverse publicity, Skilling moved in November 2004 for a change of venue.[3] The District Court denied the motion, characterizing the media coverage as largely "objective and unemotional." App. to Brief for United States 11a. *Voir dire*, it concluded, would provide an effective means to "ferret out any bias" in the jury pool. *Id.*, at 18a; see *ante*, at 370.

To that end, the District Court began the jury selection process by mailing screening questionnaires to 400 prospective jurors in November 2005. The completed questionnaires of the 283 respondents not excused for hardship dramatically illustrated the widespread impact of Enron's collapse on the Houston community and confirmed the intense animosity of Houstonians toward Skilling and his codefendants. More than one-third of the prospective jurors (approximately 99 of 283, by my count) indicated that they

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[2] According to Skilling's media expert, local television stations "adopted these same themes" and "dr[o]ve them home through such vivid and repeated visual imagery as replaying footage of Skilling's . . . 'perp walk' when details about Skilling's upcoming trial [we]re discussed." App. ¶ 65, at 584a. During arraignment, news outlets "followed each man as he drove from his home to FBI headquarters, to the court, and back home, often providing 'color' commentary—such as interviewing former Enron employees for comment on the day's events." *Id.*, ¶ 60, at 581a.

[3] Reporting on the change-of-venue motion, the Chronicle described Skilling as a "desperate defendant," and the Austin American-Statesman opined that while a change of venue may make sense "[f]rom a legal perspective," "from the standpoint of pure justice, the wealthy executives really should be judged right where their economic hurricane struck with the most force." *Id.*, at 748a, 747a.

or persons they knew had lost money or jobs as a result of the Enron bankruptcy. Two-thirds of the jurors (about 188 of 283) expressed views about Enron or the defendants that suggested a potential predisposition to convict. In many instances, they did not mince words, describing Skilling as "smug," "arrogant," "brash," "conceited," "greedy," "deceitful," "totally unethical and criminal," "a crook," "the biggest liar on the face of the earth," and "guilty as sin" (capitalization omitted).[4] Only about 5 percent of the prospective jurors (15 of 283) did not read the Houston Chronicle, had not otherwise "heard or read about any of the Enron cases," Record 13019, were not connected to Enron victims, and gave no answers suggesting possible antipathy toward the defendants.[5] The parties jointly stipulated to the dismissal

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[4] See, *e. g.*, Juror 1 ("Ken Lay and the others are guilty as all get out and ought to go to jail"; Skilling is "[b]rash, [a]rrogant [and] [c]onceited"; "I find it morally awful that these people are still running loose"); Juror 70 ("Mr. Skilling is the biggest liar on the face of the earth"); Juror 163 (Skilling "would lie to his mother if it would further his cause"); Juror 185 ("I think [Skilling] was arrogant and a crook"); Juror 200 (Skilling is a "[s]killful [l]iar [and] crook" who did "a lot of the dirty work"; the defendants would "have to be blind, deaf, [and] stupid to be unaware of what was happening" (emphasis deleted)); Juror 206 (Skilling is "[t]otally unethical and criminal"; the defendants "are all guilty and should be reduced to having to beg on the corner [and] live under a bridge"); Juror 238 ("They are all guilty as sin—come on now"); Juror 299 (Skilling "initiated, designed, [and] authorized certain illegal actions"); Juror 314 (Lay "should 'fess up' and take his punishment like a man"; "[t]he same goes for Jeffrey Skilling. . . . He and his family . . . should be stripped of *all* of their assets [and] made to start over just like the thousands he made start all over"); Juror 377 (Skilling is "[s]mug," "[g]reedy," and "[d]isingenu[ous]"; he "had an active hand in creating and sustaining a fraud"). Defendants' Renewed Motion for Change of Venue, Record, Doc. 618 (Sealed Exhs.) (hereinafter Skilling's Renewed Venue Motion); see also App. 794a–797a (summarizing additional responses).

[5] Another 20 percent (about 59 of 283) indicated that they read the Chronicle or had otherwise heard about the Enron cases but did not report that they were victims or make comments suggesting possible bias against the defendants.

of 119 members of the jury pool for cause, hardship, or disability, but numerous individuals who had made harsh comments about Skilling remained.[6]

On December 28, 2005, shortly after the questionnaires had been returned, Causey pleaded guilty. The plea was covered in lead newspaper and television stories. A front-page headline in the Chronicle proclaimed that "Causey's plea wreaks havoc for Lay, Skilling." Record 12049, n. 13; see also *ibid.* (quoting a former U. S. attorney who described the plea as "a serious blow to the defense"). A Chronicle editorial opined that "Causey's admission of securities fraud . . . makes less plausible Lay's claim that most of the guilty

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[6] See, *e. g.*, Juror 29 (Skilling is "[n]ot an honest man"); Juror 104 (Skilling "knows more than he's admitting"); Juror 211 ("I believe he was involved in wrong doings"); Juror 219 ("So many people lost their life savings because of the dishonesty of some members of the executive team"; Skilling was "[t]oo aggressive w[ith] accounting"); Juror 234 ("With his level of control and power, hard to believe that he was unaware and not responsible in some way"); Juror 240 (Skilling "[s]eems to be very much involved in criminal goings on"); Juror 255 ("[T]housands of people were taken advantage of by executives at Enron"; Skilling is "arrogant"; "Skilling was Andrew Fastow's immediate superior. Fastow has plead[ed] guilty to felony charges. I believe Skilling was aware of Fastow's illegal behavior"); Juror 263 ("Nice try resigning 6 months before the collaps[e], but again, he had to know what was going on"); Juror 272 (Skilling "[k]new he was getting out before the [d]am [b]roke"); Juror 292 (Skilling "[b]ailed out when he knew Enron was going down"); Juror 315 ("[H]ow could they not know and they seem to be lying about some things"); Juror 328 ("They should be held responsible as officers of this company for what happened"); Juror 350 ("I believe he greatly misused his power and affected hundreds of lives as a result"; "I believe they are all guilty. Their 'doings' affected not only those employed by Enron but many others as well"); Juror 360 ("I seem to remember him trying to claim to have mental or emotional issues that would remove him from any guilt. I think that is deceitful. It seems as though he is a big player in the downfall"); Juror 378 ("I believe he knew, and certainly should have known as the CEO, that illegal and improper [activities] were rampant in Enron"; "I believe all of them were instrumental, and were co-conspirators, in the massive fraud perpetrated at Enron"). Skilling's Renewed Venue Motion.

pleas were the result of prosecutorial pressure rather than actual wrongdoing." *Id.*, at 12391.

With the trial date quickly approaching, Skilling renewed his change-of-venue motion, arguing that both the questionnaire responses and the Causey guilty plea confirmed that he could not receive a fair trial in Houston. In the alternative, Skilling asserted that "defendants are entitled to a more thorough jury selection process than currently envisioned by the [c]ourt." *Id.*, at 12067. The court had announced its intention to question individual jurors at the bench with one attorney for each side present, and to complete the *voir dire* in a single day. See, *e. g.*, *id.*, at 11804–11805, 11808. Skilling proposed, *inter alia*, that defense counsel be afforded a greater role in questioning, *id.*, at 12074; that jurors be questioned privately *in camera* or in a closed courtroom where it would be easier for counsel to consult with their colleagues, clients, and jury consultants, *id.*, at 12070–12072; and that the court "avoid leading questions," which "tend to [e]licit affirmative responses from prospective jurors that may not reflect their actual views," *id.*, at 12072. At a minimum, Skilling asserted, the court should grant a continuance of at least 30 days and send a revised questionnaire to a new group of prospective jurors. *Id.*, at 12074–12075.

The District Court denied Skilling's motion without a hearing, stating in a brief order that it was "not persuaded that the evidence or arguments urged by defendants . . . establish that pretrial publicity and/or community prejudice raise a presumption of inherent jury prejudice." *Id.*, at 14115. According to the court, the "jury questionnaires sent to the remaining members of the jury panel and the court's voir dire examination of the jury panel provide adequate safeguards to defendants and will result in the selection of a fair and impartial jury in this case." *Id.*, at 14115–14116. The court did agree to delay the trial by two weeks, until January 30, 2006.

The coming trial featured prominently in local news outlets. A front-page, eve-of-trial story in the Chronicle described "the hurt and anger and resentment" that had been "churn[ing] inside" Houstonians since Enron's collapse. *Id.*, at 39946. Again criticizing Lay and Skilling for offering a "doofus defense" ("a plea of not guilty by reason of empty-headedness"), the paper stated that "Lay and Skilling took hundreds of millions in compensation yet now fail to accept the responsibility that went with it." *Ibid.* The article allowed that the defendants' guilt, "though perhaps widely assumed, remains even now an assertion. A jury now takes up the task of deciding whether that assertion is valid." *Id.*, at 39947. The next paragraph, however, assured readers that "it's normal for your skin to crawl when Lay or Skilling claim with doe-eyed innocence that they were unaware that something was amiss at Enron. The company's utter failure belies the claim." *Ibid.* (one paragraph break omitted); see also *id.*, at 39904 (declaring that Lay and Skilling would "have to offer a convincing explanation for how executives once touted as corporate geniuses could be so much in the dark about the illegal activities and deceptive finances of their own company").

It is against this backdrop of widespread community impact and pervasive pretrial publicity that jury selection in Skilling's case unfolded. Approximately 160 prospective jurors appeared for *voir dire* at a federal courthouse located "about six blocks from Enron's former headquarters." 554 F. 3d, at 561. Addressing them as a group, the District Court began by briefly describing the case and providing a standard admonition about the need to be fair and impartial and to decide the case based solely on the trial evidence and jury instructions. The court then asked whether anyone had "any reservations about your ability to conscientiously and fairly follow these very important rules." App. 815a. Two individuals raised their hands and were called forward

to the bench. One told the court that he thought Lay and Skilling "knew exactly what they were doing" and would have to prove their innocence. *Id.*, at 818a–819a. The second juror, who had stated on his written questionnaire that he held no opinion that would preclude him from being impartial, declared that he "would dearly love to sit on this jury. I would love to claim responsibility, at least 1/12 of the responsibility, for putting these sons of bitches away for the rest of their lives." *Id.*, at 819a–820a. The court excused both jurors for cause.

The court proceeded to question individual jurors from the bench. As the majority recounts, *ante*, at 373–374, the court asked them a few general yes/no questions about their exposure to Enron-related news, often variations of, "Do you recall any particular articles that stand out that you've read about the case?" App. 850a. The court also asked about questionnaire answers that suggested bias, focusing mainly on whether, notwithstanding seemingly partial comments, the prospective jurors believed they "could be fair" and "put the government to its proof." *Id.*, at 852a. Counsel were permitted to follow up on issues raised by the court. The court made clear, however, that its patience would be limited, see, *e. g.*, *id.*, at 879a, and questioning tended to be brief—generally less than five minutes per person. Even so, it exposed disqualifying biases among several prospective jurors who had earlier expressed no concerns about their ability to be fair.[7]

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[7] See App. 894a (Juror 43) (expressed the view that the defendants "stole money" from their employees); *id.*, at 922a (Juror 55) (admitted that she "lean[ed] towards prejudging" the defendants); *id.*, at 946a (Juror 71) (stated that she would place the burden of proof on the defendants); *id.*, at 954a–960a (Juror 75) (indicated that she could not set aside her view that there was fraud at Enron); *id.*, at 1003a–1006a (Juror 104) (stated that she questioned the defendants' innocence and that she "would be very upset with the government if they could not prove their case"); *id.*, at 1008a (Juror 112) (expressed that the view that the defendants were guilty).

Once it identified 38 qualified prospective jurors, the court allowed the defense and Government to exercise their allotted peremptory challenges. This left 12 jurors and 4 alternates, who were sworn in and instructed, for the first time, "not [to] read anything dealing with this case or listen to any discussion of the case on radio or television or access any Internet sites that may deal with the case" and to "inform your friends and family members that they should not discuss with you anything they may have read or heard about this case." *Id.*, at 1026a. Start to finish, the selection process took about five hours.

Skilling's trial commenced the next day and lasted four months. After several days of deliberations, the jury found Skilling guilty of conspiracy, 12 counts of securities fraud, 5 counts of making false representations to auditors, and 1 count of insider trading; it acquitted on 9 insider trading counts. The jury found Lay guilty on all counts.

On appeal, Skilling asserted that he had been denied his constitutional right to a fair trial before an impartial jury. Addressing this claim, the Court of Appeals began by disavowing the District Court's findings concerning "community hostility." There was, the court concluded, "sufficient inflammatory pretrial material to require a finding of presumed prejudice, especially in light of the immense volume of coverage." 554 F. 3d, at 559. "[P]rejudice was [also] inherent in an alleged co-conspirator's well-publicized decision to plead guilty on the eve of trial." *Ibid.* The Court of Appeals, moreover, faulted the District Court for failing to "consider the wider context." *Id.*, at 560. "[I]t was not enough for the court merely to assess the tone of the news reporting. The evaluation of the volume and nature of reporting is merely a proxy for the real inquiry: whether there could be a fair trial by an impartial jury that was not influenced by outside, irrelevant sources." *Ibid.* (internal quotation marks and footnote omitted). According to the Court of Appeals, "[t]he district court seemed to overlook that the

prejudice came from more than just pretrial media publicity, but also from the sheer number of victims." *Ibid.*

Having determined that "Skilling was entitled to a presumption of prejudice," the Court of Appeals proceeded to explain that "the presumption is rebuttable, . . . and the government may demonstrate from the *voir dire* that an impartial jury was actually impanelled." *Id.*, at 561 (internal quotation marks omitted). Describing the *voir dire* as "exemplary," "searching," and "proper and thorough," *id.*, at 562, the court concluded that "[t]he government [had] met its burden of showing that the actual jury that convicted Skilling was impartial," *id.*, at 564–565. On this basis, the Court of Appeals rejected Skilling's claim and affirmed his convictions.

II

The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961); see also *Sheppard* v. *Maxwell*, 384 U. S. 333, 362 (1966). Community passions, often inflamed by adverse pretrial publicity, can call the integrity of a trial into doubt. In some instances, this Court has observed, the hostility of the community becomes so severe as to give rise to a "presumption of [juror] prejudice." *Patton* v. *Yount*, 467 U. S. 1025, 1031 (1984).

The Court of Appeals incorporated the concept of presumptive prejudice into a burden-shifting framework: Once the defendant musters sufficient evidence of community hostility, the onus shifts to the Government to prove the impartiality of the jury. The majority similarly envisions a fixed point at which public passions become so intense that prejudice to a defendant's fair-trial rights must be presumed. The majority declines, however, to decide whether the presumption is rebuttable, as the Court of Appeals held.

This Court has never treated the notion of presumptive prejudice so formalistically. Our decisions instead merely convey the commonsense understanding that as the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury. The underlying question has always been this: Do we have confidence that the jury's verdict was "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"? *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U. S. 454, 462 (1907).

The inquiry is necessarily case specific. In selecting a jury, a trial court must take measures adapted to the intensity, pervasiveness, and character of the pretrial publicity and community animus. Reviewing courts, meanwhile, must assess whether the trial court's procedures sufficed under the circumstances to keep the jury free from disqualifying bias. Cf. *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975) (scrutinizing the record for "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair"). This Court's precedents illustrate the sort of steps required in different situations to safeguard a defendant's constitutional right to a fair trial before an impartial jury.

At one end of the spectrum, this Court has, on rare occasion, confronted such inherently prejudicial circumstances that it has reversed a defendant's conviction "without pausing to examine . . . the *voir dire* examination of the members of the jury." *Rideau* v. *Louisiana*, 373 U. S. 723, 727 (1963). In *Rideau*, repeated television broadcasts of the defendant's confession to murder, robbery, and kidnaping so thoroughly poisoned local sentiment as to raise doubts that even the most careful *voir dire* could have secured an impartial jury. A change of venue, the Court determined, was thus the only way to ensure a fair trial. *Ibid.;* see also 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 23.2(a), p. 264 (3d ed. 2007) (hereinafter LaFave) ("The best reading

of *Rideau* is that the Court there recognized that prejudicial publicity may be so inflammatory and so pervasive that the voir dire simply cannot be trusted to fully reveal the likely prejudice among prospective jurors").

As the majority describes, *ante*, at 379–380, this Court reached similar conclusions in *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Sheppard*, 384 U. S. 333. These cases involved not only massive pretrial publicity but also media disruption of the trial process itself. Rejecting the argument that the defendants were not entitled to relief from their convictions because they "ha[d] established no isolatable prejudice," the Court described the "untoward circumstances" as "inherently suspect." *Estes*, 381 U. S., at 542, 544. It would have been difficult for the jurors not to have been swayed, at least subconsciously, by the "bedlam" that surrounded them. *Sheppard*, 384 U. S., at 355. Criticizing the trial courts' failures "to protect the jury from outside influence," *id.*, at 358, the Court stressed that, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another [venue] not so permeated with publicity." *Id.*, at 363. *Estes* and *Sheppard* thus applied *Rideau*'s insight that in particularly extreme circumstances even the most rigorous *voir dire* cannot suffice to dispel the reasonable likelihood of jury bias.

Apart from these exceptional cases, this Court has declined to discount *voir dire* entirely and has instead examined the particulars of the jury selection process to determine whether it sufficed to produce a jury untainted by pretrial publicity and community animus. The Court has recognized that when antipathy toward a defendant pervades the community there is a high risk that biased jurors will find their way onto the panel. The danger is not merely that some prospective jurors will deliberately hide their prejudices, but also that, as "part of a community deeply hostile to the accused," "they may unwittingly [be] influ-

enced" by the fervor that surrounds them. *Murphy*, 421 U. S., at 803. To ensure an impartial jury in such adverse circumstances, a trial court must carefully consider the knowledge and attitudes of prospective jurors and then closely scrutinize the reliability of their assurances of fairness. Cf. *Morgan* v. *Illinois*, 504 U. S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors").

Irvin offers an example of a case in which the trial court's *voir dire* did not suffice to counter the "wave of public passion" that had swept the community prior to the defendant's trial. 366 U. S., at 728. The local news media had "extensively covered" the crimes (a murder spree), "arous[ing] great excitement and indignation." *Id.*, at 719 (internal quotation marks omitted). Following Irvin's arrest, the press "blanketed" the community with "a barrage of newspaper headlines, articles, cartoons and pictures" communicating numerous unfavorable details about Irvin, including that he had purportedly confessed. *Id.*, at 725. Nearly 90 percent of the 430 prospective jurors examined during the trial court's *voir dire* "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty." *Id.*, at 727. Of the 12 jurors seated, 8 "thought petitioner was guilty," although "each indicated that notwithstanding his opinion he could render an impartial verdict." *Id.*, at 727, 724.

Despite the seated jurors' assurances of impartiality, this Court invalidated Irvin's conviction for want of due process. "It is not required," this Court declared, "that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, at 722–723. The Court emphasized, however, that a juror's word on this matter is not decisive, particularly when "the build-up of prejudice [in the community] is clear

and convincing." *Id.*, at 725. Many of Irvin's jurors, the Court noted, had been influenced by "the pattern of deep and bitter prejudice shown to be present throughout the community." *Id.*, at 727 (internal quotation marks omitted). The Court did not "doubt [that] each juror was sincere when he said that he would be fair and impartial to [Irvin], but . . . [w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.*, at 728.

The media coverage and community animosity in *Irvin* were particularly intense. In three subsequent cases, this Court recognized that high-profile cases may generate substantial publicity without stirring similar public passions. The jury selection process in such cases, the Court clarified, generally need not be as exhaustive as in a case such as *Irvin*. So long as the trial court conducts a reasonable inquiry into extrajudicial influences and the ability of prospective jurors to presume innocence and render a verdict based solely on the trial evidence, we would generally have no reason to doubt the jury's impartiality.[8]

The first of these cases, *Murphy*, 421 U. S. 794, involved a well-known defendant put on trial for a widely publicized Miami Beach robbery. The state trial court denied his motion for a change of venue and during *voir dire* excused 20 of the 78 prospective jurors for cause. Distinguishing *Irvin*, this Court saw no indication in the *voir dire* of "such hostility to [Murphy] by the jurors who served in his trial as to suggest a partiality that could not be laid aside." 421 U. S., at 800. Although some jurors "had a vague recollection of the robbery with which [Murphy] was charged and each had

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[8] Of course, even if the jury selection process is adequate, a trial court violates a defendant's right to an impartial jury if it erroneously denies a for-cause challenge to a biased venire member who ultimately sits on the jury. See, *e. g.*, *United States* v. *Martinez-Salazar*, 528 U. S. 304, 316 (2000) ("[T]he seating of any juror who should have been dismissed for cause . . . would require reversal").

some knowledge of [his] past crimes," "none betrayed any belief in the relevance of [Murphy's] past to the present case." *Ibid.;* see also *ibid.*, n. 4 (contrasting a juror's "mere familiarity with [a defendant] or his past" with "an actual predisposition against him"). "[T]hese indicia of impartiality," the Court suggested, "might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances surrounding [Murphy's] trial [were] not at all of that variety." *Id.*, at 802.

In a second case, *Yount*, 467 U. S. 1025, the defendant was granted a new trial four years after being convicted of murder. He requested a change of venue, citing pretrial publicity and the widespread local knowledge that he had previously been convicted and had made confessions that would be inadmissible in court. The state trial court denied Yount's motion and seated a jury following a 10-day *voir dire* of 292 prospective jurors. Nearly all of the prospective jurors had heard of the case, and 77 percent "admitted they would carry an opinion into the jury box." *Id.*, at 1029. Declining to grant relief on federal habeas review, this Court stressed the significant interval between Yount's first trial—when "adverse publicity and the community's sense of outrage were at their height"—and his second trial, which "did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened." *Id.*, at 1032. While 8 of the 14 seated jurors and alternates had "at some time . . . formed an opinion as to Yount's guilt," the "particularly extensive" *voir dire* confirmed that "time had weakened or eliminated any" bias they once may have harbored. *Id.*, at 1029–1030, 1034, n. 10, 1033. Accordingly, this Court concluded, "the trial court did not commit manifest error in finding that the jury as a whole was impartial." *Id.*, at 1032.

This Court most recently wrestled with the issue of pretrial publicity in *Mu'Min* v. *Virginia*, 500 U. S. 415 (1991).

Mu'Min stood accused of murdering a woman while out of prison on a work detail. Citing 47 newspaper articles about the crime, Mu'Min moved for a change of venue. The state trial court deferred its ruling and attempted to seat a jury. During group questioning, 16 of the 26 prospective jurors indicated that they had heard about the case from media or other sources. Dividing these prospective jurors into panels of four, the court asked further general questions about their ability to be fair given what they had heard or read. One juror answered equivocally and was dismissed for cause. The court refused Mu'Min's request to ask more specific questions "relating to the content of news items that potential jurors might have read or seen." *Id.*, at 419. Of the 12 persons who served on the jury, "8 had at one time or another read or heard something about the case. None had indicated that he had formed an opinion about the case or would be biased in any way." *Id.*, at 421.

Rejecting Mu'Min's attempt to analogize his case to *Irvin*, this Court observed that "the cases differ both in the kind of community in which the coverage took place and in extent of media coverage." 500 U. S., at 429. Mu'Min's offense occurred in the metropolitan Washington, D. C., area, "which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year." *Ibid.* While the crime garnered "substantial" pretrial publicity, the coverage was not as pervasive as in *Irvin* and "did not contain the same sort of damaging information." 500 U. S., at 429–430. Moreover, in contrast to *Irvin*, the seated jurors uniformly disclaimed having ever formed an opinion about the case. Given these circumstances, this Court rebuffed Mu'Min's assertion that the trial court committed constitutional error by declining to "make precise inquiries about the contents of any news reports that potential jurors have read." 500 U. S., at 424. The Court stressed, however, that its ruling was context specific: "Had the trial court in this case been confronted with the 'wave of public passion'

engendered by pretrial publicity that occurred in connection with Irvin's trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here." *Id.*, at 429.

III

It is necessary to determine how this case compares to our existing fair-trial precedents. Were the circumstances so inherently prejudicial that, as in *Rideau*, even the most scrupulous *voir dire* would have been "but a hollow formality" incapable of reliably producing an impartial jury? 373 U. S., at 726. If the circumstances were not of this character, did the District Court conduct a jury selection process sufficiently adapted to the level of pretrial publicity and community animus to ensure the seating of jurors capable of presuming innocence and shutting out extrajudicial influences?

A

Though the question is close, I agree with the Court that the prospect of seating an unbiased jury in Houston was not so remote as to compel the conclusion that the District Court acted unconstitutionally in denying Skilling's motion to change venue. Three considerations lead me to this conclusion. First, as the Court observes, *ante*, at 382, the size and diversity of the Houston community make it probable that the jury pool contained a nontrivial number of persons who were unaffected by Enron's collapse, neutral in their outlook, and unlikely to be swept up in the public furor. Second, media coverage of the case, while ubiquitous and often inflammatory, did not, as the Court points out, *ante*, at 382–383, contain a confession by Skilling or similar "smoking-gun" evidence of specific criminal acts. For many prospective jurors, the guilty plea of codefendant and alleged coconspirator Causey, along with the pleas and convictions of other Enron executives, no doubt suggested guilt by association. But reasonable minds exposed to such information

would not necessarily have formed an indelible impression that Skilling himself was guilty as charged. Cf. *Rideau*, 373 U. S., at 726 (a majority of the county's residents were "exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged"). Third, there is no suggestion that the courtroom in this case became, as in *Estes* and *Sheppard*, a "carnival" in which the "calmness and solemnity" of the proceedings were compromised. *Sheppard*, 384 U. S., at 358, 350 (internal quotation marks omitted). It is thus appropriate to examine the *voir dire* and determine whether it instills confidence in the impartiality of the jury actually selected.[9]

B

In concluding that the *voir dire* "adequately detect[ed] and defuse[d] juror bias," *ante*, at 385, the Court downplays the

[9] Whether the District Court abused its discretion in declining to change venue pursuant to the Federal Rules of Criminal Procedure is a different question. See Fed. Rule Crim. Proc. 21(a) ("Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there"). As this Court has indicated, its supervisory powers confer "more latitude" to set standards for the conduct of trials in federal courts than in state courts. *Mu'Min* v. *Virginia*, 500 U. S. 415, 424 (1991). While the circumstances may not constitutionally compel a change of venue "without pausing to examine . . . the *voir dire*," *Rideau* v. *Louisiana*, 373 U. S. 723, 727 (1963), the widely felt sense of victimhood among Houstonians and the community's deep-seated animus toward Skilling certainly meant that the task of reliably identifying untainted jurors posed a major challenge, with no guarantee of success. It likely would have been far easier to empanel an impartial jury in a venue where the Enron story had less salience. I thus agree with the Court of Appeals that "[i]t would not have been imprudent for the [District] [C]ourt to have granted Skilling's transfer motion." 554 F. 3d 529, 558 (CA5 2009). Skilling, however, likely forfeited any Rule 21 or supervisory powers claim by failing to present it either in his opening brief before the Fifth Circuit, see *id.*, at 559, n. 39, or in his petition for certiorari, cf. *ante*, at 378, n. 11.

extent of the community's antipathy toward Skilling and exaggerates the rigor of the jury selection process. The devastating impact of Enron's collapse and the relentless media coverage demanded exceptional care on the part of the District Court to ensure the seating of an impartial jury. While the procedures employed by the District Court might have been adequate in the typical high-profile case, they did not suffice in the extraordinary circumstances of this case to safeguard Skilling's constitutional right to a fair trial before an impartial jury.

In conducting this analysis, I am mindful of the "wide discretion" owed to trial courts when it comes to jury-related issues. *Mu'Min*, 500 U. S., at 427; cf. *ante*, at 386–387. Trial courts are uniquely positioned to assess public sentiment and the credibility of prospective jurors. Proximity to events, however, is not always a virtue. Persons in the midst of a tumult often lack a panoramic view. "[A]ppellate tribunals [thus] have the duty to make an independent evaluation of the circumstances." *Sheppard*, 384 U. S., at 362. In particular, reviewing courts are well qualified to inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury. If the jury selection process does not befit the circumstances of the case, the trial court's rulings on impartiality are necessarily called into doubt. See *Morgan*, 504 U. S., at 729–730 ("'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled'" (quoting *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981) (plurality opinion))); see also *Mu'Min*, 500 U. S., at 451 (KENNEDY, J., dissenting) ("Our willingness to accord substantial deference to a trial court's finding of juror impartiality rests on our expectation that the trial court will conduct a sufficient *voir dire* to determine the credibility of a juror professing to be impartial").

1

As the Court of Appeals apprehended, the District Court gave short shrift to the mountainous evidence of public hostility. For Houstonians, Enron's collapse was an event of once-in-a-generation proportions. Not only was the volume of media coverage "immense" and frequently intemperate, but "the sheer number of victims" created a climate in which animosity toward Skilling ran deep and the desire for conviction was widely shared. 554 F. 3d, at 559–560.

The level of public animus toward Skilling dwarfed that present in cases such as *Murphy* and *Mu'Min.* The pretrial publicity in those cases consisted of dozens of news reports, most of which were "largely factual in nature." *Murphy*, 421 U. S., at 802. There was no indication that the relevant communities had been captivated by the cases or had adopted fixed views about the defendants. In contrast, the number of media reports in this case reached the tens of thousands, and full-throated denunciations of Skilling were common. The much closer analogy is thus to *Irvin*, which similarly featured a "barrage" of media coverage and a "huge . . . wave of public passion," 366 U. S., at 725, 728, although even that case did not, as here, involve direct harm to entire segments of the community.[10]

Attempting to distinguish *Irvin*, the majority suggests that Skilling's economic offenses were less incendiary than Irvin's violent crime spree and that "news stories about Enron contained nothing resembling the horrifying information rife in reports about Irvin's rampage of robberies and murders." *Ante*, at 394. Along similar lines, the District Court described "the facts of this case [as] neither heinous nor sensational." App. to Brief for United States 10a. The majority also points to the four years that passed between

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[10] One of Skilling's experts noted that, "[i]n cases involving 200 or more articles, trial judges granted a change of venue 59% of the time." App. ¶ 30, at 611a.

Enron's declaration of bankruptcy and the start of Skilling's trial, asserting that "the decibel level of media attention diminished somewhat" over this time. *Ante*, at 383. Neither of these arguments is persuasive.

First, while violent crimes may well provoke widespread community outrage more readily than crimes involving monetary loss, economic crimes are certainly capable of rousing public passions, particularly when thousands of unsuspecting people are robbed of their livelihoods and retirement savings. Indeed, the record in this case is replete with examples of visceral outrage toward Skilling and other Enron executives. See, *e. g.*, Record 39946 (front-page, eve-of-trial story describing "the hurt and anger and resentment . . . churn[ing] inside" the people of Houston). Houstonians compared Skilling to, among other things, a rapist, an axe murderer, and an al Qaeda terrorist.[11] As one commentator observed, "[i]t's a sign of how shocked Houstonians are about Enron's ignominious demise that Sept. 11 can be invoked—and is frequently—to explain the shock of the company's collapse." 3 Supp. Record 544. The bad blood was so strong that Skilling and other top executives hired private security to protect themselves from persons inclined to take the law into their own hands. See, *e. g.*, App. 1154a ("After taking the temperature of Enron's victims, [a local lawyer] says the Enron executives are wise to take security precautions").

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[11] See, *e. g.*, 554 F. 3d, at 559, n. 42 ("I'm livid, absolutely livid . . . . I have lost my entire friggin' retirement to these people. They have raped all of us" (internal quotation marks omitted)); App. 382a ("Hurting that many elderly people so severely is, I feel, the equivalent of being an axe murderer. His actions were just as harmful as an axe murderer to the [community]" (alteration in original)); *id.*, at 1152a–1153a ("Not having the stuff of suicide bombers, Enron's executive pilots took full advantage of golden parachutes to bail out of their high-flying corporate jet after setting the craft on a course to financial oblivion. In a business time frame, Enron pancaked faster than the twin towers"); *id.*, at 1163a (noting that "Skilling's picture turned up alongside Osama bin Laden's on 'Wanted' posters inside the company headquarters").

Second, the passage of time did little to soften community sentiment. Contrary to the Court's suggestion, *ante*, at 383, this case in no way resembles *Yount*, where, by the time of the defendant's retrial, "prejudicial publicity [had] greatly diminished" and community animus had significantly waned. 467 U. S., at 1032; see also *ibid.* (in the months preceding the defendant's retrial, newspaper reports about the case averaged "less than one article per month," and public interest was "minimal"). The Enron story was a continuing saga, and "publicity remained intense throughout." 554 F. 3d, at 560. Not only did Enron's downfall generate wall-to-wall news coverage, but so too did a succession of subsequent Enron-related events.[12] Of particular note is the highly publicized guilty plea of codefendant Causey just weeks before Skilling's trial. If anything, the time that elapsed between the bankruptcy and the trial made the task of seating an unbiased jury more difficult, not less. For many mem-

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[12] Among the highlights: In 2002, Skilling testified before Congress, and other Enron executives invoked their Fifth Amendment rights; Enron auditor Arthur Andersen was indicted, tried, convicted, and sentenced on charges of obstruction of justice; the Enron Task Force charged Enron chief financial officer and Skilling-protege Andrew Fastow with fraud, money laundering, and other crimes; and at least two Enron employees pleaded guilty on fraud and tax charges. In 2003, the Enron Task Force indicted numerous Enron employees, including Ben Glisan, Jr. (the company's treasurer), Lea Fastow (wife of Andrew and an assistant treasurer), and more than half a dozen executives of Enron Broadband Services; several Enron employees entered guilty pleas and received prison sentences; and Enron filed its bankruptcy reorganization plan. In 2004, Andrew and Lea Fastow both pleaded guilty; Skilling and Causey were indicted in February; a superseding indictment adding Lay was filed in July; a number of additional Enron employees entered guilty pleas; and former Enron employees and Merrill Lynch bankers were defendants in a 6-week trial in Houston concerning an Enron deal involving the sale of Nigerian barges. In 2005, a 3-month trial was held in Houston for five executives of Enron Broadband Services; various pretrial proceedings occurred in the runup to the trial of Skilling, Lay, and Causey; and, three weeks before the scheduled trial date, Causey pleaded guilty to securities fraud.

bers of the jury pool, each highly publicized Enron-related guilty plea or conviction likely served to increase their certainty that Skilling too had engaged in—if not masterminded—criminal acts, particularly given that the media coverage reinforced this view. See *supra*, at 433–434. The trial of Skilling and Lay was the culmination of all that had come before. See Record 40002 (noting that "prosecutors followed the classic pattern of working their way up through the ranks"). As the Chronicle put it in July 2005, shortly after the trial of several Enron Broadband Services executives ended without convictions: "The real trial, the true measure of justice in the Enron saga, begins in January. Let the small fry swim free if need be. We've got bigger fish in need of frying." App. 1460a (paragraph breaks omitted); see also *ibid.* ("From the beginning, the Enron prosecution has had one true measure of success: Lay and Skilling in a cold steel cage").

Any doubt that the prevailing mindset in the Houston community remained overwhelmingly negative was dispelled by prospective jurors' responses to the written questionnaires. As previously indicated, *supra*, at 431–433, more than one-third of the prospective jurors either knew victims of Enron's collapse or were victims themselves, and two-thirds gave responses suggesting an antidefendant bias. In many instances their contempt for Skilling was palpable. See nn. 4, 6, *supra.* Only a small fraction of the prospective jurors raised no red flags in their responses. And this was *before* Causey's guilty plea and the flurry of news reports that accompanied the approach of trial. One of Skilling's experts, a political scientist who had studied pretrial publicity "for over 35 years" and consulted in more than 200 high-profile cases (in which he had recommended against venue changes more often than not), "c[a]me to the conclusion that the extent and depth of bias shown in these questionnaires is the highest or at least one of the very highest I have ever encountered." App. ¶¶ 2, 7, at 783a, 785a (emphasis deleted).

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Given the extent of the antipathy evident both in the community at large and in the responses to the written questionnaire, it was critical for the District Court to take "strong measures" to ensure the selection of "an impartial jury free from outside influences." *Sheppard*, 384 U. S., at 362. As this Court has recognized, "[i]n a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Murphy*, 421 U. S., at 803; see also *Groppi* v. *Wisconsin*, 400 U. S. 505, 510 (1971) ("'[A]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere'" (quoting *Frank* v. *Mangum*, 237 U. S. 309, 349 (1915) (Holmes, J., dissenting))). Perhaps because it had underestimated the public's antipathy toward Skilling, the District Court's 5-hour *voir dire* was manifestly insufficient to identify and remove biased jurors.[13]

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[13] The majority points out that the jury selection processes in the three previous Enron trials that had been held in Houston were similarly brief. See *ante*, at 388–389. The circumstances of those cases, however, were very different. In particular, the defendants had not been personally subjected to anything approaching the withering public criticism that had been directed at Skilling and Lay. As earlier noted, see, *e. g.*, *supra*, at 451, it was the trial of Skilling and Lay that was widely seen as the climactic event of the Enron saga. Accordingly, my conclusion that the jury selection process in this unusual case did not suffice to select an impartial jury does not cast doubt on the adequacy of the processes used in the earlier Enron prosecutions.

Moreover, in referencing the length of the *voir dire* in this case, I do not mean to suggest that length should be a principal measure of the adequacy of a jury selection process. Trial courts, including this one, should be commended for striving to be efficient, but they must always take care to ensure that their expeditiousness does not compromise a defendant's fair-trial right. I also express no view with respect to court-led versus attorney-led *voir dire*. Federal Rule of Criminal Procedure 24(a) gives district courts discretion to choose between these options, and I have no doubt that either is capable of producing an impartial jury even

As an initial matter, important lines of inquiry were not pursued at all. The majority accepts, for instance, that "publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice." *Ante*, at 385. Implying that the District Court undertook this inquiry, the majority states that "[o]nly two venire members recalled [Causey's] plea." *Ibid.* In fact, the court asked very few prospective jurors any questions directed to their knowledge of or feelings about that event.[14] Considering how much news the plea generated, many more than two venire members were likely aware of it. The lack of questioning, however, makes the prejudicial impact of the plea on those jurors impossible to assess.

The court also rarely asked prospective jurors to describe personal interactions they may have had about the case, or to consider whether they might have difficulty avoiding discussion of the case with family, friends, or colleagues during the course of the lengthy trial. The tidbits of information that trickled out on these subjects provided cause for concern. In response to general media-related questions, several prospective jurors volunteered that they had spoken with others about the case. Juror 74, for example, indicated that her husband was the "news person," that they had "talked about it," that she had also heard things "from work," and that what she heard was "all negative, of course." App. 948a. The court, however, did not seek elaboration

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in high-profile cases so long as the trial court ensures that the scope of the *voir dire* is tailored to the circumstances.

[14] Juror 33 brought up the plea in response to the District Court's question about whether he "recall[ed] listening to any particular programs about the case." App. 888a. Juror 96, meanwhile, told the court that he read the "whole" Houston Chronicle every day, including "all the articles about Enron." *Id.*, at 992a. The court, however, did not ask any questions designed to elicit information about the Causey plea. Instead, Juror 96 remarked on the plea only after Skilling's counsel managed to squeeze in a followup as to whether he had "read about any guilty pleas in this case over the last month or two." *Id.*, at 993a.

about the substance of these interactions. Surely many prospective jurors had similar conversations, particularly once they learned upon receiving the written questionnaire that they might end up on Skilling's jury.

Prospective jurors' personal interactions, moreover, may well have left them with the sense that the community was counting on a conviction. Yet this too was a subject the District Court did not adequately explore. On the few occasions when prospective jurors were asked whether they would feel pressure from the public to convict, they acknowledged that it might be difficult to return home after delivering a not-guilty verdict. Juror 75, for instance, told the court, "I think a lot of people feel that they're guilty. And maybe they're expecting something to come out of this trial." *Id.*, at 956a. It would be "tough," she recognized, "to vote not guilty and go back into the community." *Id.*, at 957a; see also *id.*, at 852a (Juror 10) (admitting "some hesitancy" about "telling people the government didn't prove its case").

With respect to potential nonmedia sources of bias, the District Court's exchange with Juror 101 is particularly troubling.[15] Although Juror 101 responded in the negative when asked whether she had "read anything in the newspaper that [stood] out in [her] mind," she volunteered that she "just heard that, between the two of them, [Skilling and Lay] had $43 million to contribute for their case and that there was an insurance policy that they could collect on, also." *Id.*, at 998a. This information, she explained, "was just something I overheard today—other jurors talking." *Ibid.* It seemed suspicious, she intimated, "to have an insurance policy ahead of time." *Id.*, at 999a. The court advised her that "most corporations provide insurance for their officers and directors." *Ibid.* The court, however, did not investigate the matter further, even though it had earlier instructed prospective jurors not to talk to each other about the case. *Id.*,

[15] Portions of the *voir dire* transcript erroneously refer to this prospective juror as "Juror 110." See, *e. g.*, *id.*, at 996a.

at 843a. It is thus not apparent whether other prospective jurors also overheard the information and whether they too believed that it reflected unfavorably on the defendants; nor is it apparent what other outside information may have been shared among the venire members. At the very least, Juror 101's statements indicate that the court's questions were failing to bring to light the extent of jurors' exposure to potentially prejudicial facts and that some prospective jurors were having difficulty following the court's directives.

The topics that the District Court did cover were addressed in cursory fashion. Most prospective jurors were asked just a few yes/no questions about their general exposure to media coverage and a handful of additional questions concerning any responses to the written questionnaire that suggested bias. In many instances, their answers were unenlightening.[16] Yet the court rarely sought to draw them out with open-ended questions about their impressions of Enron or Skilling and showed limited patience for counsel's followup efforts. See, *e. g.*, *id.*, at 879a, 966a.[17] When pro-

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[16] The court's exchange with Juror 20 (who sat on the jury) is typical:

"Q. Do you remember reading any particular articles about this case or Mr. Lay or Mr. Skilling?

"A. Not until just recently this week, but nothing—

"Q. And there have been a lot of articles this week.

"A. Yeah.

"Q. Do you recall any particular articles you've read in the last week or so?

"A. Not word for word, no.

"Q. Did you read all the articles in the Sunday "Chronicle"?

"A. Some of them.

"Q. Which ones do you remember reading?

"A. The one about the trial, I think, and how the trial was going to work." *Id.*, at 873a–874a.

[17] The majority's criticism of Skilling's counsel for failing to ask questions of many of the prospective jurors, cf. *ante*, at 389, is thus misplaced. Given the District Court's express warning early in the *voir dire* that it would not allow counsel "to ask individual questions if [they] abuse[d]" that right, App. 879a, counsel can hardly be blamed for declining

spective jurors were more forthcoming, their responses tended to highlight the ubiquity and negative tone of the local news coverage, thus underscoring the need to press the more guarded members of the venire for further information.[18] Juror 17, for example, mentioned hearing a radio program that very morning in which a former Enron employee compared persons who did not think Skilling was guilty to Holocaust deniers. See *id.*, at 863a ("[H]e said he thought that he would find them guilty automatically if he was on the jury because he said that it would be worse than a German trying to say that they didn't kill the Jews").[19] Other jurors may well have encountered, and been influenced by, similarly incendiary rhetoric.

These deficiencies in the form and content of the *voir dire* questions contributed to a deeper problem: The District Court failed to make a sufficiently critical assessment of prospective jurors' assurances of impartiality. Although the Court insists otherwise, *ante*, at 392, the *voir dire* transcript indicates that the District Court essentially took jurors at

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to test the court's boundaries at every turn. Moreover, the court's perfunctory exchanges with prospective jurors often gave counsel no clear avenue for further permissible inquiry.

[18] Although the District Court underestimated the extent of the community hostility, it was certainly aware of the ubiquity of the pretrial publicity, acknowledging that "all of us have been exposed to substantial media attention about this case." *Id.*, at 841a. The court even made an offhand remark about one of the prior Enron prosecutions, "the Nigerian barge case," apparently expecting that the prospective jurors would understand the reference. *Id.*, at 840a.

[19] Taking a more defendant-favorable line than most prospective jurors, Juror 17 stated that he "thought the guy [on the radio] was pretty narrow minded," that "everyone should be considered innocent totally until they get a chance to come [to] court," and that the Government might have been overzealous in some of its Enron-related prosecutions. *Id.*, at 863a–864a. He added, however, that he "believe[d] there was probably some accounting fraud [at Enron]." *Id.*, at 864a. The District Court denied the Government's request to remove Juror 17 for cause, but he did not ultimately sit on the jury.

their word when they promised to be fair. Indeed, the court declined to dismiss for cause any prospective juror who ultimately gave a clear assurance of impartiality, no matter how much equivocation preceded it. Juror 29, for instance, wrote on her questionnaire that Skilling was "not an honest man." App. 881a. During questioning, she acknowledged having previously thought the defendants were guilty, and she disclosed that she lost $50,000–$60,000 in her 401(k) as a result of Enron's collapse. *Id.*, at 880a, 883a. But she ultimately agreed that she would be able to presume innocence. *Id.*, at 881a, 884a. Noting that she "blame[d] Enron for the loss of her money" and appeared to have "unshakeable bias," Skilling's counsel challenged her for cause. *Id.*, at 885a. The court, however, declined to remove her, stating that "she answered candidly she's going to have an open mind now" and "agree[ing]" with the Government's assertion that "we have to take her at her word." *Id.*, at 885a–886a.[20] As this Court has made plain, jurors' assurances of impartiality simply are not entitled to this sort of talismanic significance. See, *e. g.*, *Murphy*, 421 U. S., at 800 ("[T]he juror's assurances

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[20] The majority attempts to downplay the significance of Juror 29 by noting that she did not end up on the jury because Skilling used a peremptory challenge to remove her. See *ante*, at 395, n. 31. The majority makes a similar point with respect to other venire members who were not ultimately seated. See *ante*, at 389–390, n. 24. The comments of these venire members, however, are relevant in assessing the impartiality of the seated jurors, who were similarly "part of a community deeply hostile to the accused" and who may have been "unwittingly . . . influenced by it." *Murphy* v. *Florida*, 421 U. S. 794, 803 (1975); see also *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). Moreover, the fact that the District Court failed to remove persons as dubiously qualified as Juror 29 goes directly to the adequacy of its *voir dire*. If Juror 29 made it through to the end of the selection process, it is difficult to have confidence in the impartiality of the jurors who sat, especially given how little is known about many of them. Cf. 6 LaFave § 23.2(f), at 288 ("The responses of those not seated casts light on the credibility of the seated jurors who were familiar with the same publicity").

that he is equal to th[e] task cannot be dispositive of the accused's rights"); *Irvin*, 366 U. S., at 728 ("Where so many, so many times, admi[t] prejudice, . . . a statement of impartiality can be given little weight").

Worse still, the District Court on a number of occasions accepted declarations of impartiality that were equivocal on their face. Prospective jurors who "hope[d]" they could presume innocence and did "not necessarily" think Skilling was guilty were permitted to remain in the pool. App. 932a, 857a. Juror 61, for instance, wrote of Lay on her questionnaire, "Shame on him." *Id.*, at 931a. Asked by the court about this, she stated that, "innocent or guilty, he was at the helm" and "should have known what was going on at the company." *Ibid.;* see also *id.*, at 934a (Skilling is "probably" "in the same boat as" Lay). The court then asked, "[C]an you presume, as you start this trial, that Mr. Lay is innocent?" *Id.*, at 932a. She responded, "I hope so, but you know. I don't know. I can't honestly answer that one way or the other." *Ibid.;* see also *id.*, at 933a ("I bring in my past history. I bring in my biases. I would like to think I could rise above those, but I've never been in this situation before. So I don't know how I could honestly answer that question one way or the other. . . . I do have some concerns"). Eventually, however, Juror 61 answered "Yes" when the court asked if she would be able to acquit if she had "a reasonable doubt that the defendants are guilty." *Id.*, at 933a–934a. Challenging her for cause, defense counsel insisted that they had not received "a clear and unequivocal answer" about her ability to be fair. *Ibid.* The court denied the challenge, stating, "You know, she tried." *Ibid.*

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The majority takes solace in the fact that most of the persons actually seated as jurors and alternates "specifically stated that they had paid scant attention to Enron-related

news." *Ante,* at 390–391, and n. 26.[21] In context, however, these general declarations reveal little about the seated jurors' actual knowledge or views or the possible pressure they might have felt to convict, and thus cannot instill confidence that the jurors "were not under [the] sway" of the prevailing community sentiment. Cf. *ante,* at 391. Jurors who did not "get into details" of Enron's complicated accounting schemes, App. 856a, nevertheless knew the outline of the oft-repeated story, including that Skilling and Lay had been cast as the leading villains. Juror 63, for instance, told the court that she "may have heard a little bit" about Enron-related litigation but had not "really pa[id] attention." *Id.,* at 935a. Yet she was clearly aware of some specifics. On her questionnaire, despite stating that she had not followed Enron-related news, she wrote about "whistleblowers and Arthur Andersen lying about Enron's accounting," and she expressed the view that Skilling and Lay "probably knew they were breaking the law." Supp. App. 105sa–106sa. During questioning, which lasted barely four minutes, the District Court obtained no meaningful information about the actual extent of Juror 63's familiarity with the case or the basis for her belief in Skilling's guilt. Yet it nevertheless accepted her assurance that she could "absolutely" presume innocence. App. 937a.[22]

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[21] The majority also notes that about two-thirds of the seated jurors and alternates (11 of 16) had no personal Enron connection. *Ante,* at 389–390, and n. 25. This means, of course, that five of the seated jurors and alternates did have connections to friends or colleagues who had lost jobs or money as a result of Enron's collapse—a fact that does not strike me as particularly reassuring.

[22] As one of Skilling's jury experts observed, there is a "tendency in voir dire of jury pool members in high-profile cases to minimize their exposure to media, their knowledge of prejudicial information, and any biases they may have." App. ¶99, at 763a; see also *id.,* ¶95, at 637a ("Those who perceive themselves or wish to be perceived as good citizens are reluctant to admit they cannot be fair"). For this reason, the fact that "none of

Indeed, the District Court's anemic questioning did little to dispel similar doubts about the impartiality of numerous other seated jurors and alternates. In my estimation, more than half of those seated made written and oral comments suggesting active antipathy toward the defendants. The majority thus misses the mark when it asserts that "Skilling's seated jurors . . . exhibited nothing like the display of bias shown in *Irvin*." *Ante*, at 394. Juror 10, for instance, reported on his written questionnaire that he knew several co-workers who owned Enron stock; that he personally may have owned Enron stock through a mutual fund; that he heard and read about the Enron cases from the "Houston Chronicle, all three Houston news channels, Fox news, talking with friends [and] co-workers, [and] Texas Lawyer Magazine"; that he believed Enron's collapse "was due to greed and mismanagement"; that "[i]f [Lay] did not know what was going on in his company, he was really a poor manager/leader"; and that the defendants were "suspect." Supp. App. 11sa–19sa. During questioning, he said he "th[ought]" he could presume innocence and "believe[d]" he could put the Government to its proof, but he also acknowledged that he might have "some hesitancy" "in telling people the government didn't prove its case." App. 851a–852a.

Juror 11 wrote that he "work[ed] with someone who worked at Enron"; that he got Enron-related news from the "Houston Chronicle, Channel 2 News, Channel 13 News, O'Reilly Factor, [and] talking with friends and co-workers"; that he regularly visited the Chronicle Web site; that "greed on Enron's part" caused the company's collapse; and that "[a] lot of people were hurt financially." Supp. App. 26sa–30sa. During questioning, he stated that he would have "no

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the seated jurors and alternates checked the 'yes' box" on the written questionnaire when "asked whether they 'ha[d] an opinion about [Skilling],'" *ante*, at 391, is of minimal significance, particularly given that the Causey plea and the impending trial received significant media coverage *after* the questionnaires were submitted.

problem" requiring the Government to prove its case, but he also told the court that he believed Lay was "greedy" and that corporate executives are often "stretching the legal limits . . . . I'm not going to say that they're all crooks, but, you know." App. 857a, 854a. Asked whether he would "star[t] the case with sort of an inkling that because [Lay is] greedy he must have done something illegal," he offered an indeterminate "not necessarily." *Id.*, at 857.[23]

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[23] Many other seated jurors and alternates expressed similarly troubling sentiments. See, *e. g.*, Supp. App. 57sa–60sa (Juror 20) (obtained Enron-related news from the Chronicle and "local news stations"; blamed Enron's collapse on "[n]ot enough corporate controls or effective audit procedures to prevent mismanagement of corporate assets"; and was "angry that so many people lost their jobs and their retirement savings"); *id.*, at 72sa–75sa (Juror 38) (followed Enron-related news from various sources, including the Chronicle; was "angry about what happened"; and "fe[lt] bad for those that worked hard and invested in the corp[oration] only to have it all taken away"); *id.*, at 117sa–118sa (Juror 64) (had several friends who worked at Enron and lost money; heard about the Enron cases on the news; described the collapse as "sad" because "people lost jobs [and] money—lots of money"; and believed the Government "did the right thing" in its investigation); *id.*, at 177sa–181sa (Juror 87) (received Enron-related news from the Chronicle, Channel 13 news, the O'Reilly Factor, Internet news sources, and friends, family, and co-workers; attributed Enron's collapse to "[p]oor management [and] bad judgment—greed"; lamented "[t]he sad state of the long-term loyal employees who are left with nothing in their retirement accounts"; and "admire[d] [the] bravery" of Enron whistleblower Sherron Watkins "for bringing the situation to the attention of the public, which stopped things from getting worse"); *id.*, at 191sa–195sa (Juror 90) (heard Enron-related news from his wife, co-workers, and television; wrote that "[i]t's not right for someone . . . to take" away the money that the "small average worker saves . . . for retirement all his life"; and described the Government's Enron investigation as "a good thing"); *id.*, at 221sa–225sa (Juror 113) (obtained information about Enron from a "co-worker [who] was in the jury pool for Mrs. Fastow's trial"; worked for an employer who lost money as a result of Enron's collapse; found it "sad" that the collapse had affected "such a huge number of people"; and thought "someone had to be doing something illegal"); *id.*, at 236sa–237sa (Juror 116) (knew a colleague who lost money in Enron's collapse; obtained Enron-related news from the "Houston Chronicle, Time

While several seated jurors and alternates did not make specific comments suggesting prejudice, their written and oral responses were so abbreviated as to make it virtually impossible for the District Court reliably to assess whether they harbored any latent biases. Juror 13, for instance, wrote on his questionnaire that he had heard about the Enron cases from the "[n]ews." Supp. App. 42sa. The court questioned him for two minutes, during which time he confirmed that he had "heard what's on the news, basically," including "that the trial had moved from the 17th to the 31st." He added that the story "was all over the news on every detail of Enron." App. 858a–860a. No meaningful information about his knowledge or attitudes was obtained. Similarly, Juror 78 wrote that she had not followed Enron-related news but was aware that "[m]any people lost their jobs." Supp. App. 151sa. The court questioned her for less than 90 seconds. During that time, she acknowledged that she had "caught glimpses" of the coverage and "kn[e]w generally, you know, that the company went bankrupt" and that there "were some employees that went off and did their own businesses." App. 969a. Little more was learned.[24]

In assessing the likelihood that bias lurked in the minds of at least some of these seated jurors, I find telling the way in

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Magazine, local TV news [and] radio, friends, family, [and] co-workers, [and] internet news sources"; and noted that what stood out was "[t]he employees and retirees that lost their savings").

[24] Several other jurors fell into this category. Juror 67 wrote on his questionnaire that he had heard about Enron from the Chronicle and "Internet news sources." *Id.*, at 133sa. He was questioned for 90 seconds, during which time he indicated that he had read an article on the Internet the preceding night "about the jury selection taking place today, stuff like that." App. 944a. Juror 99 wrote that she had not heard or read about the Enron cases and did not "know anything about" Enron. Supp. App. 210sa. The District Court questioned her for barely one minute. She stated that she had "[n]ot really" learned more about the case, but added that she had heard "this and that" from her parents. App. 995a–996a. The court did not press further.

which *voir dire* played out. When the District Court asked the prospective jurors as a group whether they had any reservations about their ability to presume innocence and put the Government to its proof, only two answered in the affirmative, and both were excused for cause. *Id.*, at 815a–820a. The District Court's individual questioning, though truncated, exposed disqualifying prejudices among numerous additional prospective jurors who had earlier expressed no concerns about their impartiality. See n. 7, *supra.* It thus strikes me as highly likely that at least some of the seated jurors, despite stating that they could be fair, harbored similar biases that a more probing inquiry would likely have exposed. Cf. *Yount*, 467 U. S., at 1034, n. 10 (holding that the trial court's "particularly extensive" 10-day *voir dire* ensured the jury's impartiality).[25]

The majority suggests, *ante*, at 383–384, 395, that the jury's decision to acquit Skilling on nine relatively minor insider trading charges confirms its impartiality. This argument, however, mistakes partiality with bad faith or blind vindictiveness. Jurors who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices. Such jurors may well acquit where evidence is wholly lacking, while subconsciously resolving closer calls against the defendant rather than giving him the benefit of the doubt. Cf. *United States* v. *McVeigh*, 918 F. Supp. 1467, 1472 (WD Okla. 1996) (Prejudice "may go un-

[25] The majority suggests that the fact that Skilling "challenged only one of the seated jurors for cause" indicates that he did not believe the other jurors were biased. *Ante*, at 396. Our decisions, however, distinguish claims involving "the partiality of an individual juror" from antecedent claims directed at "the partiality of the trial jury as a whole." *Patton* v. *Yount*, 467 U. S. 1025, 1036 (1984); see also *Frazier* v. *United States*, 335 U. S. 497, 514 (1948) ("[T]he two sorts of challenge[s] are distinct and are therefore to be dealt with separately"). If the jury selection process does not, as here, give a defendant a fair opportunity to identify biased jurors, the defendant can hardly be faulted for failing to make for-cause challenges.

recognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses"). In this regard, it is significant that the Government placed relatively little emphasis on the nine insider trading counts during its closing argument, declining to explain its theory on those counts in any detail whatsoever. Record 37010. The acquittals on those counts thus provide scant basis for inferring a lack of prejudice.

* * *

In sum, I cannot accept the majority's conclusion that *voir dire* gave the District Court "a sturdy foundation to assess fitness for jury service." Cf. *ante*, at 395. Taken together, the District Court's failure to cover certain vital subjects, its superficial coverage of other topics, and its uncritical acceptance of assurances of impartiality leave me doubtful that Skilling's jury was indeed free from the deep-seated animosity that pervaded the community at large. "[R]egardless of the heinousness of the crime charged, the apparent guilt of the offender[,] or the station in life which he occupies," our system of justice demands trials that are fair in both appearance and fact. *Irvin*, 366 U. S., at 722. Because I do not believe Skilling's trial met this standard, I would grant him relief.

Syllabus

BLACK ET AL. *v.* UNITED STATES

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

No. 08–876. Argued December 8, 2009—Decided June 24, 2010

Petitioners (hereinafter Defendants)—executives of Hollinger International, Inc. (Hollinger), a publicly held U. S. company—were indicted for mail fraud, 18 U. S. C. §§ 1341, 1346, and other federal crimes. At trial, the Government pursued alternative mail-fraud theories, charging that (1) Defendants stole millions from Hollinger by fraudulently paying themselves bogus "noncompetition fees"; and (2) by failing to disclose those fees, Defendants deprived Hollinger of their honest services. Before jury deliberations began, the Government proposed special-verdict forms that would reveal, in the event that the jury voted to convict on a mail-fraud count, the particular theory or theories accounting for the verdict. Defendants resisted, preferring an unelaborated general verdict. The Government ultimately acquiesced. The District Court instructed the jury on each of the alternative theories. As to honest-services fraud, the court informed the jury, over Defendants' timely objection, that a person commits that offense if he misuses his position for private gain for himself and/or a co-schemer and knowingly and intentionally breaches his duty of loyalty. The jury returned general verdicts of "guilty" on the mail-fraud counts, found that one Defendant was also guilty of obstruction of justice, and acquitted Defendants on all other charges.

On appeal, Defendants urged the invalidity of the honest-services-fraud jury instructions. Seeking reversal of their mail-fraud convictions, Defendants relied on *Yates* v. *United States*, 354 U. S. 298, 312, which held that a general verdict may be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." The Seventh Circuit found no infirmity in the honest-services instructions, but further determined that even if those instructions were wrong, Defendants could not prevail. By opposing the Government-proposed special-verdict forms, the Court of Appeals declared, Defendants had forfeited their objection to the instructions. Their challenge would have become moot, the court observed, had the jury received special-verdict forms separating the alternative fraud theories, and reported on the forms that Defendants were not guilty of honest-services fraud. Defendants, the Court of Appeals therefore reasoned, bore responsibility for the obscurity of the jury's verdict.

Syllabus

Held:

1. In *Skilling* v. *United States*, decided today, *ante*, p. 358, this Court vacated a conviction on the ground that the honest-services component of the federal mail-fraud statute, § 1346, criminalizes only schemes to defraud that involve bribes or kickbacks. That holding renders the honest-services instructions given in this case incorrect. P. 471.

2. By properly objecting to the honest-services jury instructions at trial, Defendants secured their right to challenge those instructions on appeal. They did not forfeit that right by declining to acquiesce in the Government-proposed special-verdict forms. The Federal Rules of Criminal Procedure do not provide for submission of special questions to the jury. In contrast, Federal Rule of Civil Procedure 49 provides for jury interrogatories of two kinds: special verdicts, Rule 49(a); and general verdicts with answers to written questions, Rule 49(b). While the Criminal Rules are silent on special verdicts, they are informative on objections to instructions. Criminal Rule 30(d) provides that a "party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Defendants here, it is undisputed, complied with that requirement. The Seventh Circuit, in essence, added a further requirement for preservation of a meaningful objection to jury instructions. It devised a forfeiture sanction unmoored to any federal statute or criminal rule. And it placed in the prosecutor's hands authority to trigger the sanction simply by requesting a special verdict. To boot, the appeals court applied the sanction to Defendants, although they lacked any notice that forfeiture would attend their resistance to the Government's special-verdict request. Criminal Rule 57(b) is designed to ward off such judicial invention. It provides: "No sanction . . . may be imposed for noncompliance with any requirement not in federal law [or] federal rules . . . unless the alleged violator was furnished with actual notice of the requirement before the noncompliance." Pp. 472–474.

3. As in *Skilling*, the Court expresses no opinion on whether the honest-services instructional error was ultimately harmless, but leaves that matter for consideration on remand. P. 474.

530 F. 3d 596, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 474. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 475.

Miguel A. Estrada argued the cause for petitioners. With him on the briefs were *David Debold*, *Richard A. Greenberg*, *Gustave H. Newman*, *Steven Y. Yurowitz*, *Ronald S. Safer*, *Patricia Brown Holmes*, *Neil Lloyd*, and *Michael E. Swartz*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Matthew D. Roberts*, and *Joel M. Gershowitz*.*

JUSTICE GINSBURG delivered the opinion of the Court.

In *Skilling* v. *United States*, decided today, *ante*, p. 358, we vacated the Court of Appeals judgment and remanded the case because the indictment rested, in part, on an improper construction of the "honest services" component of the federal ban on mail fraud, 18 U. S. C. §§ 1341, 1346. A similar infirmity is present in this case. Here, too, the Government and trial court advanced an interpretation of § 1346 rejected by the Court's opinion in *Skilling*. Nevertheless, the Government urges, the convictions of the defendants below, petitioners here, should be affirmed for an independent reason. At trial, the Government pursued alternative theories: (1) money-or-property fraud; and (2) honest-services fraud. To pinpoint whether the jury based its verdict on money-or-property fraud, or honest-services fraud, or both, the Government proposed special interrogatories to accompany the

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Lawrence S. Robbins*, *Daniel R. Walfish*, *Robin S. Conrad*, and *Amar D. Sarwal;* and for the National Association of Criminal Defense Lawyers et al. by *Jonathan L. Marcus*, *Barbara E. Bergman*, *Barry A. Bohrer*, and *Alexandra A. E. Shapiro*.

Briefs of *amici curiae* were filed for Citizens for Responsibility and Ethics in Washington by *Anne L. Weismann* and *Melanie Sloan;* and for Jeffrey K. Skilling by *Daniel M. Petrocelli*, *M. Randall Oppenheimer*, *Walter Dellinger*, *Jonathan D. Hacker*, and *Irving L. Gornstein*.

verdict. The defendants resisted, preferring an unelaborated general verdict, and the Government ultimately acquiesced in that standard form of submission.

The Court of Appeals held that the defendants, by opposing the Government-suggested special interrogatories, forfeited their objection to the honest-services-fraud instructions given to the jury. 530 F. 3d 596, 603 (CA7 2008). We reverse that ruling. A criminal defendant, we hold, need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt.

I

Petitioners Conrad Black, John Boultbee, and Mark Kipnis, as well as Peter Atkinson,[1] (collectively, Defendants) were leading executives of Hollinger International, Inc. (Hollinger), a publicly held U. S. company that, through subsidiaries, owned newspapers here and abroad. In 2005, the Government indicted Defendants on multiple counts, of prime concern here, three counts of mail fraud in violation of §§ 1341 and 1346.[2] Two theories were pursued by the Government on each mail-fraud count. The Government charged that (1) Defendants stole millions from Hollinger by fraudulently paying themselves bogus "noncompetition fees"; and that (2) by failing to disclose their receipt of those fees, Defendants deprived Hollinger of their honest services as managers of the company. App. to Pet. for Cert. 24a–54a.

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[1] Peter Atkinson is a respondent in support of petitioners who qualifies for relief under this Court's Rule 12.6. See Letter from Michael S. Schachter to the Clerk of Court (July 29, 2009).

[2] Section 1341 criminalizes use of the mails to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Section 1346 defines the § 1341 term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

At the close of the four-month trial, the U. S. District Court for the Northern District of Illinois instructed the jury, discretely, on the theft-of-money-or-property and honest-services-deprivation theories advanced by the Government. *Id.*, at 235a. As to the latter, the District Court informed the jury, over Defendants' objection, that a person commits honest-services fraud if he "misuse[s] his position for private gain for himself and/or a co-schemer" and "knowingly and intentionally breache[s] his duty of loyalty." *Id.*, at 235a–236a.

Before jury deliberations began, the Government asked the District Court to employ a special-verdict form, which would reveal, in the event that the jury voted to convict on a mail-fraud count, the theory or theories accounting for the verdict—money-or-property fraud, honest-services fraud, or both. See App. 430a.[3] Defendants opposed the Government-proposed special interrogatories and urged, instead, standard general-verdict forms. *Id.*, at 432a. Comprehending, however, that in the event of a guilty verdict, "the jury's specification of the [mail-]fraud theory might [aid] appellate review," *ibid.*, Defendants proposed an accommodation: Upon return of a guilty verdict on any mail-fraud count, jurors could be asked to specify the theory on which they relied, *id.*, at 433a.

The Government objected to special interrogatories presented to the jury postverdict, App. to Pet. for Cert. 222a, and the District Court declined to adopt that procedure, *id.*,

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[3] The Government proposed this language for each defendant on each mail-fraud count:

"If you find the defendant . . . Guilty with respect to [this Count], you must answer the following question by checking the applicable lines.

"With respect to [this Count], we, the jury, find the following has been proven beyond a reasonable doubt (check all that apply):

"Defendant engaged in a scheme to defraud [Hollinger] and its shareholders of money or property ——

"Defendant engaged in a scheme to defraud [Hollinger] and its shareholders of their intangible right to honest services ——." App. 430a.

at 225a.[4] When the court rejected postverdict interrogatories, the Government represented that it would not object to submission of the mail-fraud counts for jury decision by general verdict. *Id.*, at 228a. The jury returned general verdicts of "guilty" on the three mail-fraud counts;[5] it also found defendant Black guilty of obstruction of justice in violation of 18 U. S. C. § 1512(c)(1), and it acquitted Defendants on all other charges.

On appeal, Defendants urged the invalidity of the jury instructions on honest-services fraud. Under the rule declared by this Court in *Yates* v. *United States*, 354 U. S. 298, 312 (1957), a general verdict may be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Relying on that rule, Defendants urged reversal of their mail-fraud convictions. The Court of Appeals found no infirmity in the honest-services instructions, 530 F. 3d, at 600–602, but further determined that Defendants could not prevail even if those instructions were wrong, *id.*, at 602–603. For this determination, the court homed in on the Government's special-verdict proposal.

The challenge to the honest-services instructions would have become moot, the court observed, had the jury received special-verdict forms separating money-or-property fraud from honest-services fraud, and reported on the forms that Defendants were not guilty of honest-services fraud. Defendants, the Court of Appeals reasoned, bore responsibility for the obscurity of the jury's verdict. True, the court acknowledged, it was not incumbent on Defendants to request special verdicts. But by resisting the Government's proposal for separate findings on money-or-property fraud and

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[4] In her years at the bar and on the bench, the trial judge commented, she had "absolutely" never seen the postverdict procedure used. App. to Pet. for Cert. 225a.

[5] The District Court later granted Kipnis' motion for judgment of acquittal on one of these counts.

on honest-services fraud, and requesting general verdicts instead, the Seventh Circuit concluded, Defendants had "forfeited their objection to the [honest-services] instruction[s]." *Id.*, at 603. Defendants' suggestion of postverdict interrogatories did not, in the Court of Appeals' view, overcome the forfeiture, for "[q]uestioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that a district judge is *required* to employ." *Ibid.*[6]

We granted certiorari in this case, 556 U. S. 1234 (2009), along with *Skilling* v. *United States*, 558 U. S. 945 (2009), and *Weyhrauch* v. *United States*, 557 U. S. 934 (2009), to determine what conduct Congress rendered criminal by proscribing, in § 1346, fraudulent deprivation of "the intangible right of honest services." We also agreed to consider in this case the question whether Defendants forfeited their objection to the honest-services jury instructions by opposing the Government's request for special verdicts.

II

We decided in *Skilling* that § 1346, properly confined, criminalizes only schemes to defraud that involve bribes or kickbacks. See *ante*, p. 358. That holding renders the honest-services instructions given in this case incorrect,[7] and brings squarely before us the question presented by the Seventh Circuit's forfeiture ruling: Did Defendants, by failing to acquiesce in the Government's request for special verdicts, forfeit their objection, timely made at trial, to the honest-services instructions?

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[6] See, *e. g.*, *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 19 F. 3d 1259, 1267 (CA8 1994) ("Postverdict interrogatories may imply the jury's verdict is unjustified and cause the jury to answer the interrogatories in a manner inconsistent with the verdict."); cf. *Yeager* v. *United States*, 557 U. S. 110, 122 (2009) ("Courts properly avoid . . . explorations into the jury's sovereign space.").

[7] The scheme to defraud alleged here did not involve any bribes or kickbacks.

In addressing this issue, we note first the absence of any provision in the Federal Rules of Criminal Procedure for submission of special questions to the jury. See *Stein* v. *New York*, 346 U. S. 156, 178 (1953) ("Our own Rules of Criminal Procedure make no provision for anything but a general verdict."), overruled on other grounds, *Jackson* v. *Denno*, 378 U. S. 368 (1964).[8] The sole call for special findings in the Criminal Rules concerns nonjury trials. Rule 23(c) provides: "If a party [in a case tried without a jury] requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion."

In contrast, the Federal Rules of Civil Procedure provide for jury interrogatories of two kinds: special verdicts, which instruct the jury to return "a special written finding on each issue of fact," Rule 49(a); and general verdicts with answers to "written questions on one or more issues of fact," Rule 49(b).[9] Although not dispositive,[10] the absence of a Criminal Rule authorizing special verdicts counsels caution.[11]

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[8] The absence of a special-verdict or interrogatory provision in the Criminal Rules is hardly accidental. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54, 70 (CA2 1948) (L. Hand, J., concurring) ("I should like to subject a verdict, as narrowly as was practical, to a review which should make it in fact, what we very elaborately pretend that it should be: a decision based upon law. In criminal prosecutions there may be, and in my judgment there are, other considerations which intervene to make such an attempt undesirable.").

[9] Although the special interrogatories requested by the Government in this case have been called "special verdicts" by the parties and the courts below, they more closely resemble what Civil Rule 49(b) describes as "general verdict[s] with answers to written questions." (Capitalization omitted.)

[10] See Fed. Rule Crim. Proc. 57(b) (when there is no controlling law, "[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district").

[11] By calling for caution, we do not mean to suggest that special verdicts in criminal cases are never appropriate. See *United States* v. *Ruggiero*, 726 F. 2d 913, 922–923 (CA2 1984) (in complex Racketeer Influenced and

While the Criminal Rules are silent on special verdicts, they are informative on objections to instructions. Rule 30(d) "clarifies what . . . counsel must do to preserve a claim of error regarding an instruction." Advisory Committee's Notes on 2002 Amendment on Fed. Rule Crim. Proc. 30(d), 18 U. S. C. App., p. 915. The Rule provides: "A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Defendants here, it is undisputed, complied with that requirement.[12]

The Court of Appeals, in essence, added a further requirement for preservation of a meaningful objection to jury instructions. It devised a forfeiture sanction unmoored to any federal statute or criminal rule. And it placed in the prosecutor's hands authority to trigger the sanction simply by requesting a special verdict. See 530 F. 3d, at 603.[13] To boot,

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Corrupt Organizations Act cases, "it can be extremely useful for a trial judge to request the jury to record their specific dispositions of the separate predicate acts charged, in addition to their verdict of guilt or innocence"); *id.*, at 927 (Newman, J., concurring in part and dissenting in part) ("[A] District Court should have the discretion to use a jury interrogatory in cases where risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial.").

[12] The Government asserts that Defendants' opposition to a special verdict resulted in forfeiture not of their jury-instruction objection, but of their "*Yates* argument" that any instructional error may "requir[e] reversal." Brief for United States 52, and n. 21 (internal quotation marks omitted). The Government thus appears to concede that Defendants preserved their instructional challenge, but maintains that they are powerless to ask a court to assess the prejudicial effect of any error they may be able to demonstrate. See Reply Brief 29, n. 10 (on Government's view, "[Defendants] could still 'claim' they were wrongly convicted, they just could not ask a court to do anything about it"). We see little merit in the Government's attempt to divorce preservation of a claim from preservation of the right to redress should the claim succeed.

[13] Rendering the Seventh Circuit's forfeiture ruling all the more anomalous, at the time the trial court settled on the general-verdict form, the Government was no longer pressing its special-verdict request. See App. to Pet. for Cert. 228a.

the Court of Appeals applied the sanction to Defendants, although they lacked any notice that forfeiture would attend their resistance to the Government's special-verdict request. There is a Rule designed to ward off judicial invention of the kind present here. Federal Rule of Criminal Procedure 57(b) admonishes: "No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law [or] federal rules . . . unless the alleged violator was furnished with actual notice of the requirement before the noncompliance."

We hold, in short, that, by properly objecting to the honest-services jury instructions at trial, Defendants secured their right to challenge those instructions on appeal. They did not forfeit that right by declining to acquiesce in the Government-proposed special-verdict forms. Our decision in *Skilling* makes it plain that the honest-services instructions in this case were indeed incorrect. As in *Skilling*, *ante*, at 414, we express no opinion on the question whether the error was ultimately harmless, but leave that matter for consideration on remand.[14]

* * *

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

I join the Court's opinion with two exceptions. First, I do not join in its reliance, *ante*, at 473, on the Notes of the Advi-

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[14] Black contends that spillover prejudice from evidence introduced on the mail-fraud counts requires reversal of his obstruction-of-justice conviction. Brief for Petitioners 47–49. That question, too, is one on which we express no opinion.

sory Committee in determining the meaning of Federal Rule of Criminal Procedure 30(d). The Committee's view is not authoritative. See *Krupski* v. *Costa Crociere S. p. A.*, 560 U. S. 538, 557 (2010) (SCALIA, J., concurring in part and concurring in judgment). The Court accurately quotes the text of the Rule, see *ante*, at 473, the meaning of which is obvious. No more should be said.

Second, I agree with the Court, *ante*, at 471, 474, that the District Court's honest-services-fraud instructions to the jury were erroneous, but for a quite different reason. In my view, the error lay not in instructing inconsistently with the theory of honest-services fraud set forth in *Skilling* v. *United States*, *ante*, p. 358, but in instructing the jury on honest-services fraud *at all*. For the reasons set forth in my opinion in that case, 18 U. S. C. § 1346 is unconstitutionally vague. *Ante*, p. 415 (opinion concurring in part and concurring in judgment).

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

I join the Court's opinion except for those parts stating that 18 U. S. C. § 1346 "criminalizes only schemes to defraud that involve bribes or kickbacks." *Ante*, at 471. For the reasons set forth in JUSTICE SCALIA's separate opinion in *Skilling* v. *United States*, *ante*, p. 415 (opinion concurring in part and concurring in judgment), § 1346 is unconstitutionally vague. To convict a defendant based on an honest-services-fraud theory, even one limited to bribes or kickbacks, would violate his or her rights under the Due Process Clause of the Fifth Amendment.

Per Curiam

WEYHRAUCH *v.* UNITED STATES

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

No. 08–1196. Argued December 8, 2009—Decided June 24, 2010

548 F. 3d 1237, vacated and remanded.

Donald B. Ayer argued the cause for petitioner. With him on the briefs were *Douglas Pope*, *Brian J. Murray*, and *Nicole C. H. Massey*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, and *Anthony A. Yang*.*

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skilling* v. *United States*, *ante*, p. 358.

**Abbe David Lowell*, *Paul M. Thompson*, and *Jeffrey W. Mikoni* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Albert W. Alschuler, pro se, filed a brief as *amicus curiae*.

Syllabus

FREE ENTERPRISE FUND ET AL. *v.* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ET AL.

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

No. 08–861. Argued December 7, 2009—Decided June 28, 2010

Respondent, the Public Company Accounting Oversight Board, was created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002. The Board is composed of five members appointed by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Unlike these organizations, the Board is a Government-created entity with expansive powers to govern an entire industry. Every accounting firm that audits public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board may inspect registered firms, initiate formal investigations, and issue severe sanctions in its disciplinary proceedings. The parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397, and that its members are "'Officers of the United States'" who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U. S. 1, 125–126. While the SEC has oversight of the Board, it cannot remove Board members at will, but only "for good cause shown," "in accordance with" specified procedures. 15 U. S. C. §§ 7211(e)(6), 7217(d)(3). The parties also agree that the Commissioners, in turn, cannot themselves be removed by the President except for "'inefficiency, neglect of duty, or malfeasance in office.'" *Humphrey's Executor* v. *United States*, 295 U. S. 602, 620.

The Board inspected petitioner accounting firm, released a report critical of its auditing procedures, and began a formal investigation. The firm and petitioner Free Enterprise Fund, a nonprofit organization of which the firm is a member, sued the Board and its members, seeking, *inter alia*, a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. Petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring executive power on Board members without subjecting them to Presidential control. The basis for petitioners'

challenge was that Board members were insulated from Presidential control by two layers of tenure protection: Board members could only be removed by the Commission for good cause, and the Commissioners could in turn only be removed by the President for good cause. Petitioners also challenged the Board's appointment as violating the Appointments Clause, which requires officers to be appointed by the President with the Senate's advice and consent, or—in the case of "inferior Officers"—by "the President alone, . . . the Courts of Law, or . . . the Heads of Departments," Art. II, § 2, cl. 2. The United States intervened to defend the statute. The District Court found it had jurisdiction and granted summary judgment to respondents. The Court of Appeals affirmed. It first agreed that the District Court had jurisdiction. It then ruled that the dual restraints on Board members' removal are permissible, and that Board members are inferior officers whose appointment is consistent with the Appointments Clause.

Held:

1. The District Court had jurisdiction over these claims. The Commission may review any Board rule or sanction, and an aggrieved party may challenge the Commission's "final order" or "rule" in a court of appeals under 15 U. S. C. § 78y. The Government reads § 78y as an exclusive route to review, but the text does not expressly or implicitly limit the jurisdiction that other statutes confer on district courts. It is presumed that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "'wholly "collateral"' to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 212–213.

These considerations point against any limitation on review here. Section 78y provides only for review of *Commission* action, and petitioners' challenge is "collateral" to any Commission orders or rules from which review might be sought. The Government advises petitioners to raise their claims by appealing a Board sanction, but petitioners have not been sanctioned, and it is no "meaningful" avenue of relief, *id.*, at 212, to require a plaintiff to *incur* a sanction in order to test a law's validity, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129. Petitioners' constitutional claims are also outside the Commission's competence and expertise, and the statutory questions involved do not require technical considerations of agency policy. Pp. 489–491.

2. The dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers. Pp. 492–508.

(a) The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. Since 1789, the Constitution has been understood to empower the

President to keep executive officers accountable—by removing them from office, if necessary. See generally *Myers* v. *United States*, 272 U. S. 52. This Court has determined that this authority is not without limit. In *Humphrey's Executor*, *supra*, this Court held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483, and *Morrison* v. *Olson*, 487 U. S. 654, the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. However, this Court has not addressed the consequences of more than one level of good-cause tenure. Pp. 492–495.

(b) Where this Court has upheld limited restrictions on the President's removal power, only one level of protected tenure separated the President from an officer exercising executive power. The President—or a subordinate he could remove at will—decided whether the officer's conduct merited removal under the good-cause standard. Here, the Act not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested in other tenured officers—the Commissioners—who are not subject to the President's direct control. Because the Commission cannot remove a Board member at will, the President cannot hold the Commission fully accountable for the Board's conduct. He can only review the Commissioner's determination of whether the Act's rigorous good-cause standard is met. And if the President disagrees with that determination, he is powerless to intervene—unless the determination is so unreasonable as to constitute "'inefficiency, neglect of duty, or malfeasance in office.'" *Humphrey's Executor*, *supra*, at 620.

This arrangement contradicts Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. If this dispersion of responsibility were allowed to stand, Congress could multiply it further by adding still more layers of good-cause tenure. Such diffusion of power carries with it a diffusion of accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act's restrictions are therefore incompatible with the Constitution's separation of powers. Pp. 495–498.

(c) The "'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will

not save it if it is contrary to the Constitution." *Bowsher* v. *Synar*, 478 U. S. 714, 736. The Act's multilevel tenure protections provide a blueprint for the extensive expansion of legislative power. Congress controls the salary, duties, and existence of executive offices, and only Presidential oversight can counter its influence. The Framers created a structure in which "[a] dependence on the people" would be the "primary controul on the government," and that dependence is maintained by giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, p. 349. A key "constitutional means" vested in the President was "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463. While a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty," *Bowsher*, *supra*, at 730. Pp. 498–502.

(d) The Government errs in arguing that, even if some constraints on the removal of inferior executive officers might violate the Constitution, the restrictions here do not. There is no construction of the Commission's good-cause removal power that is broad enough to avoid invalidation. Nor is the Commission's broad power over Board *functions* the equivalent of a power to remove Board *members*. Altering the Board's budget or powers is not a meaningful way to control an inferior officer; the Commission cannot supervise individual Board members if it must destroy the Board in order to fix it. Moreover, the Commission's power over the Board is hardly plenary, as the Board may take significant enforcement actions largely independently of the Commission. Enacting new SEC rules through the required notice and comment procedures would be a poor means of micromanaging the Board, and without certain findings, the Act forbids any general rule requiring SEC preapproval of Board actions. Finally, the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of good-cause removal. Pp. 502–508.

3. The unconstitutional tenure provisions are severable from the remainder of the statute. Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234, the "normal rule" is "that partial . . . invalidation is the required course," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504. The Board's existence does not violate the separation of powers, but the substantive removal restrictions imposed by §§ 7211(e)(6) and 7217(d)(3) do. Concluding that the removal restrictions here are invalid

leaves the Board removable by the Commission at will. With the tenure restrictions excised, the Act remains "'fully operative as a law,'" *New York* v. *United States*, 505 U. S. 144, 186, and nothing in the Act's text or historical context makes it "evident" that Congress would have preferred no Board at all to a Board whose members are removable at will, *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684. The consequence is that the Board may continue to function as before, but its members may be removed at will by the Commission. Pp. 508–510.

4. The Board's appointment is consistent with the Appointments Clause. Pp. 510–513.

(a) The Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]." Inferior officers "are officers whose work is directed and supervised at some level" by superiors appointed by the President with the Senate's consent. *Edmond* v. *United States*, 520 U. S. 651, 662–663. Because the good-cause restrictions discussed above are unconstitutional and void, the Commission possesses the power to remove Board members at will, in addition to its other oversight authority. Board members are therefore directed and supervised by the Commission. P. 510.

(b) The Commission is a "Departmen[t]" under the Appointments Clause. *Freytag* v. *Commissioner*, 501 U. S. 868, 887, n. 4, specifically reserved the question whether a "principal agenc[y], such as" the SEC, is a "Departmen[t]." The Court now adopts the reasoning of the concurring Justices in *Freytag*, who would have concluded that the SEC is such a "Departmen[t]" because it is a freestanding component of the Executive Branch not subordinate to or contained within any other such component. This reading is consistent with the common, near-contemporary definition of a "department"; with the early practice of Congress, see § 3, 1 Stat. 234; and with this Court's cases, which have never invalidated an appointment made by the head of such an establishment. Pp. 510–511.

(c) The several Commissioners, and not the Chairman, are the Commission's "Hea[d]." The Commission's powers are generally vested in the Commissioners jointly, not the Chairman alone. The Commissioners do not report to the Chairman, who exercises administrative functions subject to the full Commission's policies. There is no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, § 2, cl. 2, and each House of Congress appoints its officers collectively, see, *e. g.*, Art. I, § 2, cl. 5. Practice has also sanctioned the appointment of inferior officers by multimember agencies. Pp. 511–513.

537 F. 3d 667, affirmed in part, reversed in part, and remanded.

Syllabus

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined, *post*, p. 514.

Michael A. Carvin argued the cause for petitioners. With him on the briefs were *Noel J. Francisco*, *Christian G. Vergonis*, *Kenneth W. Starr*, *Viet D. Dinh*, *Sam Kazman*, and *Hans Bader*.

Solicitor General Kagan argued the cause for the United States. With her on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Curtis E. Gannon*, *Mark B. Stern*, *Mark R. Freeman*, *David M. Becker*, *Mark D. Cahn*, *Jacob H. Stillman*, and *John W. Avery*.

Jeffrey A. Lamken argued the cause for respondents. With him on the brief were *Robert K. Kry*, *James R. Doty*, *J. Gordon Seymour*, *Jacob N. Lesser*, and *Mary I. Peters*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Rights Union et al. by *Peter Ferrara;* for the Cato Institute et al. by *Gene C. Schaerr*, *Steffen N. Johnson*, *Linda T. Coberly*, and *Ilya Shapiro;* for the Center for Individual Rights by *Michael E. Rosman;* for the Coalition for Fair Lumber Imports by *Kannon K. Shanmugam;* for the Mountain States Legal Foundation by *J. Scott Detamore;* for Stephen Bainbridge et al. by *Donna M. Nagy;* for William P. Barr et al. by *Helgi C. Walker*, *Daniel J. Popeo*, and *Richard A. Samp;* and for Steven G. Calabresi et al. by *Christopher S. Yoo*.

Briefs of *amici curiae* urging affirmance were filed for the Center for Audit Quality by *Douglas R. Cox* and *Michael J. Scanlon;* for Harold H. Bruff et al. by *Caitlin J. Halligan*, *Gillian E. Metzger*, *pro se*, and *Henry Paul Monaghan*, *pro se;* for Former Chairmen of the Securities and Exchange Commission by *Richard H. Pildes*, *Christopher J. Meade*, and *Catherine M. A. Carroll;* and for the National Association of State Boards of Accountancy by *Noel L. Allen*.

Briefs of *amici curiae* were filed for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman;* and for the Council of Institutional Investors et al. by *Gregory S. Coleman*, *Christian J. Ward*,

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Our Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. See generally *Myers* v. *United States*, 272 U. S. 52 (1926). This Court has determined, however, that this authority is not without limit. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the

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Ira M. Millstein, *Harvey J. Goldschmid*, *Gregory W. Smith*, *Peter H. Mixon*, and *Luke Bierman*.

President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws." *Id.*, at 693.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002, 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U. S. C. §§ 7211(a), (b). The Board can thus recruit its members and employees from

the private sector by paying salaries far above the standard Government pay scale. See §§ 7211(f)(4), 7219.[1]

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§ 7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§ 7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe." § 7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§ 7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.*—a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). §§ 78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million ($750,000 for a natural person). § 7215(c)(4). Despite the provisions specifying that

[1] The current salary for the Chairman is $673,000. Other Board members receive $547,000. Brief for Petitioners 3.

Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397 (1995), and that its members are "'Officers of the United States'" who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U. S. 1, 125–126 (1976) (*per curiam*) (quoting Art. II, § 2, cl. 2); cf. Brief for Petitioners 9, n. 1; Brief for United States 29, n. 8.

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). §§ 7217(b)–(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures. § 7211(e)(6).

Those procedures require a Commission finding, "on the record" and "after notice and opportunity for a hearing," that the Board member

> "(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;
>
> "(B) has willfully abused the authority of that member; or
>
> "(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof." § 7217(d)(3).

Removal of a Board member requires a formal Commission order and is subject to judicial review. See 5 U. S. C. §§ 554(a), 556(a), 557(a), (c)(B); 15 U. S. C. § 78y(a)(1). Simi-

lar procedures govern the Commission's removal of officers and directors of the private self-regulatory organizations. See § 78s(h)(4). The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U. S., at 620 (internal quotation marks omitted); see Brief for Petitioners 31; Brief for United States 43; Brief for Respondent Public Company Accounting Oversight Board 31 (hereinafter PCAOB Brief); Tr. of Oral Arg. 47, and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. App. 71.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. *Id.*, at 67–68. Petitioners also challenged the Act under the Appointments Clause, which requires "Officers of the United States" to be appointed by the President with the Senate's advice and consent. Art. II, § 2, cl. 2. The Clause provides an exception for "inferior Officers," whose appointment Congress may choose to vest "in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the Board is appointed by the SEC, petitioners argued that (1) Board members are not "inferior Officers" who may be appointed by "Heads of Departments"; (2) even if they are, the Commission is not a "Departmen[t]"; and (3) even if it is,

the several Commissioners (as opposed to the Chairman) are not its "Hea[d]." See App. 68–70. The United States intervened to defend the Act's constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents. App. to Pet. for Cert. 110a–117a.

A divided Court of Appeals affirmed. 537 F. 3d 667 (CADC 2008). It agreed that the District Court had jurisdiction over petitioners' claims. *Id.*, at 671. On the merits, the Court of Appeals recognized that the removal issue was "a question of first impression," as neither that court nor this one "ha[d] considered a situation where a restriction on removal passes through two levels of control." *Id.*, at 679. It ruled that the dual restraints on Board members' removal are permissible because they do not "render the President unable to perform his constitutional duties." *Id.*, at 683. The majority reasoned that although the President "does not directly select or supervise the Board's members," *id.*, at 681, the Board is subject to the comprehensive control of the Commission, and thus the President's influence over the Commission implies a constitutionally sufficient influence over the Board as well. *Id.*, at 682–683. The majority also held that Board members are inferior officers subject to the Commission's direction and supervision, *id.*, at 672–676, and that their appointment is otherwise consistent with the Appointments Clause, *id.*, at 676–678.

Judge Kavanaugh dissented. He agreed that the case was one of first impression, *id.*, at 698, but argued that "the double for-cause removal provisions in the [Act] . . . combine to eliminate any meaningful Presidential control over the [Board]," *id.*, at 697. Judge Kavanaugh also argued that Board members are not effectively supervised by the Commission and thus cannot be inferior officers under the Appointments Clause. *Id.*, at 709–712.

We granted certiorari. 556 U. S. 1234 (2009).

II

We first consider whether the District Court had jurisdiction. We agree with both courts below that the statutes providing for judicial review of Commission action did not prevent the District Court from considering petitioners' claims.

The Sarbanes-Oxley Act empowers the Commission to review any Board rule or sanction. See 15 U. S. C. §§ 7217(b)(2)–(4), (c)(2). Once the Commission has acted, aggrieved parties may challenge "a final order of the Commission" or "a rule of the Commission" in a court of appeals under § 78y, and "[n]o objection . . . may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." §§ 78y(a)(1), (b)(1), (c)(1).

The Government reads § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. See, *e. g.*, 28 U. S. C. §§ 1331, 2201. Nor does it do so implicitly. Provisions for agency review do not restrict judicial review unless the "statutory scheme" displays a "fairly discernible" intent to limit jurisdiction, and the claims at issue "are of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 207, 212 (1994) (internal quotation marks omitted). Generally, when Congress creates procedures "designed to permit agency expertise to be brought to bear on particular problems," those procedures "are to be exclusive." *Whitney Nat. Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411, 420 (1965). But we presume that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly collateral to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Thunder Basin*, *supra*, at 212–213 (internal quotation marks

omitted). These considerations point against any limitation on review here.

We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory. Section 78y provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule.

The Government suggests that petitioners could first have sought Commission review of the Board's "auditing standards, registration requirements, or other rules." Brief for United States 16. But petitioners object to the Board's existence, not to any of its auditing standards. Petitioners' general challenge to the Board is "collateral" to any Commission orders or rules from which review might be sought. Cf. *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 491–492 (1991). Requiring petitioners to select and challenge a Board rule at random is an odd procedure for Congress to choose, especially because only *new* rules, and not existing ones, are subject to challenge. See 15 U. S. C. §§ 78s(b)(2), 78y(a)(1), 7217(b)(4).

Alternatively, the Government advises petitioners to raise their claims by appealing a Board sanction. Brief for United States 16–17. But the investigation of Beckstead and Watts produced no sanction, see *id.*, at 7, n. 5; Reply Brief for Petitioners 29, n. 11, and an uncomplimentary inspection report is not subject to judicial review, see § 7214(h)(2). So the Government proposes that Beckstead and Watts *incur* a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony. Brief for United States 17. If the Commission then affirms, the firm will win access to a court of appeals—and severe punishment should its challenge fail. We normally do not require plaintiffs to "bet the farm . . . by taking the violative action" before "testing the validity of the law," *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129 (2007); accord, *Ex parte Young*, 209 U. S. 123 (1908), and we do not consider this a

"meaningful" avenue of relief, *Thunder Basin*, 510 U. S., at 212.

Petitioners' constitutional claims are also outside the Commission's competence and expertise. In *Thunder Basin*, the petitioner's primary claims were statutory; "at root . . . [they] ar[o]se under the Mine Act and f[e]ll squarely within the [agency's] expertise," given that the agency had "extensive experience" on the issue and had "recently addressed the precise . . . claims presented." *Id.*, at 214–215. Likewise, in *United States* v. *Ruzicka*, 329 U. S. 287 (1946), on which the Government relies, we reserved for the agency fact-bound inquiries that, even if "formulated in constitutional terms," rested ultimately on "factors that call for [an] understanding of the milk industry," to which the Court made no pretensions. *Id.*, at 294. No similar expertise is required here, and the statutory questions involved do not require "technical considerations of [agency] policy." *Johnson* v. *Robison*, 415 U. S. 361, 373 (1974). They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.

We therefore conclude that § 78y did not strip the District Court of jurisdiction over these claims, which are properly presented for our review.[2]

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[2] The Government asserts that "petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." Brief for United States 22. The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional provisions at issue here. See, *e. g.*, *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Bell* v. *Hood*, 327 U. S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); see also *Ex parte Young*, 209 U. S. 123, 149, 165, 167 (1908). If the Government's point is that an Appointments Clause or separation-of-powers claim should

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws."

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be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

272 U. S., at 164. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he can not continue to be responsible." *Id.*, at 117.

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for "'inefficiency, neglect of duty, or malfeasance in office.'" 295 U. S., at 620 (quoting 15 U. S. C. §41). The Court distinguished *Myers* on the ground that *Myers* concerned "an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." 295 U. S., at 627. By contrast, the Court characterized the FTC as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act . . . independently of executive control." *Id.*, at 627–629. Because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," the Court held that Congress had power to "fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." *Id.*, at 629.

Humphrey's Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers*, *supra*, at 119, 127; *Hennen*, *supra*, at 259–260. This Court has upheld for-cause limitations on that power as well.

In *Perkins*, a naval cadet-engineer was honorably discharged from the Navy because his services were no longer required. 116 U. S. 483. He brought a claim for his salary under statutes barring his peacetime discharge except by a court-martial or by the Secretary of the Navy "for misconduct." Rev. Stat. §§ 1229, 1525. This Court adopted verbatim the reasoning of the Court of Claims, which had held that when Congress "'vests the appointment of inferior officers in the heads of Departments[,] it may limit and restrict the power of removal as it deems best for the public interest.'" 116 U. S., at 485. Because Perkins had not been "'dismissed for misconduct . . . [or upon] the sentence of a court-martial,'" the Court agreed that he was "'still in office and . . . entitled to [his] pay.'" *Ibid.*[3]

We again considered the status of inferior officers in *Morrison*. That case concerned the Ethics in Government Act, which provided for an independent counsel to investigate allegations of crime by high executive officers. The counsel was appointed by a special court, wielded the full powers of a prosecutor, and was removable by the Attorney General only "'for good cause.'" 487 U. S., at 663 (quoting 28 U. S. C. § 596(a)(1)). We recognized that the independent counsel was undoubtedly an executive officer, rather than "'quasi-legislative'" or "'quasi-judicial,'" but we stated as "our present considered view" that Congress had power to impose

[3] When *Perkins* was decided in 1886, the Secretary of the Navy was a principal officer and the head of a department, see Rev. Stat. § 415, and the Tenure of Office Act purported to require Senate consent for his removal. Ch. 154, 14 Stat. 430, Rev. Stat. § 1767. This requirement was widely regarded as unconstitutional and void (as it is universally regarded today), and it was repealed the next year. See Act of Mar. 3, 1887, ch. 353, 24 Stat. 500; *Myers* v. *United States*, 272 U. S. 52, 167–168 (1926); see also *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986). *Perkins* cannot be read to endorse any such restriction, much less in combination with *further* restrictions on the removal of inferiors. The Court of Claims opinion adopted verbatim by this Court addressed only the authority of the Secretary of the Navy to remove inferior officers.

good-cause restrictions on her removal. 487 U. S., at 689–691. The Court noted that the statute "g[a]ve the Attorney General," an officer directly responsible to the President and "through [whom]" the President could act, "several means of supervising or controlling" the independent counsel—"[m]ost importantly . . . the power to remove the counsel for good cause." *Id.*, at 695–696 (internal quotation marks omitted). Under those circumstances, the Court sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure—leaving the issue, as both the court and dissent below recognized, "a question of first impression" in this Court. 537 F. 3d, at 679; see *id.*, at 698 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to

the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U. S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions

of the Executive Branch." *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (BREYER, J., concurring in judgment).[4]

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. Tr. of Oral Arg. 47–48. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York* v. *United States*, 505 U. S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the

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[4] Contrary to the dissent's suggestion, *post*, at 525–527 (opinion of BREYER, J.), the second layer of tenure protection does compromise the President's ability to remove a Board member the Commission wants to retain. Without a second layer of protection, the Commission has no excuse for retaining an officer who is not faithfully executing the law. With the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission's own protected tenure, the President cannot easily overturn. The dissent describes this conflict merely as one of four possible "scenarios," see *post*, at 525–526, but it is the central issue in this case: The second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so.

United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.'" *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276 (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)); see, *e. g.*, *post*, at 519 (opinion of BREYER, J.). According to the dissent, Congress may impose multiple levels of for-cause tenure between the President and his subordinates when it "rests agency independence upon the need for technical expertise." *Post*, at 531. The Board's mission is said to demand both "technical competence" and "apolitical expertise," and its powers may only be exercised by "technical experts." *Ibid.* (internal

quotation marks omitted). In this respect the statute creating the Board is, we are told, simply one example of the "vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, [that] provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives." *Post*, at 521.

No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the "'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher*, 478 U. S., at 736 (quoting *Chadha*, 462 U. S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.

For example, the dissent dismisses the importance of removal as a tool of supervision, concluding that the President's "power to get something done" more often depends on "who controls the agency's budget requests and funding, the relationships between one agency or department and another, . . . purely political factors (including Congress' ability

to assert influence)," and indeed whether particular *unelected* officials support or "resist" the President's policies. *Post*, at 524, 526 (emphasis deleted). The Framers did not rest our liberties on such bureaucratic minutiae. As we said in *Bowsher*, *supra*, at 730, "[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress."

In fact, the multilevel protection that the dissent endorses "provides a blueprint for extensive expansion of the legislative power." *MWAA*, *supra*, at 277. In a system of checks and balances, "[p]ower abhors a vacuum," and one branch's handicap is another's strength. 537 F. 3d, at 695, n. 4 (Kavanaugh, J., dissenting) (internal quotation marks omitted). "Even when a branch does not arrogate power to itself," therefore, it must not "impair another in the performance of its constitutional duties." *Loving* v. *United States*, 517 U. S. 748, 757 (1996).[5] Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that "the Legislature has no right to diminish or modify." 1 Annals of Cong., at 463 (J. Madison).[6]

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[5] The dissent quotes *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) (*per curiam*), for the proposition that Congress has "broad authority to 'create' governmental '"offices"' and to structure those offices 'as it chooses.'" *Post*, at 515. The *Buckley* Court put "'offices'" in quotes because it was actually describing legislative positions that are not really offices at all (at least not under Article II). That is why the very next sentence of *Buckley* said, "*But* Congress' power . . . is inevitably bounded by the express language" of the Constitution. 424 U. S., at 138–139 (emphasis added).

[6] The dissent attributes to Madison a belief that some executive officers, such as the Comptroller, could be made independent of the President. See *post*, at 530. But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of "years, unless sooner removed by the President"; he would thus be "dependent upon the President, because he can be removed by him," and also "dependent upon the Senate, because they must consent to his [reappointment] for every term of years." 1 Annals of Cong. 612 (1789).

The Framers created a structure in which "[a] dependence on the people" would be the "primary controul on the government." The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by "parchment barriers," *id.*, No. 48, at 333 (same), but by letting "[a]mbition . . . counteract ambition," giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.*, No. 51, at 349. A key "constitutional means" vested in the President—perhaps *the* key means—was "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong., at 463. And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, *supra*, at 730.

Calls to abandon those protections in light of "the era's perceived necessity," *New York*, 505 U. S., at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Id.*, at 187–188. Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires *more* than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as "elementary arithmetical logic," *post*, at 535, two layers are not the same as one.

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what

they ought to do without persuasion." *Post*, at 524 (internal quotation marks omitted). In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

D

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. See Brief for United States 47. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission's removal power over the Board is "broad," and could be construed as broader still, if necessary to avoid invalidation. See, *e. g.*, *id.*, at 51, and n. 19; cf. PCAOB Brief 22–23. But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute "good cause" for its removal. See Tr. of Oral Arg. 41–43, 45–46. Nor do our precedents suggest as much. *Humphrey's Executor*, for example, rejected a removal premised on a lack of agreement "'on either the policies or the administering of the Federal Trade Commission,'" because the FTC was designed to be "'independent in character,'" "free from 'political domination or control,'" and not "'subject to anybody in the government'" or "'to the orders of the President.'" 295 U. S., at 619, 625. Accord, *Morrison*, 487 U. S., at 693 (noting that "the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the necessary independence of the office"); *Wiener* v. *United States*, 357 U. S. 349, 356 (1958) (describing for-cause removal as "involving the rectitude" of an officer). And here there is judicial review of any effort to remove Board members, see 15 U. S. C. § 78y(a)(1), so the Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an "ordinary" dual for-cause standard.

Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. § 7217(d)(3); see § 78y(a). The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under § 7217(d)(3).[7]

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. Cf. §§ 78s(h)(4), 7217(d)(3). While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act's limitations on removal as irrelevant, because—as the Court of Appeals held—the Commission wields "at-will removal power over Board *functions* if not Board members." 537 F. 3d, at 683 (emphasis added); accord, Brief for United States 27–28;

[7] The Government implausibly argues that § 7217(d)(3) "does not expressly make its three specified grounds of removal exclusive," and that "the Act could be construed to permit other grounds." Brief for United States 51, n. 19. But having provided in § 7211(e)(6) that Board members are to be removed "in accordance with [§ 7217(d)(3)], for good cause shown," Congress would not have specified the necessary Commission finding in § 7217(d)(3)—including formal procedures and detailed conditions—if Board members could also be removed without any finding at all. Cf. PCAOB Brief 6 ("Cause exists where" the § 7217(d)(3) conditions are met).

PCAOB Brief 48. The Commission's general "oversight and enforcement authority over the Board," § 7217(a), is said to "blun[t] the constitutional impact of for-cause removal," 537 F. 3d, at 683, and to leave the President no worse off than "if Congress had lodged the Board's functions in the SEC's own staff," PCAOB Brief 15.

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board's budget, § 7219(b), issue binding regulations, §§ 7202(a), 7217(b)(5), relieve the Board of authority, § 7217(d)(1), amend Board sanctions, § 7217(c), or enforce Board rules on its own, §§ 7202(b)(1), (c). But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. See *supra*, at 485–486. Its powers are, of course, subject to some latent Commission control. See *supra*, at 486–487. But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board's daily exercise of prosecutorial discretion by promulgating new SEC rules, or by amending those of the Board. Brief for United States 27; *post*, at 528. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board's affairs. See §§ 78s(c), 7215(b)(1), 7217(b)(5); cf. 5 U. S. C. § 553, 15 U. S. C. § 7202(a), PCAOB

Brief 24, n. 6.[8] So the Government offers another proposal, that the Commission require the Board by rule to "secure SEC approval for any actions that it now may take itself." Brief for United States 27. That would surely constitute one of the "limitations upon the activities, functions, and operations of the Board" that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. § 7217(d)(2). The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes "good cause," and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. See, *e. g.*, PCAOB Brief 43. As Judge Kavanaugh noted in dissent below:

> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by

[8] Contrary to the dissent's assertions, see *post*, at 528–529, the Commission's powers to conduct its own investigations (with its own resources), to remove particular provisions of law from the Board's bailiwick, or to require the Board to perform functions "other" than inspections and investigations, § 7211(c)(5), are no more useful in directing individual enforcement actions.

and removable only for cause by another independent agency." 537 F. 3d, at 699.

The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. *Post*, at 536–544. The dissent itself, however, stresses the very size and variety of the Federal Government, see *post*, at 520–521, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board. See *post*, at 540–543.

For example, many civil servants within independent agencies would not qualify as "Officers of the United States," who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U. S., at 126.[9] The parties here concede that Board members are executive "Officers," as that term is used in the Constitution. See *supra*, at 485–486; see also Art. II, § 2, cl. 2. We do not decide the status of other Government employees, nor do we decide whether "lesser functionaries subordinate to officers of the United States" must be subject to the same sort of control as those who exercise "significant authority pursuant to the laws." *Buckley*, *supra*, at 126, and n. 162.

Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, see 5 U. S. C. §§ 2302(a)(2)(B), 3302, 7511(b)(2), and members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Serv-

[9] One "may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its office[r]." *United States* v. *Germaine*, 99 U. S. 508, 509 (1879). The applicable proportion has of course increased dramatically since 1879.

ice by the President), see, *e. g.*, §§ 3132(c), 3395(a), 4312(d), 4314(b)(3), (c)(3); cf. § 2302(a)(2)(B)(ii). While the full extent of that authority is not before us, any such authority is of course wholly absent with respect to the Board. Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.[10]

Finally, the dissent wanders far afield when it suggests that today's opinion might increase the President's authority to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation's armed services and the Public Company Accounting Oversight Board. Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief. Art. II, § 2, cl. 1; see, *e. g.*, 10 U. S. C. §§ 162, 164(g). The President and his subordinates may also convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers. See, *e. g.*, §§ 822(a)(1), 823(a)(1), 892(3), 933–934, 1181–1185. Here, by contrast, the President has no authority to initiate a Board member's removal for cause.

There is no reason for us to address whether these positions identified by the dissent, or any others not at issue in this case, are so structured as to infringe the President's

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[10] For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges. See, *e. g.*, 5 U. S. C. §§ 556(c), 3105. Whether administrative law judges are necessarily "Officers of the United States" is disputed. See, *e. g.*, *Landry* v. *FDIC*, 204 F. 3d 1125 (CADC 2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB." 537 F. 3d 667, 699, n. 8 (CADC 2008) (Kavanaugh, J., dissenting); see Tr. of Oral Arg. in No. 07–5127 (CADC), pp. 32, 37–38, 42.

constitutional authority. Nor is there any substance to the dissent's concern that the "work of all these various officials" will "be put on hold." *Post*, at 544. As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might someday be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office. The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.

IV

Petitioners' complaint argued that the Board's "freedom from Presidential oversight and control" rendered it "and all power and authority exercised by it" in violation of the Constitution. App. 46. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.

"Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–329 (2006). Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932), the "normal rule" is "that partial, rather than facial, invalidation is the required course," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985). Putting to one side petitioners' Appointments Clause challenges (addressed below), the existence of the Board does not violate the separation of powers, but the substantive re-

moval restrictions imposed by 15 U. S. C. §§ 7211(e)(6) and 7217(d)(3) do. Under the traditional default rule, removal is incident to the power of appointment. See, *e. g.*, *Sampson* v. *Murray*, 415 U. S. 61, 70, n. 17 (1974); *Myers*, 272 U. S., at 119; *Ex parte Hennen*, 13 Pet., at 259–260. Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.

The Sarbanes-Oxley Act remains "'fully operative as a law'" with these tenure restrictions excised. *New York*, 505 U. S., at 186 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987)). We therefore must sustain its remaining provisions "[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." *Ibid.* (internal quotation marks omitted). Though this inquiry can sometimes be "elusive," *Chadha*, 462 U. S., at 932, the answer here seems clear: The remaining provisions are not "incapable of functioning independently," *Alaska Airlines*, 480 U. S., at 684, and nothing in the statute's text or historical context makes it "evident" that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will. *Ibid.*; see also *Ayotte*, *supra*, at 330.

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board

members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate's advice and consent. We held in *Edmond* v. *United States*, 520 U. S. 651, 662–663 (1997), that "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that "'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent. In particular, we noted that "[t]he power to remove officers" at will and without cause "is a powerful tool for control" of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]."

But, petitioners argue, the Commission is not a "Departmen[t]" like the "Executive departments" (*e. g.*, State, Treasury, Defense) listed in 5 U. S. C. § 101. In *Freytag*, 501 U. S., at 887, n. 4, we specifically reserved the question whether a "principal agenc[y], such as . . . the Securities and Exchange Commission," is a "Departmen[t]" under the Appointments Clause. Four Justices, however, would have concluded that

the Commission is indeed such a "Departmen[t]," see *id.*, at 918 (SCALIA, J., concurring in part and concurring in judgment), because it is a "free-standing, self-contained entity in the Executive Branch," *id.*, at 915.

Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, see Brief for United States 37–39; PCAOB Brief 30–33, and we do. Respondents' reading of the Appointments Clause is consistent with the common, near-contemporary definition of a "department" as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." 1 N. Webster, American Dictionary of the English Language (1828) (def. 2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint "an assistant, and deputy postmasters, at all places where such shall be found necessary," § 3, 1 Stat. 234—thus treating him as the "Hea[d] of [a] Departmen[t]" without the title of Secretary or any role in the President's Cabinet. And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. See *Freytag*, *supra*, at 917; cf. *Burnap* v. *United States*, 252 U. S. 512, 515 (1920); *United States* v. *Germaine*, 99 U. S. 508, 511 (1879). Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a "Departmen[t]" for the purposes of the Appointments Clause.[11]

But petitioners are not done yet. They argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Com-

[11] We express no view on whether the Commission is thus an "executive Departmen[t]" under the Opinions Clause, Art. II, § 2, cl. 1, or under Section 4 of the Twenty-Fifth Amendment. See *Freytag* v. *Commissioner*, 501 U. S. 868, 886–887 (1991).

mission's "Hea[d]."[12] The Commission's powers, however, are generally vested in the Commissioners jointly, not the Chairman alone. See, *e. g.*, 15 U. S. C. §§ 77s, 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies. See Reorg. Plan No. 10 of 1950, § 1(b)(1), 64 Stat. 1265. The Chairman is also appointed from among the Commissioners by the President alone, *id.*, § 3, at 1266, which means that he cannot be regarded as "the head of an agency" for purposes of the Reorganization Act. See 5 U. S. C. § 904. (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that "the head of an agency [may] be an individual or a commission or board with more than one member.")[13]

As a constitutional matter, we see no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]"

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[12] The Board argued below that petitioners lack standing to raise this claim, because no member of the Board has been appointed over the Chairman's objection, and so petitioners' injuries are not fairly traceable to an invalid appointment. See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaint in Civil Action No. 1:06–cv–00217–JR (DC), Doc. 17, pp. 42–43; Brief for Appellees PCAOB et al. in No. 07–5127 (CADC), pp. 32–33. We cannot assume, however, that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 533 (1962) (plurality opinion).

[13] Petitioners contend that finding the Commission to be the head will invalidate numerous appointments made directly by the Chairman, such as those of the "heads of major [SEC] administrative units." Reorg. Plan No. 10, § 1(b)(2), at 1266. Assuming, however, that these individuals are officers of the United States, their appointment is still made "subject to the approval of the Commission." *Ibid.* We have previously found that the department head's approval satisfies the Appointments Clause, in precedents that petitioners do not ask us to revisit. See, *e. g.*, *United States* v. *Smith*, 124 U. S. 525, 532 (1888); *Germaine*, 99 U. S., at 511; *United States* v. *Hartwell*, 6 Wall. 385, 393–394 (1868).

that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, § 2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. I, § 2, cl. 5; *id.*, § 3, cl. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies. See *Freytag*, 501 U. S., at 918 (SCALIA, J., concurring in part and concurring in judgment); see also Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 (defining "the head of the department" to mean "the officer *or group of officers* . . . who are not subordinate or responsible to any other officer of the department" (emphasis added)); 37 Op. Atty. Gen. 227, 231 (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board's continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See *Bowsher*, 478 U. S., at 727, n. 5 (concluding that a separation-of-powers violation may create a "here-and-now" injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his

duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court holds unconstitutional a statute providing that the Securities and Exchange Commission (SEC or Commission) can remove members of the Public Company Accounting Oversight Board from office only for cause. It argues that granting the "inferior officer[s]" on the Accounting Board "more than one level of good-cause protection . . . contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Ante*, at 484. I agree that the Accounting Board members are inferior officers. See *ante*, at 493–495. But in my view the statute does not significantly interfere with the President's "executive Power." Art. II, §1. It violates no separation-of-powers principle. And the Court's contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I

A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes "necessary and proper" to the exercise of its specifically enumerated constitutional authority. Art. I, § 8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers' efforts to create a Constitution that would "endure for ages to come." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819). It embodies their recognition that it would be "unwise" to prescribe "the means by which government should, in all future time, execute its powers." *Ibid.* Such "immutable rules" would deprive the Government of the needed flexibility to respond to future "exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* Thus the Necessary and Proper Clause affords Congress broad authority to "create" governmental "'offices'" and to structure those offices "as it chooses." *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) *(per curiam);* cf. *Lottery Case*, 188 U. S. 321, 355 (1903). And Congress has drawn on that power over the past century to create numerous federal agencies in response to "various crises of human affairs" as they have arisen. *McCulloch*, *supra*, at 415 (emphasis deleted). Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–37 (1950).

On the other hand, the opening sections of Articles I, II, and III of the Constitution separately and respectively vest "[a]ll legislative Powers" in Congress, the "executive Power" in the President, and the "judicial Power" in the Supreme Court (and such "inferior Courts as Congress may from time to time ordain and establish"). In doing so, these provisions imply a structural separation-of-powers principle. See, *e. g.*, *Miller* v. *French*, 530 U. S. 327, 341–342 (2000). And that

principle, along with the instruction in Article II, § 3, that the President "shall take Care that the Laws be faithfully executed," limits Congress' power to structure the Federal Government. See, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919, 946 (1983); *Freytag* v. *Commissioner*, 501 U. S. 868, 878 (1991); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 64 (1982); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 859–860 (1986). Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. *Myers* v. *United States*, 272 U. S. 52 (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. *Ibid.* Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post. See *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), overruling in part *Myers*, *supra; Morrison* v. *Olson*, 487 U. S. 654 (1988). And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation.

In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases. See, *e. g.*, *Chadha*, *supra*, at 946; *Buckley*, *supra*, at 124–125. That is because, with the exception of the general "vesting" and "take care" language, the Constitution is completely "silent with respect to the power of removal from office." *Ex parte Hennen*, 13 Pet. 230, 258 (1839); see also *Morrison*,

supra, at 723 (SCALIA, J., dissenting) ("There is, of course, no provision in the Constitution stating who may remove executive officers . . . ").

Nor does history offer significant help. The President's power to remove Executive Branch officers "was not discussed in the Constitutional Convention." *Myers*, *supra*, at 109–110. The First Congress enacted federal statutes that limited the President's ability to *oversee* Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today's United States attorneys), and, to a lesser extent, the Secretary of the Treasury. See, *e. g.*, Lessig, Readings by Our Unitary Executive, 15 Cardozo L. Rev. 175, 183–184 (1993); Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B. U. L. Rev. 59, 74–75 (1983); Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 240–241 (1989) (hereinafter Casper); H. Bruff, Balance of Forces: Separation of Powers Law in the Administrative State 414–417 (2006). But those statutes did not directly limit the President's authority to *remove* any of those officials—"a subject" that was "much disputed" during "the early history of this government," "and upon which a great diversity of opinion was entertained." *Hennen*, *supra*, at 259; see also *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284, 306 (1855) (McLean, J., dissenting); Casper 233–237 (recounting the Debate of 1789). Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement. Compare *ante*, at 492; *Myers*, *supra*, at 114 (majority opinion of Taft, C. J.); and Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006), with, *e. g.*, *Myers*, *supra*, at 194 (McReynolds, J., dissenting); Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 369 (1927); Lessig & Sunstein, The President

and the Administration, 94 Colum. L. Rev. 1, 25–26 (1994) (hereinafter Lessig & Sunstein); and L. Fisher, President and Congress: Power and Policy 86–89 (1972).

Nor does this Court's precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. See Part II–C, *infra.* In *Myers*, *supra*, the Court invalidated—for the first and only time—a congressional statute on the ground that it unduly limited the President's authority to remove an Executive Branch official. But soon thereafter the Court expressly disapproved most of *Myers'* broad reasoning. See *Humphrey's Executor*, *supra*, at 626–627, overruling in part *Myers*, *supra; Wiener* v. *United States*, 357 U. S. 349, 352 (1958) (stating that *Humphrey's Executor* "explicitly 'disapproved'" of much of the reasoning in *Myers*). Moreover, the Court has since said that "the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from *'draw[ing] to itself* . . . the power to remove or the right to participate in the exercise of that power.'" *Morrison*, *supra*, at 686 (emphasis added). And that feature of the statute—a feature that would *aggrandize* the power of Congress—is not present here. Congress has not granted itself any role in removing the members of the Accounting Board. Cf. *Freytag*, 501 U. S., at 878 ("separation-of-powers jurisprudence generally focuses on the danger of one branch's *aggrandizing its power* at the expense of another branch" (emphasis added)); *Buckley*, 424 U. S., at 129 (same); *Schor*, 478 U. S., at 856 (same); *Bowsher* v. *Synar*, 478 U. S. 714, 727 (1986) (same). Compare *Myers*, *supra* (striking down statute where Congress granted *itself* removal authority over Executive Branch official), with *Humphrey's Executor*, *supra* (upholding statute where such aggrandizing was absent); *Wiener*, *supra* (same); *Morrison*, *supra* (same).

In short, the question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent pro-

vides any clear answer. Cf. *Chicago* v. *Morales*, 527 U. S. 41, 106 (1999) (THOMAS, J., joined by Rehnquist, C. J., and SCALIA, J., dissenting) (expressing the view that "this Court" is "most vulnerable" when "it deals with judge-made constitutional law" that lacks "roots in the language" of the Constitution (internal quotation marks omitted)).

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. Thus, in *Crowell* v. *Benson*, 285 U. S. 22, 53 (1932), a foundational separation-of-powers case, the Court said that "regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required." The Court repeated this injunction in *Schor* and again in *Morrison*. See *Schor*, *supra*, at 854 (stating that the Court must look " 'beyond form to the substance of what' Congress has done"); *Morrison*, 487 U. S., at 689–691 ("The analysis contained in our removal cases is designed *not to define rigid categories* of those officials who may or may not be removed at will by the President," but rather asks whether, given the "functions of the officials in question," a removal provision "interfere[s] with the President's exercise of the 'executive power' " (emphasis added)). The Court has thereby written into law Justice Jackson's wise perception that "the Constitution . . . contemplates that practice will integrate the dispersed powers into *a workable government*." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion) (emphasis added). See also *ibid.* ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context").

It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line

rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and "exigencies," which at the time of the founding could be seen only "dimly," and perhaps not at all. *McCulloch*, 4 Wheat., at 415.

For another, a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances. That is why the "powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role" over time. *New York* v. *United States*, 505 U. S. 144, 157 (1992). Indeed, the Federal Government at the time of the founding consisted of about 2,000 employees and served a population of about 4 million. See Kaufman, The Growth of the Federal Personnel System, in The Federal Government Service 7, 8 (W. Sayre 2d ed. 1965); Dept. of Commerce, Census Bureau, Historical Statistics of the United States: Colonial Times to 1970, pt. 1, p. 8 (1975). Today, however, the Federal Government employs about *4.4 million workers* who serve a Nation of more than 310 million people living in a society characterized by rapid technological, economic, and social change. See Office of Management and Budget, Analytical Perspectives, Budget of the U. S. Government, Fiscal Year 2010, p. 368 (2009).

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection, and much else besides. Those statutes create a host of different organi-

zational structures. Sometimes they delegate administrative authority to the President directly, *e. g.*, 10 U. S. C. § 2031(a)(1); 42 U. S. C. § 5192(c); sometimes they place authority in a long-established Cabinet department, *e. g.*, 7 U. S. C. § 1637b(c)(1); 12 U. S. C. § 5221(b)(2) (2006 ed., Supp. II); sometimes they delegate authority to an independent commission or board, *e. g.*, 15 U. S. C. § 4404(b); 28 U. S. C. § 994; sometimes they place authority directly in the hands of a single senior administrator, *e. g.*, 15 U. S. C. § 657d(c)(4); 42 U. S. C. § 421; sometimes they place it in a subcabinet bureau, office, division, or other agency, *e. g.*, 18 U. S. C. § 4048; sometimes they vest it in multimember or multiagency task groups, *e. g.*, 5 U. S. C. §§ 593–594; 50 U. S. C. § 402 (2006 ed. and Supp. II); sometimes they vest it in commissions or advisory committees made up of members of more than one branch, *e. g.*, 20 U. S. C. § 42(a); 28 U. S. C. § 991(a) (2006 ed., Supp. II); 42 U. S. C. § 1975; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators, *e. g.*, 5 U. S. C. § 9902(a) (2006 ed., Supp. II); 7 U. S. C. § 136i–1(g); and sometimes they permit state or local governments to participate as well, *e. g.*, 7 U. S. C. § 2009aa–1(a). Statutes similarly grant administrators a wide variety of powers—for example, the power to make rules, develop informal practices, investigate, adjudicate, impose sanctions, grant licenses, and provide goods, services, advice, and so forth. See generally 5 U. S. C. § 500 *et seq.*

The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government's work, it is not surprising that administrative units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways Presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President's friends and allies may weaken him. But a rule that takes power from the President's opponents may strengthen him. And what if the rule takes power from a functionally *neutral* independent authority? In that case, it is difficult to predict how the President's power is affected in the abstract.

These practical reasons not only support our precedents' determination that cases such as this should examine the specific functions and context at issue; they also indicate that judges should hesitate before second-guessing a "for cause" decision made by the other branches. See, *e. g.*, *Chadha*, 462 U. S., at 944 (applying a "presumption that the challenged statute is valid"); *Bowsher*, 478 U. S., at 736 (STEVENS, J.,

concurring in judgment). Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context.

There is no indication that the two comparatively more expert branches were divided in their support for the "for cause" provision at issue here. In this case, the Act embodying the provision was passed by a vote of 423 to 3 in the House of Representatives and by a vote of 99 to 0 in the Senate. 148 Cong. Rec. 14458, 14505 (2002). The creation of the Accounting Board was discussed at great length in both bodies without anyone finding in its structure any constitutional problem. See *id.*, at 12035–12037, 12112–12132, 12315–12323, 12372–12377, 12488–12508, 12529–12534, 12612–12618, 12673–12680, 12734–12751, 12915–12960, 13347–13354, 14439–14458, 14487–14506. The President signed the Act. And, when he did so, he issued a signing statement that critiqued multiple provisions of the Act but did not express any separation-of-powers concerns. See President's Statement on Signing the Sarbanes-Oxley Act of 2002, 38 Weekly Comp. of Pres. Doc. 1286 (2002). Cf. ABA, Report of Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 15 (2006), online at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf (all Internet materials as visited June 24, 2010, and available in Clerk of Court's case file) (noting that President Bush asserted "over 500" "constitutional objections" through signing statements "in his first term," including 82 "related to his theory of the 'unitary executive' ").

Thus, here, as in similar cases, we should decide the constitutional question in light of the provision's practical functioning in context. And our decision should take account of the Judiciary's comparative lack of institutional expertise.

II

A

To what extent then is the Act's "for cause" provision likely, as a practical matter, to limit the President's exercise of executive authority? In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. That is why President Truman complained that "'the powers of the President amount to'" bringing "'people in and try[ing] to persuade them to do what they ought to do without persuasion.'" C. Rossiter, The American Presidency 154 (2d rev. ed. 1960). And that is why scholars have written that the President "is neither dominant nor powerless" in his relationships with many Government entities, "whether denominated executive or independent." Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 583 (1984) (hereinafter Strauss). Those entities "are *all* subject to presidential direction in significant aspects of their functioning, and [are each] able to resist presidential direction in others." *Ibid.* (emphasis added).

Indeed, notwithstanding the majority's assertion that the removal authority is "*the* key" mechanism by which the President oversees inferior officers in the independent agencies, *ante,* at 501, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision. See Bruff, Bringing the Independent

Agencies in From the Cold, 62 Vand. L. Rev. En Banc 63, 68 (2009), online at http://vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf (noting that "Presidents do not test the limits of their power by removing commissioners . . . "); Lessig & Sunstein 110–112 (noting that courts have not had occasion to define what constitutes "cause" because Presidents rarely test removal provisions).

But even if we put all these other matters to the side, we should still conclude that the "for cause" restriction before us will not restrict Presidential power significantly. For one thing, the restriction directly limits, not the President's power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President "is powerless to intervene" if he has determined that the Board members' "conduct merit[s] removal" because "[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control." *Ante*, at 495–496. But so long as the President is *legitimately* foreclosed from removing the *Commissioners* except for cause (as the majority assumes), nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be "powerless to intervene" by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why *two* layers of "for cause" protection—layer 1 insulating the Commissioners from the President, and layer 2 insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.
2. The President and the Commission both want to dismiss a Board member. Layer 2 stops them both from doing

so without cause. The President's ability to remove the Commission (layer 1) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer 1 allows the Commission to make that determination notwithstanding the President's contrary view. Layer 2 is irrelevant because the Commission does not seek to remove the Board member.
4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, layer 2 *helps the President*, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority's decision to eliminate only *layer 2* accomplishes virtually nothing. And that is because a removal restriction's effect upon Presidential power depends not on the presence of a "double-layer" of for-cause removal, as the majority pretends, but rather on the real-world nature of the President's relationship with the Commission. If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission's membership must reflect both political parties, 15 U. S. C. § 78d(a)—the restriction on the *Commission's* ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to *implement* his policy preferences, layer 1 is irrelevant, for the President and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President *both* want to remove a Board member, but have varying judgments as to whether they have good "cause" to do so—*i. e.*, the President and the Commission both conclude that a Board member should be removed, but

disagree as to whether that conclusion (which they have both reached) is *reasonable*. *Ante*, at 496. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by layer 1), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses layer 2 as an "excuse" to pursue its actual aims—an excuse which, given layer 1, it does not need. *Ante*, at 497, n. 4.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President's power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board's functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial regulation, such as the New York Stock Exchange and other similar self-regulating organizations. See generally Brief for Former Chairmen of the SEC as *Amici Curiae* (hereinafter Brief for Former SEC Chairmen). And those organizations—which rely on private financing and on officers drawn from the private sector—exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed "entirely derivative" of, the Securities and Exchange Commission. See *National Assn. of Securities Dealers, Inc.* v. *SEC*, 431 F. 3d 803, 806 (CADC 2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards "relating to the preparation of audit reports"; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See 15 U. S. C. §§ 7211–7216. But, at the same time:

- No Accounting Board rule takes effect unless and until the Commission approves it, § 7217(b)(2);
- The Commission may "abrogat[e], delet[e] or ad[d] to" any rule or any portion of a rule promulgated by the Accounting Board whenever, in the Commission's view, doing so "further[s] the purposes" of the securities and accounting-oversight laws, § 7217(b)(5);
- The Commission may review any sanction the Board imposes and "enhance, modify, cancel, reduce, or require the remission of" that sanction if it finds the Board's action not "appropriate," §§ 7215(e), 7217(c)(3);
- *The Commission may promulgate rules restricting or directing the Accounting Board's conduct of all inspections and investigations,* §§ 7211(c)(3), 7214(h), 7215(b)(1)–(4);
- *The Commission may itself initiate any investigation or promulgate any rule within the Accounting Board's purview,* § 7202, and may also *remove any Accounting Board member who has unreasonably "failed to enforce compliance with" the relevant "rule[s], or any professional standard,"* § 7217(d)(3)(C) (emphasis added);
- *The Commission may at any time "relieve the Board of any responsibility to enforce compliance with any provision" of the Act, the rules, or professional stand-*

ards if, in the Commission's view, doing so is in "the public interest," §§ 7217(d)(1)–(2) (emphasis added).

As these statutory provisions make clear, the Court is simply wrong when it says that "the Act nowhere gives the Commission effective power to start, stop, or alter" Board investigations. *Ante,* at 504. On the contrary, the Commission's control over the Board's investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board's budget, §§ 7219(b), (d)(1); it can assign to the Board any "duties or functions" that it "determines are necessary or appropriate," § 7211(c)(5); it has full "oversight and enforcement authority over the Board," § 7217(a), *including the authority to inspect the Board's activities whenever it believes it "appropriate" to do so,* § 7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, § 7217(d)(3). Cf. *Shurtleff* v. *United States,* 189 U. S. 311, 314–319 (1903) (holding that removal authority is not always "restricted to a removal for th[e] causes" set forth by statute); *Bowsher,* 478 U. S., at 729 (rejecting the "arguable premis[e]" "that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes"). Contra, *ante,* at 503, n. 7. See generally Pildes, Putting Power Back Into Separation of Powers Analysis: Why the SEC-PCAOB Structure is Constitutional, 62 Vand. L. Rev. En Banc 85 (2009), online at http://vanderbiltlawreview.org/articles/2009/11/Pildes-62-Vand-L-Rev-En-Banc-85.pdf (explaining further the comprehensive nature of the Commission's powers).

What is left? The Commission's inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of

the President's serious concern about such a matter? Everyone concedes that the President's control over the Commission is constitutionally sufficient. See *Humphrey's Executor*, 295 U. S. 602; *Wiener*, 357 U. S. 349; *ante*, at 483. And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged "for cause" provision. First and foremost, the Board adjudicates cases. See 15 U. S. C. § 7215. This Court has long recognized the appropriateness of using "for cause" provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. *Humphrey's Executor*, *supra*, at 623–628; see also *Wiener*, *supra*, at 355–356; *Morrison*, 487 U. S., at 690–691, and n. 30; *McAllister* v. *United States*, 141 U. S. 174, 191–201 (1891) (Field, J., dissenting). Indeed, as early as 1789 James Madison stated that "there may be strong reasons why an" executive "officer" such as the Comptroller of the United States "should not hold his office at the pleasure of the Executive branch" if one of his "principal dut[ies]" "partakes strongly of the judicial character." 1 Annals of Cong. 611–612; cf. *ante*, at 500, n. 6 (noting that the statute Congress ultimately enacted limited Presidential control over the Comptroller in a different fashion); see *supra*, at 517. The Court, however, all but ignores the Board's adjudicatory functions when conducting its analysis. See, *e. g.*, *ante*, at 498–499. And when it finally does address that central function (in a footnote), it simply asserts that the Board *does not* "*perform* adjudicative . . . functions," *ante*, at 507, n. 10 (emphasis added), an assertion that is inconsistent with the terms of the statute. See § 7215(c)(1) (governing "proceeding[s] by the Board to determine whether a

registered public accounting firm, or an associated person thereof, should be disciplined").

Moreover, in addition to their adjudicative functions, the Accounting Board members supervise, and are themselves, technical professional experts. See § 7211(e)(1) (requiring that Board members "have a demonstrated" technical "understanding of the responsibilities" and "obligations of accountants with respect to the preparation and issuance of audit reports"). This Court has recognized that the "difficulties involved in the preparation of" sound auditing reports require the application of "scientific accounting principles." *United States* v. *Anderson*, 269 U. S. 422, 440 (1926). And this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise. See *Humphrey's Executor*, *supra*, at 624–626; see also Breger & Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1131–1133 (2000) (hereinafter Breger & Edles) (explaining how the need for administrators with "technical competence," "apolitical expertise," and skill in "scientific management" led to original creation of independent agencies); J. Landis, The Administrative Process 23 (1938) (similar); Woodrow Wilson, Democracy and Efficiency, 87 Atlantic Monthly 289, 299 (1901) (describing need for insulation of experts from political influences).

Here, the justification for insulating the "technical experts" on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. See, *e. g.*, 148 Cong. Rec. 12036, 12115, 13352–13355. It did so for good reason. See *ante*, at 484 (noting that the Accounting Board was created in response to "a series of celebrated accounting debacles"); H. R. Rep. No. 107–414, pp. 18–19 (2002) (same); Brief for Former SEC Chairmen 8–9. And historically, this regulatory subject matter—financial regulation—has been thought to exhibit a particular need for independence. See,

e. g., 51 Cong. Rec. 8857 (1914) (remarks of Sen. Morgan upon creation of the Federal Trade Commission) ("[I]t is unsafe for an . . . administrative officer representing a great political party . . . to hold the power of life and death over the great business interests of this country. . . . That is . . . why I believe in . . . taking these business matters out of politics"). And Congress, by, for example, providing the Board with a revenue stream independent of the congressional appropriations process, § 7219, helped insulate the Board from congressional, as well as other, political influences. See, *e. g.*, 148 Cong. Rec. 12036 (statement of Sen. Stabenow).

In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. Cf. *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent"). And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court's assertion that we should simply learn to get by "without being" regulated "by experts" is, at best, unrealistic—at worst, dangerously so. *Ante*, at 499.

C

Where a "for cause" provision is so unlikely to restrict Presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. First, in considering a related issue in *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977), the Court made clear that when "determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally

assigned functions." *Id.*, at 443. The Court said the same in *Morrison*, where it upheld a restriction on the President's removal power. 487 U. S., at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light"). Here, the removal restriction may somewhat diminish the *Commission's* ability to control the Board, but it will have little, if any, negative effect in respect to the President's ability to control the Board, let alone to coordinate the Executive Branch. See Part II–A, *supra*. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President's important historic power to control criminal prosecutions, a "'purely executive'" function, 487 U. S., at 687–689, the constitutionality of the present restriction would seem to follow *a fortiori*.

Second, as previously pointed out, this Court has repeatedly upheld "for cause" provisions where they restrict the President's power to remove an officer with adjudicatory responsibilities. Compare *Humphrey's Executor*, 295 U. S., at 623–628; *Wiener*, 357 U. S., at 355; *Schor*, 478 U. S., at 854; *Morrison*, *supra*, at 691, n. 30, with *ante*, at 498–499 (ignoring these precedents). And we have also upheld such restrictions when they relate to officials with technical responsibilities that warrant a degree of special independence. *E. g.*, *Humphrey's Executor*, *supra*, at 624. The Accounting Board's functions involve both kinds of responsibility. And, accordingly, the Accounting Board's adjudicatory responsibilities, the technical nature of its job, the need to attract experts to that job, and the importance of demonstrating the nonpolitical nature of the job to the public strongly justify a statute that ensures that Board members need not fear for their jobs when competently carrying out their tasks, while still maintaining the Commission as the ultimate authority over Board policies and actions. See Part II–B, *supra*.

Third, consider how several cases fit together in a way that logically compels a holding of constitutionality here. In *United States* v. *Perkins*, 116 U. S. 483, 484 (1886)—which was reaffirmed in *Myers*, 272 U. S., at 127, and in *Morrison*, *supra*, at 689, n. 27—the Court upheld a removal restriction limiting the authority of the Secretary of the Navy to remove a "cadet-engineer," whom the Court explicitly defined as an "inferior officer." The Court said:

> "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments *it may limit and restrict the power of removal as it deems best for the public interest.* The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *Perkins*, *supra*, at 485 (emphasis added; internal quotation marks omitted).

See also *Morrison*, *supra*, at 723–724 (SCALIA, J., dissenting) (agreeing that the power to remove an "inferior officer" who is appointed by a department head can be restricted). Cf. *ante*, at 510–513 (holding that SEC Commissioners are "Heads of Departments").

In *Humphrey's Executor*, the Court held that Congress may constitutionally limit the President's authority to remove certain principal officers, including heads of departments. 295 U. S., at 627–629. And the Court has consistently recognized the validity of that holding. See *Wiener*, *supra; United States* v. *Nixon*, 418 U. S. 683, 706 (1974); *Buckley*, 424 U. S., at 133–136; *Chadha*, 462 U. S., at 953, n. 16; *Bowsher*, 478 U. S., at 725–726; *Morrison*, *supra*, at 686–693; *Mistretta* v. *United States*, 488 U. S. 361, 410–411 (1989).

And in *Freytag*, 501 U. S., at 921, JUSTICE SCALIA stated in a concurring opinion written for four Justices, including JUSTICE KENNEDY, that "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." In these Justices' view, the Court should not create a *separate* constitutional jurisprudence for the "independent agencies." That being so, the law should treat their heads as it treats other Executive Branch heads of departments. Consequently, as the Court held in *Perkins*, Congress may constitutionally "limit and restrict" the Commission's power to remove those whom they appoint (*e. g.*, the Accounting Board members).

Fourth, the Court has said that "[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch's *aggrandizing its power* at the expense of another branch." *Freytag*, *supra*, at 878 (emphasis added); accord, *Buckley*, *supra*, at 129; *Schor*, *supra*, at 856; *Morrison*, 487 U. S., at 686; cf. *Bowsher*, *supra*. Indeed, it has added that "the essence of the decision in *Myers*," which is the only one of our cases to have struck down a "for cause" removal restriction, "was the judgment that the Constitution prevents Congress from '*draw[ing] to itself . . . the power to remove.*'" *Morrison*, *supra*, at 686 (quoting *Myers*, *supra*, at 161; emphasis added). Congress here has "drawn" no power to itself to remove the Board members. It has instead sought to *limit* its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. See *supra*, at 532; see also Brief for Former SEC Chairmen 16. And this case thereby falls outside the ambit of the Court's most serious constitutional concern.

In sum, the Court's prior cases impose functional criteria that are readily met here. Once one goes beyond the Court's elementary arithmetical logic (*i. e.*, "one plus one is

greater than one") our precedent virtually dictates a holding that the challenged "for cause" provision is constitutional.

D

We should ask one further question. Even if the "for cause" provision before us does not itself significantly interfere with the President's authority or aggrandize Congress' power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President's central constitutional role? Cf. Strauss 625–626. The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this "for cause" provision might bring about.

The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court's opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer "perform[s] adjudicative . . . functions." Cf. *ante,* at 507, n. 10. But the Accounting Board performs adjudicative functions. See *supra,* at 530–532. What, then, are we to make of the Court's potential exception? And would such an exception apply to an administrative law judge who also has important administrative duties beyond pure adjudication? See, *e. g.,* 8 CFR § 1003.9, 34 CFR § 81.4 (2009). The Court elsewhere suggests that its rule may be limited to removal statutes that provide for "judicial review of a[n] effort to remove" an official for cause. *Ante,* at 502. But we have previously stated that *all* officers protected by a for-cause removal provision and later subject to termination are entitled to "notice and [a] hearing" in the "courts," as without such review "the appointing power" otherwise "could remove at pleasure or for such cause as [only] it deemed sufficient." *Reagan* v. *United States,* 182 U. S.

419, 425 (1901); *Shurtleff*, 189 U. S., at 314; cf. *Humphrey's Executor*, 295 U. S. 602 (entertaining civil suit challenging removal). But cf. *Bowsher*, 478 U. S., at 729. What weight, then, should be given to this hint of an exception?

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission and the Board. See *ante*, at 502–503, 506–507. But the only characteristic of the "relationship" between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. See, *e. g.*, *ante*, at 504 ("Broad power over Board functions is not equivalent to the power to remove Board members"). Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? Cf. Part II–A, *supra* (describing the Commission's near absolute control over the Board). In a word, what differences are relevant? If the Court means to state that its holding in fact applies only where Congress has "enacted an *unusually high standard*" of for-cause removal—and does not otherwise render two layers of "'ordinary'" for-cause removal unconstitutional—I should welcome the statement. *Ante*, at 502–503 (emphasis added); see also *ante*, at 505, 506, 496, 503 (underscoring this statute's "sharply circumscribed definition of what constitutes 'good cause'" and its "rigorous," "significant and unusual [removal] protections"). But much of the majority's opinion appears to avoid so narrow a holding in favor of a broad, basically mechanical rule—a rule that, as I have said, is divorced from the context of the case at hand. Compare Parts III–A, III–B, III–C, *ante*, with Parts II–A, II–B, II–C, *supra*. And such a mechanical rule cannot be cabined simply by saying that, *perhaps*, the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not "a restricted railroad ticket, good

for" one "day and train only." *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to "the civil service." *Ante*, at 507. The "civil service" is defined by statute to include "all appointive positions in . . . the Government of the United States," excluding the military, but including *all* civil "officer[s]" up to and including those who are subject to Senate confirmation. 5 U. S. C. §§ 2101, 2102(a)(1)(B), 2104. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. Indeed, as this Court recognized in *Myers*, the "competitive service"—the class within the broader civil service that enjoys the most robust career protection—"includes a *vast majority* of all the civil officers" in the United States. 272 U. S., at 173 (emphasis added); 5 U. S. C. § 2102(c).

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, cf. *ante*, at 506 (leaving this question open), the exclusion would be insufficient. This is because the Court's "double for-cause" rule applies to appointees who are "inferior officer[s]." *Ante*, at 484. And who are they? Courts and scholars have struggled for more than a century to define the constitutional term "inferior officers," without much success. See 2 J. Story, Commentaries on the Constitution § 1536, pp. 397–398 (3d ed. 1858) ("[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution"); *Edmond* v. *United States*, 520 U. S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for [defining] inferior officers"); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online

at http://www.justice.gov/olc/2007/appointmentsclausev10.pdf ("[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause's requirements"); Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L. J. 489, 492 (1995) (same); Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1347, 1364 (1976) (describing our early precedent as "circular" and our later law as "not particularly useful"). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority's new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court's opinion) threatens serious harm.

The problem is not simply that the term "inferior officer" is indefinite but also that efforts to define it inevitably conclude that the term's sweep is unusually broad. Consider the Court's definitions: Inferior officers are, *inter alia*, (1) those charged with "the administration and enforcement of the public law," *Buckley*, 424 U. S., at 139; (2) those granted "significant authority," *id.*, at 126; *ante*, at 506; (3) those with "responsibility for conducting civil litigation in the courts of the United States," 424 U. S., at 140; and (4) those "who can be said to hold an office," *United States* v. *Germaine*, 99 U. S. 508, 510 (1879), that has been created either by "regulations" or by "statute," *United States* v. *Mouat*, 124 U. S. 303, 307–308 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An "inferior officer" is anyone who holds a "continuing" position and who is "invested by legal authority with a portion of the sovereign powers of the federal Government," including, *inter alia*, the power to "*arrest criminals*," "*seize persons or property*," "issue regu-

lations," "issue . . . authoritative legal opinions," "*conduc[t] civil litigation*," "collec[t] revenue," represent "the United States to foreign nations," "command" military force, or *enter into* "*contracts*" on behalf "of the nation." OLC Memo 1, 4, 12–13, 15–16 (internal quotation marks omitted; emphasis added).

And consider the fact that those whom this Court has *held* to be "officers" include: (1) a district court clerk, *Hennen*, 13 Pet., at 258; (2) "thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments, *Germaine*, *supra*, at 511, who are responsible for "the records, books, and papers appertaining to the office," *Hennen*, *supra*, at 259; (3) a clerk to "the assistant treasurer" stationed "at Boston," *United States* v. *Hartwell*, 6 Wall. 385, 392 (1868); (4 & 5) an "assistant-surgeon" and a "cadet-engineer" appointed by the Secretary of the Navy, *United States* v. *Moore*, 95 U. S. 760, 762 (1878); *Perkins*, 116 U. S., at 484; (6) election monitors, *Ex parte Siebold*, 100 U. S. 371, 397–399 (1880); (7) United States attorneys, *Myers*, *supra*, at 159; (8) federal marshals, *Siebold*, *supra*, at 397; *Morrison*, 487 U. S., at 676; (9) military judges, *Weiss* v. *United States*, 510 U. S. 163, 170 (1994); (10) judges in Article I courts, *Freytag*, 501 U. S., at 880–881; and (11) the general counsel of the Department of Transportation, *Edmond*, *supra*. Individual Members of the Court would add to the list the Federal Communication Commission's managing director, the Federal Trade Commission's "secretary," the general counsel of the Commodity Futures Trading Commission, and more generally, bureau chiefs, general counsels, and administrative law judges, see *Freytag*, *supra*, at 918–920 (SCALIA, J., concurring in part and concurring in judgment), as well as "ordinary commissioned military officers," *Weiss*, *supra*, at 182 (Souter, J., concurring).

Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high-level Government officials within the scope of the

Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus, and other agencies whose heads are by statute removable only "for cause." I have found 48 such agencies, which I have listed in Appendix A, *infra*. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only "for cause." I have identified 573 such high-ranking officials, whom I have listed in Appendix B, *infra*. They include most of the leadership of the Nuclear Regulatory Commission (including that agency's executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the executive directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see 5 U. S. C. §§ 2101a, 3132(a)(2), a group of high-ranking officials distinct from the "competitive service," see § 2102(a)(1)(C), who "serve in the key positions just below the top Presidential appointees," Office of Personnel Management, About the SES, online at http://www.opm.gov/ses/about_ses/index.asp; and who are, without exception, subject to "removal" only for cause, §§ 7542–7543; see also § 2302(a)(2) (substantially limiting conditions under which "a career appointee position in the Senior Executive Service" may be "transfer[red], or reassign[ed]"). SES officials include, for example, the Director of the Bureau of Prisons, the Director of the National Drug Intelligence Center, and the Director of the Office of International Monetary Policy in the Treasury Department. See Senate Committee on Homeland Security

and Governmental Affairs, United States Government Policy and Supporting Positions 99, 103, 129 (2008) (hereinafter Plum Book). And by virtually any definition, essentially all SES officials qualify as "inferior officers," for their duties, as defined by statute, require them to "direc[t] the work of an organizational unit," carry out high-level managerial functions, or "*otherwise exercis[e] important policy-making, policy-determining, or other executive functions.*" § 3132(a)(2) (emphasis added). Cf. *ante*, at 484 (describing an "inferior officer" as someone who "determines the policy and enforces the laws of the United States"); *ante*, at 506–507 (acknowledging that career SES appointees in independent agencies may be rendered unconstitutional in future cases). Is the SES exempt from today's rule or is it not? The Court, after listing reasons why the SES may be different, simply says that it will not "address" the matter. *Ante*, at 507. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and thereby also revealing the inherent instability of the legal rule it creates.

The potential list of those whom today's decision affects is yet larger. As JUSTICE SCALIA has observed, administrative law judges (ALJs) "are all executive officers." *Freytag*, 501 U. S., at 910 (opinion concurring in part and concurring in judgment) (emphasis deleted); see also, *e. g.*, *id.*, at 881 (majority opinion) ("[A] [tax-court] special trial judge is an 'inferior Officer' "); *Edmond*, 520 U. S., at 654 ("[M]ilitary trial and appellate judges are [inferior] officers"). But cf. *ante*, at 507, n. 10. And ALJs are each removable "only for good cause established and determined by the Merit Systems Protection Board," 5 U. S. C. §§ 7521(a)–(b). But the members of the Merit Systems Protection Board are themselves protected from removal by the President absent good cause. § 1202(d).

My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over

25 agencies. See Appendix C, *infra;* see also Memorandum of Juanita Love, Office of Personnel Management, to Supreme Court Library (May 28, 2010) (available in Clerk of Court's case file). These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals. Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional? Cf. *ante,* at 507, n. 10 ("[O]ur holding also does not address" this question).

And what about the military? Commissioned military officers "are 'inferior officers.' " *Weiss,* 510 U. S., at 182 (Souter, J., concurring); *id.,* at 169–170 (majority opinion). There are over 210,000 active-duty commissioned officers currently serving in the Armed Forces. See Dept. of Defense, Active Duty Military Personnel by Rank (Apr. 30, 2010), online at http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1004.pdf. Numerous statutory provisions provide that such officers may not be removed from office except for cause (at least in peacetime). See, *e. g.,* 10 U. S. C. §§ 629–632, 804, 1161, 1181–1185. And such officers can generally be so removed only by *other* commissioned officers, see §§ 612, 825, 1187, who themselves enjoy the same career protections.

The majority might simply say that the military is different. But it will have to explain *how* it is different. It is difficult to see why the Constitution would provide a President who is the military's "commander-in-chief," Art. II, § 2, cl. 1, with *less* authority to remove "inferior" military "officers" than to remove comparable civil officials. See Barron & Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941, 1102–1106 (2008) (describing President's "superintendence prerogative" over the military). Cf. *ante,* at 507 (not "expressing any view whatever" as to whether military officers' authority is now unconstitutional).

The majority sees "no reason . . . to address whether" any of "these positions," "or any others," might be deemed un-

constitutional under its new rule, preferring instead to leave these matters for a future case. *Ante*, at 507. But what is to happen in the meantime? Is the work of all these various officials to be put on hold while the courts of appeals determine whether today's ruling applies to them? Will Congress have to act to remove the "for cause" provisions? Cf. *Buckley*, 424 U. S., at 142–143. Can the President then restore them via executive order? And, still, what about the military? A clearer line would help avoid these practical difficulties.

The majority asserts that its opinion will not affect the Government's ability to function while these many questions are litigated in the lower courts because the Court's holding concerns only "the conditions under which th[e]se officers might someday be removed." *Ante*, at 508. But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were *subject to regulation* "'*here-and-now*'" and who "object to the" very "existence" of the regulators themselves. *Ante*, at 513, 490 (emphasis added). And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court's amorphous new rule will be able to bring an "'implied private right of action directly under the Constitution'" "seeking . . . a declaratory judgment that" the official's actions are "unconstitutional and an injunction preventing the" official "from exercising [his] powers." *Ante*, at 491, n. 2, 487; cf., *e. g.*, *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 546 (2001) (affirming grant of preliminary injunction to cure, *inter alia*, a separation-of-powers violation); *Youngstown Sheet & Tube Co.*, 343 U. S. 579 (same). Such a plaintiff need not even first exhaust his administrative remedies. *Ante*, at 489–491.

Nor is it clear that courts will always be able to cure such a constitutional defect merely by severing an offending removal provision. For a court's "ability to devise [such] a ju-

dicial remedy . . . often depends on how clearly" the "background constitutional rules at issue" have been "articulated"; severance will be unavailable "in a murky constitutional context," which is precisely the context that the Court's new rule creates. *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329, 330 (2006). Moreover, "the touchstone" of the severability analysis "is legislative intent," *id.*, at 330, and Congress has repeatedly expressed its judgment "over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service," *Civil Service Comm'n*, 413 U. S., at 557; see also *Bush* v. *Lucas*, 462 U. S. 367, 380–388 (1983) (describing the history of "[c]ongressional attention to the problem of politically motivated removals"). And so it may well be that courts called upon to resolve the many questions the majority's opinion raises will not only apply the Court's new rule to its logical conclusion, but will also determine that the only available remedy to certain double for-cause problems is to invalidate entire agencies.

Thus, notwithstanding the majority's assertions to the contrary, the potential consequences of today's holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court's decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive.

III

One last question: How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only "for cause"? See *ante*, at 487 ("[W]e decide the case with th[e] *understanding*" "that the Commissioners cannot themselves be removed by the President except" for cause (emphasis added)). Unless the Commissioners themselves are *in fact* protected by a "for cause" requirement, the Accounting Board statute, on the Court's own reasoning,

is not constitutionally defective. I am not aware of any other instance in which the Court has similarly (on its own or through stipulation) *created* a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional. Cf. *Alabama* v. *North Carolina*, 560 U. S. 330, 352 (2010) (opinion for the Court by SCALIA, J.) ("We do not—we cannot—add provisions to a federal statute . . . especially [if] . . . separation-of-powers concerns . . . would [thereby] arise"); *The Anaconda* v. *American Sugar Refining Co.*, 322 U. S. 42, 46 (1944) (describing parties' inability to "stipulate away" what "the legislation declares").

It is certainly not obvious that the SEC Commissioners enjoy "for cause" protection. Unlike the statutes establishing the 48 federal agencies listed in Appendix A, *infra*, the statute that established the Commission says nothing about removal. It *is silent* on the question. As far as its text is concerned, the President's authority to remove the Commissioners is no different from his authority to remove the Secretary of State or the Attorney General. See *Shurtleff*, 189 U. S., at 315 ("To take away th[e] power of removal . . . would require very clear and explicit language. It should not be held to be taken away by mere inference or implication"); see also Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, to the Principal Deputy Counsel to the President: Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects, p. 2 (Oct. 23, 2009), online at http://justice.gov/olc/2009/gas-transportproject.pdf ("[Where] Congress did not explicitly provide tenure protection . . . the President, consistent with . . . settled principles, may remove . . . without cause"); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Legal Counsel 124, 170 (1996) (same).

Nor is the absence of a "for cause" provision in the statute that created the Commission likely to have been inadvertent. Congress created the Commission during the 9-year period *after* this Court decided *Myers*, and thereby cast serious

doubt on the constitutionality of all "for cause" removal provisions, but *before* it decided *Humphrey's Executor*, which removed any doubt in respect to the constitutionality of making commissioners of independent agencies removable only for cause. In other words, Congress created the SEC at a time when, under this Court's precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause. And, during that 9-year period, Congress created at least three major federal agencies without making *any* of their officers removable for cause. See 48 Stat. 885, 15 U. S. C. § 78d (SEC); 48 Stat. 1066, 47 U. S. C. § 154 (Federal Communications Commission); 46 Stat. 797 (Federal Power Commission) (re-formed post-*Humphrey's Executor* as the Federal Energy Regulatory Commission *with* "for cause" protection, 91 Stat. 582, 42 U. S. C. § 7171). By way of contrast, only *one month* after *Humphrey's Executor* was decided, Congress returned to its pre-*Myers* practice of including such provisions in statutes creating independent commissions. See § 3, 49 Stat. 451, 29 U. S. C. § 153 (establishing National Labor Relations Board with an explicit removal limitation).

The fact that Congress did not make the SEC Commissioners removable "for cause" does not mean it intended to create a dependent, rather than an independent agency. Agency independence is a function of several different factors, of which "for cause" protection is only one. Those factors include, *inter alia*, an agency's separate (rather than presidentially dependent) budgeting authority, its separate litigating authority, its composition as a multimember bipartisan board, the use of the word "independent" in its authorizing statute, and, above all, a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause. See generally Breger & Edles 1135–1155.

The absence of a "for cause" provision is thus not fatal to agency independence. Indeed, a "Congressional Research

Service official suggests that there are *at least* 13 'independent' agencies without a removal provision in their statutes." *Id.*, at 1143, n. 161 (emphasis added) (citing congressional testimony). But it does draw the majority's rule into further confusion. For not only are we left without a definition of an "inferior officer," but we are also left to guess which department heads will be deemed by the majority to be subject to for-cause removal notwithstanding statutes containing no such provision. If any agency deemed "independent" will be similarly treated, the scope of the majority's holding is even broader still. See Appendix D, *infra* (listing agencies potentially affected).

The Court then, by assumption, reads *into* the statute books a "for cause removal" phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite. See *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (internal quotation marks omitted)); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

I do not need to decide whether the Commissioners are in fact removable only "for cause" because I would uphold the Accounting Board's removal provision as constitutional regardless. But were that not so, a determination that the silent SEC statute means no more than it says would properly avoid the determination of unconstitutionality that the Court now makes.

* * *

In my view the Court's decision is wrong—very wrong. As Parts II–A, II–B, and II–C of this opinion make clear, if

the Court were to look to the proper functional and contextual considerations, it would find the Accounting Board provision constitutional. As Part II–D shows, insofar as the Court instead tries to create a bright-line rule, it fails to do so. Its rule of decision is both imprecise and overly broad. In light of the present imprecision, it must either narrow its rule arbitrarily, leaving it to apply virtually alone to the Accounting Board, or it will have to leave in place a broader rule of decision applicable to many other "inferior officers" as well. In doing the latter, it will undermine the President's authority. And it will create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create—in provisions this Court is sworn to uphold.

With respect I dissent.

APPENDIXES

A

There are 24 stand-alone federal agencies (*i. e.*, "departments") whose heads are, *by statute*, removable by the President only "for cause." Moreover, there are at least 24 additional offices, boards, or bureaus situated within departments that are similarly subject, *by statute*, to for-cause removal provisions. The chart below first lists the 24 departments and then lists the 24 additional offices, boards, and bureaus. I have highlighted those instances in which a "for-cause" office is situated within a "for-cause" department—*i. e.*, instances of "double for-cause" removal that are essentially indistinguishable from this case (with the notable exception that the Accounting Board may *not* be *statutorily* subject to two layers of for-cause removal, cf. Part III, *supra*). This list does not include instances of "double for-cause" removal that arise in Article I courts, although such instances might also be affected by the majority's holding, cf. *ante*, at 507, n. 10. Compare 48 U. S. C. §§ 1424(a), 1614(a), with 28 U. S. C. §§ 631(a), (i), and 18 U. S. C. §§ 23, 3602(a).

	Department	Statutory Removal Provision
1	Chemical Safety Board	"Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office." 42 U. S. C. § 7412(r)(6)(B)
2	Commission on Civil Rights	"The President may remove a member of the Commission only for neglect of duty or malfeasance in office." 42 U. S. C. § 1975(e)
3	Consumer Product Safety Commission	"Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause." 15 U. S. C. § 2053(a)
4	Federal Energy Regulatory Commission	"Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 42 U. S. C. § 7171(b)(1)
5	Federal Labor Relations Authority	"Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office." 5 U. S. C. § 7104(b)
6	Federal Maritime Commission	"The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office." 46 U. S. C. § 301(b)(3)
7	Federal Mine Safety and Health Review Commission	"Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 30 U. S. C. § 823(b)(1)
8	Federal Reserve Board	"[E]ach member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President." 12 U. S. C. § 242

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	Department	Statutory Removal Provision
9	Federal Trade Commission	"Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 15 U. S. C. § 41
10	Independent Medicare Advisory Board	"Any appointed member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause." 124 Stat. 504
11	Merit Systems Protection Board	"Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U. S. C. § 1202(d)
12	National Labor Relations Board	"Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U. S. C. § 153(a)
13	National Mediation Board	"A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." 45 U. S. C. § 154
14	National Transportation Safety Board	"The President may remove a member for inefficiency, neglect of duty, or malfeasance in office." 49 U. S. C. § 1111(c)
15	Nuclear Regulatory Commission	"Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 42 U. S. C. § 5841(e)
16	Occupational Safety and Health Review Commission	"A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 29 U. S. C. § 661(b)
17	Office of Special Counsel	"The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U. S. C. § 1211(b)

	Department	Statutory Removal Provision
18	Postal Regulatory Commission	"The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause." 39 U. S. C. § 502(a)
19	Postal Service*	"The exercise of the power of the Postal Service shall be directed by a Board of Governors composed of 11 members . . . . The Governors shall not be representatives of specific interests using the Postal Service, and may be removed only for cause." 39 U. S. C. § 202
20	Social Security Administration	"[The] Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office." 42 U. S. C. § 902(a)(3)
21	United States Institute of Peace*	"A member of the Board appointed under subsection (b)(5) . . . may be removed by the President . . . in consultation with the Board, for conviction of a felony, malfeasance in office, persistent neglect of duties, or inability to discharge duties." 22 U. S. C. § 4605(f)
22	United States Sentencing Commission	"The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown." 28 U. S. C. § 991(a)
23	Legal Services Corporation*	"A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause." 42 U. S. C. § 2996c(e)

*See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995).

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	Department	Statutory Removal Provision
24	State Justice Institute*	"A member of the Board may be removed by a vote of seven members for malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, but for no other cause." 42 U. S. C. § 10703(h)
	Office Within Department	**Statutory Removal Provision**
25	Department of Agriculture: National Appeals Division	"The Division shall be headed by a Director, appointed by the Secretary from among persons who have substantial experience in practicing administrative law. . . . The Director shall not be subject to removal during the term of office, except for cause established in accordance with law." 7 U. S. C. §§ 6992(b)(1)–(2)
26	Department of Agriculture: Regional Fishery Management Councils	"The Secretary may remove for cause any member of a Council required to be appointed by the Secretary . . . ." 16 U. S. C. § 1852(b)(6)
27	Department of Commerce: Corporation for Travel Promotion†	"The Secretary of Commerce may remove any member of the board [of the Corporation] for good cause." 124 Stat. 57
28	Department of Defense: Office of Navy Reserve	"The Chief of Navy Reserve is appointed for a term determined by the Chief of Naval Operations, normally four years, but may be removed for cause at any time." 10 U. S. C. § 5143(c)(1)
29	Department of Defense: Office of Marine Forces Reserve	"The Commander, Marine Forces Reserve, is appointed for a term determined by the Commandant of the Marine Corps, normally four years, but may be removed for cause at any time." 10 U. S. C. § 5144(c)(1)

*See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995).

†See *Lebron*, *supra*.

	Office Within Department	**Statutory Removal Provision**
30	Department of Defense: Office of Air Force Reserve	"The Chief of Air Force Reserve is appointed for a period of four years, but may be removed for cause at any time." 10 U. S. C. § 8038(c)(1)
31	Department of Defense: Joint Staff of the National Guard Bureau	"[A]n officer appointed as Director of the Joint Staff of the National Guard Bureau serves for a term of four years, but may be removed from office at any time for cause." 10 U. S. C. § 10505(a)(3)(A)
32	Department of Defense: Board of Actuaries	"A member of the Board may be removed by the Secretary of Defense only for misconduct or failure to perform functions vested in the Board." 10 U. S. C. § 183(b)(3) (2006 ed., Supp. IV)
33	Department of Defense: Medicare-Eligible Retiree Health Care Board of Actuaries	"A member of the Board may be removed by the Secretary of Defense for misconduct or failure to perform functions vested in the Board, and for no other reason." 10 U. S. C. § 1114(a)(2)(A)
34	Department of Education: Performance-Based Organization for the Delivery of Federal Student Financial Assistance	"The Chief Operating Officer may be removed by . . . the President; or . . . the Secretary, for misconduct or failure to meet performance goals set forth in the performance agreement in paragraph (4)." 20 U. S. C. § 1018(d)(3)
35	Federal Labor Relations Authority: Foreign Service Labor Relations Board (see *supra*, row 5)	"The Chairperson [of the FLRA, who also chairs the Board] may remove any other Board member . . . for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions . . . ." 22 U. S. C. § 4106(e)
36	General Services Administration: Civilian Board of Contract Appeals (see *supra*, row 11)	"Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges, *[i. e.*, 'only for good cause established and determined *by the Merit Systems Protection Board.']*" 41 U. S. C. § 438(b)(2) (emphasis added)

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	Office Within Department	Statutory Removal Provision
37	Department of Health and Human Services: National Advisory Council on National Health Service Corps	"No member shall be removed, except for cause." 42 U. S. C. § 254j(b)
38	Department of Health and Human Services: Medicare & Medicaid Office of the Chief Actuary	"The Chief Actuary may be removed only for cause." 42 U. S. C. § 1317(b)(1)
39	Department of Homeland Security: Office of the Coast Guard Reserve	"An officer may be removed from the position of Director for cause at any time." 14 U. S. C. § 53(c)(1)
40	Department of the Interior: National Indian Gaming Commission	"A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown." 25 U. S. C. § 2704(b)(6)
41	Library of Congress: Copyright Royalty Judgeships	"The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability." 17 U. S. C. § 802(i)
42	Postal Service: Inspector General (see *supra*, row 19)	"The Inspector General may at any time be removed upon the written concurrence of at least 7 Governors, but only for cause." 39 U. S. C. § 202(e)(3)
43	Securities and Exchange Commission: Public Company Accounting Oversight Board	"A member of the Board may be removed by the Commission from office . . . for good cause shown . . . ." 15 U. S. C. § 7211(e)(6)

	Office Within Department	Statutory Removal Provision
44	Social Security Administration: Office of the Chief Actuary (see *supra*, row 20)	"The Chief Actuary may be removed only for cause." 42 U. S. C. § 902(c)(1)
45	Department of State: Foreign Service Grievance Board	"The Secretary of State may, upon written notice, remove a Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions, established at a hearing (unless the right to a hearing is waived in writing by the Board member)." 22 U. S. C. § 4135(d)
46	Department of Transportation: Air Traffic Services Committee	"Any member of the Committee may be removed for cause by the Secretary." 49 U. S. C. § 106(p)(6)(G)
47	Department of Transportation: Surface Transportation Board	"The President may remove a member for inefficiency, neglect of duty, or malfeasance in office." 49 U. S. C. § 701(b)(3)
48	Department of Veterans Affairs: Board of Veterans' Appeals	"The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds." 38 U. S. C. § 7101(b)(2)

B

The table that follows lists the 573 career appointees in the SES who constitute the upper level management of the independent agencies listed in Appendix A, *supra*. Each

of these officials is, under any definition—including the Court's—an inferior officer, and is, by statute, subject to two layers of for-cause removal. See *supra*, at 539–543.

The data are organized into three columns: The first column lists the "office" to which the corresponding official is assigned within the respective agency and, where available, the provision of law establishing that office. Cf. *supra*, at 539 (citing *Mouat*, 124 U. S., at 307–308; *Germaine*, 99 U. S., at 510). The second and third columns respectively list the career appointees in each agency who occupy "general" and "reserved" SES positions. A "general" position is one that could be filled by either a career appointee or by a noncareer appointee were the current (career) occupant to be replaced. See 5 U. S. C. § 3132(b)(1). Because 90% of *all* SES positions must be filled by career appointees, § 3134(b), "most General positions are filled by career appointees," Plum Book 200. A "reserved" position, by contrast, must always be filled by a career appointee. § 3132(b)(1). The data for the "general position" column come from the 2008 Plum Book, a quadrennial manual prepared by the congressional committees responsible for Government oversight. See *supra*, at 541–542. Positions listed as vacant in that source are not included. The data for the "reserved position" column come from a list periodically published by the Office of Personnel Management and last published in 2006. See 72 Fed. Reg. 16154–16251 (2007); § 3132(b)(4). Given the Federal Government's size and the temporal lag between the underlying sources, the list that follows is intended to be illustrative, not exact.

Nuclear Regulatory Commission (192)		
Office	*General Position*	*Reserved Position*
Office of the Executive Director for Operations 10 CFR § 1.32 (2009)	Executive Director	Director of Nuclear Security Projects
	Deputy Executive Director for Reactor and Preparedness Programs	

Office	*General Position*	*Reserved Position*
Office of the Executive Director for Operations—*Continued*	Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs	
	Deputy Executive Director for Corporate Management	
	Assistant for Operations	
	Director for Strategic Organizational Planning and Optimization	
Office of the Secretary 10 CFR § 1.25	Secretary	
Office of the Chief Financial Officer 10 CFR § 1.31	Chief Financial Officer	Director, Division of Planning, Budget and Analysis
		Director, Division of Financial Services
		Deputy Chief Financial Officer
		Director, Division of Financial Management
Office of the Inspector General 10 CFR § 1.12		Deputy Inspector General
		Assistant Inspector General for Audits
		Assistant Inspector General for Investigations
Office of the General Counsel 10 CFR § 1.23	General Counsel	Director, Commission Adjudicatory Technical Support

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Office	*General Position*	*Reserved Position*
Office of the General Counsel—*Continued*	Deputy General Counsel	Deputy Assistant General Counsel for Rulemaking and Fuel Cycle
	Solicitor	Deputy Assistant General Counsel for Administration
	Associate General Counsel for Licensing and Regulation	Assistant General Counsel for Operating Reactors
	Assistant General Counsel for Rulemaking and Fuel Cycle	
	Assistant General Counsel for Legal Counsel, Legislation, and Special Projects	
	Associate General Counsel for Hearings, Enforcement, and Administration	
	Assistant General Counsel for New Reactor Programs	
	Assistant General Counsel for Operating Reactors	
	Assistant General Counsel for the High-Level Waste Repository Programs	
Office of Commission Appellate Adjudication 10 CFR § 1.24		Director
Office of Congressional Affairs 10 CFR § 1.27	Director	

Office	*General Position*	*Reserved Position*
Office of Public Affairs 10 CFR § 1.28	Director	
Office of International Programs 10 CFR § 1.29	Director	
	Deputy Director	
Office of Investigations 10 CFR § 1.36	Director	Deputy Director
Office of Enforcement 10 CFR § 1.33	Director	
Office of Administration 10 CFR § 1.34	Director	Deputy Director
		Director, Division of Contracts
		Director, Division of Administrative Services
		Director, Division of Facilities and Security
Office of Human Resources 10 CFR § 1.39	Director	
	Deputy Director	
	Associate Director for Training and Development	
Office of Information Services 10 CFR § 1.35	Director	Deputy Director
		Director, Information and Records Services Division
		Director, High-Level Waste Business and Program Integration Staff
		Director, Business Process Improvement and Applications

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Office	*General Position*	*Reserved Position*
Office of Information Services—*Continued*		Director, Program Management, Policy Development and Analysis Staff
		Director, Infrastructure and Computer Operations
Office of Nuclear Security and Incident Response 10 CFR § 1.46	Director	Deputy Director (2)
		Director, Program Management, Policy Development
(Division of Security Policy)		Director
		Deputy Director
		Project Director, Nuclear Security Policy
		Project Director, Nuclear Security Operations
		Deputy Director for Material Security
		Deputy Director for Reactor Security and Rulemaking
(Division of Preparedness and Response)		Director
		Deputy Director (2)
		Deputy Director for Emergency Preparedness
(Division of Security Operations)		Director
		Deputy Director for Security Oversight
		Deputy Director for Security Programs

Office	*General Position*	*Reserved Position*
Office of Nuclear Reactor Regulation 10 CFR § 1.43	Director	Director, Program Management, etc.
	Deputy Director	Deputy Director, Program Management, etc.
		Associate Director, Operating Reactor Oversight and Licensing
		Associate Director, Risk Assessment and New Projects
		Associate Director, Engineering and Safety Systems
(Division of Safety Systems)		Director
		Deputy Director (2)
(Division of License Renewal)		Director
		Deputy Director
(Division of Operating Reactor Licensing)		Director
		Deputy Director (2)
(Division of Inspection and Regional Support)		Director
		Deputy Director (2)
(Division of New Reactor Licensing)		Director
		Deputy Director (2)
(Division of Engineering)		Director
		Deputy Director (3)
(Division of Risk Assessment)		Director
		Deputy Director (2)
(Division of Policy and Rulemaking)		Director
		Deputy Director (2)

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Office	*General Position*	*Reserved Position*
(Division of Component Integrity)		Director
		Deputy Director
Office of New Reactors 10 CFR § 1.44	Director	Assistant to the Director for Transition Management
Office of Nuclear Material Safety and Safeguards 10 CFR § 1.42	Director	Director, Program Planning, etc.
	Deputy Director	
(Division of Fuel Cycle Safety and Safeguards)		Chief, Special Projects Branch
		Chief, Safety and Safeguards Support Branch
		Chief, Fuel Cycle Facilities Branch
(Division of Industrial and Medical Nuclear Safety)		Chief, Rulemaking and Guidance Branch
		Chief, Materials Safety and Inspection Branch
(Division of High Level Waste Repository Safety)		Deputy Director, Licensing and Inspection
		Deputy Director, Technical Review Directorate (2)
(Spent Fuel Project Office)		Deputy Director, Technical Review Directorate
		Deputy Director, Licensing and Inspection
Office of Federal and State Materials and Environmental Management Programs 10 CFR § 1.41	Director	Deputy Director
		Director, Program Planning, etc.

Office	*General Position*	*Reserved Position*
(Division of Waste Management and Environmental Protection)		Director
		Deputy Director, Decommissioning (2)
		Deputy Director, Environmental Protection (2)
		Chief, Environmental and Performance Assessment
(Division of Materials Safety and State Agreements)		Director
		Deputy Director
(Division of Intergovernmental Liaison and Rulemaking)		Director
		Deputy Director
Office of Nuclear Regulatory Research 10 CFR § 1.45	Director	Director, Program Management, etc.
	Deputy Director	Deputy Director for Materials Engineering
	Regional Administrator (4)	Deputy Director for Engineering Research Applications
		Deputy Director for New Reactors and Computational Analysis
		Deputy Director for Probabilistic Risk and Applications
		Deputy Director for Operating Experience and Risk Analysis
		Deputy Director for Radiation Protection, Environmental Risk and Waste Management

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Office	*General Position*	*Reserved Position*
(Division of Engineering Technology)		Chief, Generic Safety Issues Branch
		Chief, Electrical, Mechanical, and Materials Branch
		Chief, Structural and Geological Engineering Branch
		Chief, Materials Engineering Branch
		Chief, Engineering Research Applications Branch
(Division of Systems Analysis and Regulatory Effectiveness)		Deputy Director
		Chief, Advanced Reactors and Regulatory Effectiveness
		Chief, Safety Margins and Systems Analysis Branch
		Chief, Radiation Protection, etc.
(Division of Risk Analysis and Application)		Deputy Director
		Chief, Operating Experience Risk Analysis Branch
		Chief, Probabilistic Risk Analysis Branch
(Division of Risk Assessment and Special Projects)		Director
		Assistant Director (2)
(Division of Fuel, Engineering and Radiological Research)		Director
		Assistant Director

Office	*General Position*	*Reserved Position*
Office of Small Business and Civil Rights 10 CFR § 1.37		Director
Advisory Committee on Reactor Safeguards 10 CFR § 1.13	Executive Director	Deputy Executive Director
Regional Offices 10 CFR § 1.47		Deputy Regional Administrator (5)
		Director, Division of Fuel Facility Inspection
		Director, Division of Reactor Projects (4)
		Deputy Director, Division of Reactor Projects (5)
		Director, Division of Reactor Safety (4)
		Deputy Director, Division of Reactor Safety (4)
		Director, Division of Nuclear Materials Safety (3)
		Deputy Director, Division of Nuclear Materials Safety
		Deputy Director, Division of Radiation Safety, etc.
Social Security Administration (143)		
Office	*General Position*	*Reserved Position*
Office of the Commissioner 33 Fed. Reg. 5828 (1968)	Executive Counselor to the Commissioner	
	Deputy Chief of Staff	
	Director for Regulations	

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Office	*General Position*	*Reserved Position*
Office of the Commissioner—*Continued*	Senior Advisor to the Commissioner	
	Senior Advisor to the Deputy Commissioner	
Office of International Programs 63 Fed. Reg. 41888 (1998)	Associate Commissioner for International Programs	
Office of Executive Operations 56 Fed. Reg. 15888 (1991)		Assistant Inspector General
Office of the Chief Actuary 42 U. S. C. § 902(c)(1) 33 Fed. Reg. 5828	Chief Actuary	
	Deputy Chief Actuary, Long-Range	
	Deputy Chief Actuary, Short-Range	
Office of the Chief Information Officer 33 Fed. Reg. 5829	Deputy Chief Information Officer	Director, Office of Information Technology Systems Review
Office of Information Technology Investment Management	Associate Chief Information Officer	
Office of Budget, Finance and Management 60 Fed. Reg. 22099 (1995)	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Acquisition and Grants 60 Fed. Reg. 22099	Associate Commissioner	

Office	*General Position*	*Reserved Position*
Office of Budget 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Facilities Management 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Financial Policy and Operations 56 Fed. Reg. 15888	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Publications and Logistics Management 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Communications 62 Fed. Reg. 9476 (1997)	Assistant Deputy Commissioner	
	Press Officer	
Office of Communications Planning and Technology 63 Fed. Reg. 15476	Associate Commissioner	
Office of Public Inquiries 62 Fed. Reg. 9477	Associate Commissioner	
Office of Disability Adjudication and Review	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Appellate Operations 53 Fed. Reg. 29778 (1988)	Executive Director	

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Office	*General Position*	*Reserved Position*
Office of the General Counsel 65 Fed. Reg. 39218 (2000)	Deputy General Counsel	
Office of General Law 65 Fed. Reg. 39218	Associate General Counsel	
Office of Public Disclosure 67 Fed. Reg. 63186 (2002)	Executive Director	
Office of Regional Chief Counsels 65 Fed. Reg. 39219	Regional Chief Counsel (7)	
Office of Human Resources 60 Fed. Reg. 22128	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Civil Rights and Equal Opportunity 60 Fed. Reg. 22128	Associate Commissioner	
Office of Labor Management and Employee Relations	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Personnel 60 Fed. Reg. 22128	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Training 60 Fed. Reg. 22128	Associate Commissioner	
Office of the Inspector General 42 U. S. C. § 902(e) 60 Fed. Reg. 22133	Deputy Inspector General	
	Counsel to the Inspector General	

Office	*General Position*	*Reserved Position*
Office of Audits 60 Fed. Reg. 22133	Assistant Inspector General for Audit	
	Deputy Assistant Inspector General for Audit	
Office of Investigations 60 Fed. Reg. 22133	Assistant Inspector General	
	Deputy Assistant Inspector General for Field Investigations	
	Deputy Assistant Inspector General for National Investigative Operations	
Office of Legislation and Congressional Affairs 60 Fed. Reg. 22152	Senior Advisor to the Deputy Commissioner	
Office of Legislative Development 65 Fed. Reg. 10846	Associate Commissioner	
Office of Operations 60 Fed. Reg. 22107	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Automation Support 60 Fed. Reg. 22108	Associate Commissioner	
Office of Central Operations 63 Fed. Reg. 32275	Associate Commissioner	
	Deputy Associate Commissioner	
	Assistant Associate Commissioner	

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Office	*General Position*	*Reserved Position*
Office of Central Operations—*Continued*	Assistant Associate Commissioner for Management and Operations Support	
Office of Disability Determinations 67 Fed. Reg. 69288	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Electronic Services 66 Fed. Reg. 29618 (2001)	Associate Commissioner	
Office of Public Service and Operations Support 59 Fed. Reg. 56511 (1994)	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Telephone Services 60 Fed. Reg. 22108	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Regional Commissioner 60 Fed. Reg. 22108	Regional Commissioner (10)	
	Deputy Regional Commissioner (10)	
	Assistant Regional Commissioner (15)	
Office of Retirement and Disability Policy	Deputy Commissioner	
	Assistant Deputy Commissioner (2)	
	Senior Advisor for Program Outreach	
Office of Disability Programs 67 Fed. Reg. 69289	Associate Commissioner	

Office	*General Position*	*Reserved Position*
Office of Employment Support Programs 64 Fed. Reg. 19397 (1999)	Associate Commissioner	
Office of Income Security Programs 67 Fed. Reg. 69288	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Medical and Vocational Expertise	Associate Commissioner	
Office of Research, Evaluation and Statistics 61 Fed. Reg. 35847 (1996)	Associate Commissioner	
Office of Systems 60 Fed. Reg. 22116	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Disability Systems 61 Fed. Reg. 35849	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Supplemental Security Income Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Earnings, Enumeration and Administrative Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Enterprise Support, Architecture and Engineering 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner (2)	

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Office	*General Position*	*Reserved Position*
Office of Retirement and Survivors Insurance Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Systems Electronic Services 66 Fed. Reg. 10766	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Quality Performance 63 Fed. Reg. 32035	Deputy Commissioner	Chief Quality Officer
	Assistant Deputy Commissioner	Deputy Chief Quality Officer
		Deputy Associate Commissioner
Office of Quality Data Management	Associate Commissioner	
Office of Quality Improvement	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Quality Review	Associate Commissioner	
	Deputy Associate Commissioner	
Office of the Chief Strategic Officer 67 Fed. Reg. 79950		Chief Strategic Officer
National Labor Relations Board (60)		
Office	*General Position*	*Reserved Position*
Office of the Board 29 U. S. C. § 153(a)	Director, Office of Representation Appeals and Advice	Executive Secretary
	Solicitor	Deputy Executive Secretary
	Deputy Chief Counsel to Board Member (4)	Inspector General

Office	*General Position*	*Reserved Position*
Office of the Board—*Continued*		Chief Information Officer
Office of the General Counsel 29 U. S. C. § 153(d)	Deputy General Counsel	
(Division of Enforcement Litigation)	Associate General Counsel	Deputy Associate General Counsel
		Deputy Associate General Counsel, Appellate Court Branch
		Director, Office of Appeals
(Division of Advice)		Associate General Counsel
		Deputy Associate General Counsel
(Division of Administration)		Director
		Deputy Director
(Division of Operations Management)		Associate General Counsel
		Deputy Associate General
		Assistant General Counsel (6)
Regional Offices 29 U. S. C. § 153(b)		Regional Director (33)
Federal Energy Regulatory Commission (44)		
Office	*General Position*	*Reserved Position*
Office of the Executive Director 18 CFR § 1.101(e) (2009)	Executive Director	
	Deputy Executive Director	
	Deputy Chief Information Officer	
Office of General Counsel 18 CFR § 1.101(f)	General Counsel	
	Deputy General Counsel	

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Office	*General Position*	*Reserved Position*
Office of General Counsel—*Continued*	Associate General Counsel (3)	
	Deputy Associate General Counsel (4)	
	Solicitor	
Office of Energy Market Regulation 18 CFR § 376.204(b)(2)(ii)	Director	
	Deputy Director	
	Director, Tariffs and Market Development (3)	
	Director, Policy Analysis and Rulemaking	
	Director, Administration, Case Management, and Strategic Planning	
Office of Energy Projects 18 CFR § 376.204(b)(2)(iii)	Director	Director, Dam Safety and Inspections
	Principal Deputy Director	
	Deputy Director	
	Director, Hydropower Licensing	
	Director, Pipeline Certificates	
	Director, Gas Environment and Engineering	
	Director, Hydropower Administration and Compliance	
Office of Enforcement 18 CFR § 376.204(b)(2)(vi)	Director	Chief Accountant and Director, Division of Financial Regulations
	Deputy Director	Chief, Regulatory Accounting Branch

Office	*General Position*	*Reserved Position*
Office of Enforcement—*Continued*	Director, Investigations	
	Deputy Director, Investigations	
	Director, Audits	
	Director, Energy Market Oversight	
Office of Electric Reliability 18 CFR § 376.204(b)(2)(iv)	Director	
	Deputy Director	
	Director, Compliance	
	Director, Logistics and Security	
Office of Administrative Litigation 64 Fed. Reg. 51226 (1999) 68 Fed. Reg. 27056 (2003)	Director	
	Director, Technical Division	
	Director, Legal Division	
	Senior Counsel for Litigation	
Federal Trade Commission (31)		
Office	*General Position*	*Reserved Position*
Office of the Chairman 16 CFR § 0.8 (2010)	Secretary	
Office of the Executive Director 16 CFR § 0.10	Executive Director	Deputy Executive Director
	Chief Financial Officer	Chief Information Officer
Office of the General Counsel 16 CFR § 0.11	Principal Deputy General Counsel	Deputy General Counsel for Policy Studies
	Deputy General Counsel for Litigation	
	Deputy General Counsel for Legal Counsel	

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Office	*General Position*	*Reserved Position*
Office of International Affairs 16 CFR § 0.20	Director	
	Deputy Director	
Bureau of Competition 16 CFR § 0.16	Associate Director	
	Associate Director, Policy	
	Assistant Director, Mergers (2)	
	Assistant Director, Compliance	
Bureau of Consumer Protection 16 CFR § 0.17	Director	Associate Director for International Division
	Deputy Director (2)	
	Associate Director for Privacy and Identity Protection	
	Associate Director for Advertising Practices	
	Associate Director for Marketing Practices	
	Associate Director for Financial Practices	
	Associate Director for Consumer and Business Education	
	Associate Director for Planning and Information	
	Associate Director for Enforcement	
Bureau of Economics 16 CFR § 0.18	Deputy Director for Research and Development and Operations	

Office	*General Position*	*Reserved Position*
Bureau of Economics—*Continued*	Deputy Director for Antitrust	
	Associate Director for Consumer Protection and Research	
Office of the Inspector General 16 CFR § 0.13		Inspector General
Consumer Product Safety Commission (16)		
Office	*General Position*	*Reserved Position*
Office of the Executive Director 16 CFR § 1000.18 (2010)	Deputy Executive Director	Assistant Executive Director for Compliance and Administrative Litigation
	Chief Financial Officer	Associate Executive Director for Field Operations
		Executive Assistant
Office of Compliance and Field Operations 16 CFR § 1000.21	Deputy Director	
Office of Hazard Identification and Reduction 16 CFR § 1000.25		Assistant Executive Director
		Deputy Assistant Executive Director
		Associate Executive Director for Economic Analysis
		Associate Executive Director for Engineering Sciences
		Associate Executive Director for Epidemiology

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Office	*General Position*	*Reserved Position*
Directorate for Health Sciences 16 CFR § 1000.27	Associate Executive Director	
Directorate for Laboratory Sciences 16 CFR § 1000.30	Associate Executive Director	
Office of International Programs and Intergovernmental Affairs 16 CFR § 1000.24		Director
Office of Information and Technology Services 16 CFR § 1000.23		Assistant Executive Director
Office of the General Counsel 16 CFR § 1000.14	General Counsel	
Federal Labor Relations Authority (14)		
Office	*General Position*	*Reserved Position*
Office of the Chairman 5 CFR § 2411.10(a) (2010)		Director, Human Resources, Policy and Performance Management
		Chief Counsel
		Senior Advisor
Office of the Solicitor 5 CFR § 2417.203(a)		Solicitor
Offices of Members 5 U. S. C. § 7104(b)		Chief Counsel (2)
Office of the Executive Director 5 U. S. C. § 7105(d) 5 CFR § 2421.7		Executive Director

Office	*General Position*	*Reserved Position*
Federal Service Impasses Panel 5 U. S. C. § 7119(c)		Executive Director
Office of the General Counsel 5 U. S. C. § 7104(f)		Deputy General Counsel
Regional Offices 5 U. S. C. § 7105(d) 5 CFR § 2421.6		Regional Director (5)
National Transportation Safety Board (14)		
Office	*General Position*	*Reserved Position*
Office of the Managing Director 49 CFR § 800.2(c) (2009)		Managing Director
		Associate Managing Director for Quality Assurance
Office of the General Counsel 49 CFR § 800.2(c)	General Counsel	
Office of Administration 60 Fed. Reg. 61488		Director
		Director, Bureau of Accident Investigation
Office of Aviation Safety 49 CFR § 800.2(e)		Deputy Director, Technology and Investment Operations
		Deputy Director, Regional Operations
Office of Research and Engineering 49 CFR § 800.2(j)		Director
		Deputy Director
Office of Chief Financial Officer 49 U. S. C. § 1111(h) 49 CFR § 800.28		Chief Financial Officer

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Office	*General Position*	*Reserved Position*
Office of Safety Recommendations and Accomplishments 49 CFR § 800.2(k)		Director
Office of Railroad, Pipeline and Hazardous Materials Investigations 49 CFR §§ 800.2(f), (i)		Director
National Transportation Safety Board Academy 49 U. S. C. § 1117		Director
		President and Academic Dean
Performance-Based Organization for the Delivery of Federal Student Financial Assistance (13)		
Office	*General Position*	*Reserved Position*
Office of the Chief Operating Officer 20 U. S. C. §§ 1018(d)–(e)	Deputy Chief Operating Officer	Director, Student Aid Awareness
	Chief Financial Officer	
	Chief Compliance Officer	
	Director, Policy Liaison and Implementation Staff	
	Audit Officer	
	Director, Financial Management Group	
	Director, Budget Group	
	Deputy Chief Information Officer	
	Director, Application Development Group	

Office	*General Position*	*Reserved Position*
Office of the Chief Operating Officer—*Continued*	Internal Review Officer	
	Director, Strategic Planning and Reporting Group	
	Senior Adviser	
Merit Systems Protection Board (11)		
Office	*General Position*	*Reserved Position*
Office of the Clerk of the Board 5 CFR § 1200.10(a)(4) (2010)		Clerk of the Board
Office of Financial and Administrative Management 5 CFR § 1200.10(a)(8)		Director
Office of Policy and Evaluation 5 CFR § 1200.10(a)(6)		Director
Office of Information Resources Management 5 CFR § 1200.10(a)(9)		Director
Office of Regional Operations 5 CFR § 1200.10(a)(1)		Director
		Regional Director (6)

Appendix B to opinion of BREYER, J.

Office of Special Counsel (8)		
Office	*General Position*	*Reserved Position*
Office of Special Counsel 5 U. S. C. § 1211	Deputy Special Counsel	Associate Special Counsel for Investigation and Prosecution (3)
		Senior Associate Special Counsel for Investigation and Prosecution
		Associate Special Counsel, Planning and Oversight
		Associate Special Counsel for Legal Counsel and Policy
		Director of Management and Budget
Postal Regulatory Commission (10)*		
Office	*General Position*	*Reserved Position*
Office of the General Counsel 39 CFR § 3002.13 (2009)	General Counsel	
	Assistant General Counsel	
Office of Accountability and Compliance	Director	
	Assistant Director, Analysis and Pricing Division	
	Assistant Director, Auditing and Costing Division	

*The officers in this agency are part of the "excepted service," but enjoy tenure protection similar to that enjoyed by career SES appointees. See 5 U. S. C. § 2302(a)(2)(B); Plum Book, p. v (distinguishing "excepted service" from "Schedule C"); *id.*, at 202 (describing schedule C positions).

Office	*General Position*	*Reserved Position*
Office of Public Affairs and Governmental Relations 39 CFR § 3002.15	Director	
Office of the Secretary and Administration 48 Fed. Reg. 13167 (1983)	Secretary and Director	
	Assistant Director, Human Resources and Infrastructure	
	Assistant Director, Strategic Planning, etc.	
Office of the Inspector General 39 CFR § 3002.16	Inspector General	
Federal Maritime Commission (8)		
Office	*General Position*	*Reserved Position*
Office of the Managing Director 46 CFR § 501.3(h) (2010) 75 Fed. Reg. 29452 (2010)	Director	
Office of the Secretary 46 CFR § 501.3(c)		Secretary
Office of the General Counsel 46 CFR § 501.3(d)		Deputy General Counsel for Reports, Opinions and Decisions
Bureau of Certification and Licensing 46 CFR § 501.3(h)(5)		Director
Bureau of Trade Analysis 46 CFR § 501.3(h)(6)		Director

Appendix B to opinion of BREYER, J.

Office	*General Position*	*Reserved Position*
Bureau of Enforcement 46 CFR § 501.3(h)(7)		Director
		Deputy Director
Office of Administration 70 Fed. Reg. 7660 (2005)		Director
Surface Transportation Board (4)		
Office	*General Position*	*Reserved Position*
Office of the Chairman 49 CFR § 1011.3 (2009)	Director of Public Assistance, Governmental Affairs and Compliance	
Office of the General Counsel 49 CFR § 1011.6(c)(3)	General Counsel	
	Deputy General Counsel	
Office of Proceedings 49 CFR § 1011.6(h)	Director	
Federal Mine Safety and Health Review Commission (1)		
Office	*General Position*	*Reserved Position*
Office of the General Counsel 29 CFR § 2706.170(c) (2009)	General Counsel	
Chemical Safety and Hazard Investigation Board (1)		
Office	*General Position*	*Reserved Position*
Office of the General Counsel 40 CFR § 1600.2(b)(3) (2009)	General Counsel	

National Mediation Board (1)		
Office	*General Position*	*Reserved Position*
Office of the General Counsel 29 CFR § 1209.06(e) (2009)	General Counsel	
Commission on Civil Rights (1)		
Office	*General Position*	*Reserved Position*
Office of the Staff Director 42 U. S. C. § 1975b(a)(2)(A)	Associate Deputy Staff Director	
Board of Veterans Appeals (1)		
Office	*General Position*	*Reserved Position*
Office of the Vice Chairman 38 U. S. C. § 7101(a)		Vice Chairman

C

According to data provided by the Office of Personnel Management, reprinted below, there are 1,584 ALJs in the Federal Government. Each of these ALJs is an inferior officer and each is subject, by statute, to two layers of for-cause removal. See *supra*, at 542–543. The table below lists the 28 federal agencies that rely on ALJs to adjudicate individual administrative cases. The source is available in the Clerk of Court's case file. See *supra*, at 543.

AGENCY	**TOTAL NUMBER OF ALJs**
Commodity Futures Trading Commission	2
Department of Agriculture	4

Appendix C to opinion of BREYER, J.

AGENCY	TOTAL NUMBER OF ALJs
Department of Education	1
Department of Health and Human Services (Departmental Appeals Board)	7
Department of Health and Human Services (Food and Drug Administration)	1
Department of Health and Human Services (Office of Medicare Hearings and Appeals)	65
Department of Homeland Security (United States Coast Guard)	6
Department of Housing and Urban Development	2
Department of the Interior	9
Department of Justice (Drug Enforcement Administration)	3
Department of Justice (Executive Office for Immigration Review)	1
Department of Labor (Office of the Secretary)	44
Department of Transportation	3
Environmental Protection Agency	4
Federal Communications Commission	1
Federal Energy Regulatory Commission	14
Federal Labor Relations Authority	3
Federal Maritime Commission	1
Federal Mine Safety and Health Review Commission	11
Federal Trade Commission	1
International Trade Commission	6
National Labor Relations Board	39
National Transportation Safety Board	4
Occupational Safety and Health Review Commission	12
Office of Financial Institution Adjudication	1
Securities and Exchange Commission	4

AGENCY	TOTAL NUMBER OF ALJs
Social Security Administration	1,334
United States Postal Service	1
TOTAL	**1,584**

D

The table below lists 27 departments and other agencies the heads of which are *not* subject to any statutory for-cause removal provision, but that do bear certain other indicia of independence.

The table identifies six criteria that may suggest independence: (1) whether the agency consists of a multimember commission; (2) whether its members are required, by statute, to be bipartisan (or nonpartisan); (3) whether eligibility to serve as the agency's head depends on statutorily defined qualifications; (4) whether the agency has independence in submitting budgetary and other proposals to Congress (thereby bypassing the Office of Management and Budget); (5) whether the agency has authority to appear in court independent of the Department of Justice, cf. 28 U. S. C. §§ 516–519; and (6) whether the agency is explicitly classified as "independent" by statute. See generally Breger & Edles 1135–1155; *supra*, at 546–548. Unless otherwise noted, all information refers to the relevant agency's organic statute, which is cited in the first column. The list of agencies is nonexhaustive.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Securities and Exchange Commission 15 U. S. C. § 78d	Yes	Yes		Yes 12 U. S. C. § 250	Yes 15 U. S. C. § 78u	

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Architectural and Transportation Barriers Compliance Board 29 U. S. C. § 792	Yes		Yes (related experience)		Yes	
Arctic Research Commission 15 U. S. C. § 4102	Yes		Yes (related knowledge, experience)			
Broadcasting Board of Governors 22 U. S. C. § 6203	Yes	Yes	Yes (citizenship; related knowledge)			Yes
Central Intelligence Agency 50 U. S. C. § 403–4						Cf. *Freytag*, 501 U. S., at 887, n. 4
Commission of Fine Arts 40 U. S. C. § 9101	Yes		Yes (related knowledge)			
Commodity Futures Trading Commission 7 U. S. C. § 2(a)(2)	Yes	Yes	Yes (related knowledge)		Yes § 2(a)(4)	Yes
Defense Nuclear Facilities Safety Board 42 U. S. C. § 2286	Yes	Yes	Yes (citizenship; expert knowledge)			Yes
Equal Employment Opportunity Commission 42 U. S. C. § 2000e–4	Yes	Yes			Yes § 2000e–5(f)	

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Export-Import Bank of the United States* 12 U. S. C. § 635a	Yes	Yes			Yes § 635(a)(1)	Yes
Farm Credit Administration 12 U. S. C. §§ 2241, 2242	Yes	Yes	Yes (citizenship)		Yes § 2244(c)	Yes
Federal Communications Commission 47 U. S. C. §§ 151, 154	Yes	Yes	Yes (citizenship)		Yes § 401(b)	
Federal Deposit Insurance Corporation 12 U. S. C. §§ 1811, 1812	Yes	Yes	Yes (citizenship; related experience)	Yes § 250	Yes § 1819(a)	
Federal Election Commission 2 U. S. C. § 437c	Yes	Yes	Yes (general)	Yes § 437d(d)	Yes § 437d (a)(6)	
Federal Housing Finance Agency 12 U. S. C. § 4511 (2006 ed., Supp. IV)				Yes § 250 (2006 ed., Supp. IV)		Yes
Federal Retirement Thrift Investment Board 5 U. S. C. § 8472	Yes	Cf. § 8472 (b)(2)	Yes (related knowledge)			

*See *Lebron*, 513 U. S. 374.

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
International Trade Commission 19 U. S. C. § 1330	Yes	Yes	Yes (citizenship; expert knowledge)	Yes § 2232	Yes § 1333(g)	Yes
Marine Mammal Commission 16 U. S. C. § 1401	Yes		Yes (related knowledge)			
Millennium Challenge Corporation† 22 U. S. C. § 7703	Yes	Cf. § 7703(c)(3)(B)	Yes (related experience)			
National Credit Union Administration 12 U. S. C. § 1752a	Yes	Yes	Yes (related experience)	Yes § 250		Yes
National Archives and Records Administration 44 U. S. C. §§ 2102, 2103		Yes	Yes (related knowledge)			Yes
National Council on Disability 29 U. S. C. § 780	Yes		Yes (related experience)			
National Labor-Management Panel 29 U. S. C. § 175	Yes		Yes (related knowledge)			
National Science Foundation 42 U. S. C. §§ 1861, 1863, 1864	Yes		Yes (related expertise)			Yes

†See *Lebron*, *supra*.

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Peace Corps 22 U. S. C. § 2501–1						Yes
Pension Benefit Guaranty Corporation‡ 29 U. S. C. § 1302	Yes				Yes	
Railroad Retirement Board 45 U. S. C. § 231f	Yes				Yes	Yes

‡See *Lebron, supra.*

Syllabus

BILSKI ET AL. *v.* KAPPOS, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE

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

No. 08–964. Argued November 9, 2009—Decided June 28, 2010

Petitioners' patent application seeks protection for a claimed invention that explains how commodities buyers and sellers in the energy market can protect, or hedge, against the risk of price changes. The key claims are claim 1, which describes a series of steps instructing how to hedge risk, and claim 4, which places the claim 1 concept into a simple mathematical formula. The remaining claims explain how claims 1 and 4 can be applied to allow energy suppliers and consumers to minimize the risks resulting from fluctuations in market demand. The patent examiner rejected the application on the grounds that the invention is not implemented on a specific apparatus, merely manipulates an abstract idea, and solves a purely mathematical problem. The Board of Patent Appeals and Interferences agreed and affirmed. The Federal Circuit, in turn, affirmed. The en banc court rejected its prior test for determining whether a claimed invention was a patentable "process" under the Patent Act, 35 U. S. C. § 101—*i. e.*, whether the invention produced a "'useful, concrete and tangible result,'" see, *e. g.*, *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368, 1373—holding instead that a claimed process is patent eligible if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing. Concluding that this "machine-or-transformation test" is the sole test for determining patent eligibility of a "process" under § 101, the court applied the test and held that the application was not patent eligible.

Held: The judgment is affirmed.

545 F. 3d 943, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Parts II–B–2 and II–C–2, concluding that petitioners' claimed invention is not patent eligible. Pp. 601–604, 606–608, 609–613.

(a) Section 101 specifies four independent categories of inventions or discoveries that are patent eligible: "process[es]," "machin[es]," "manufactur[es]," and "composition[s] of matter." "In choosing such expansive terms, . . . Congress plainly contemplated that the patent laws

would be given wide scope," *Diamond* v. *Chakrabarty*, 447 U. S. 303, 308, in order to ensure that "'ingenuity should receive a liberal encouragement,'" *id.*, at 308–309. This Court's precedents provide three specific exceptions to § 101's broad principles: "laws of nature, physical phenomena, and abstract ideas." *Id.*, at 309. While not required by the statutory text, these exceptions are consistent with the notion that a patentable process must be "new and useful." And, in any case, the exceptions have defined the statute's reach as a matter of statutory *stare decisis* going back 150 years. See *Le Roy* v. *Tatham*, 14 How. 156, 174. The § 101 eligibility inquiry is only a threshold test. Even if a claimed invention qualifies in one of the four categories, it must also satisfy "the conditions and requirements of this title," § 101, including novelty, see § 102, nonobviousness, see § 103, and a full and particular description, see § 112. The invention at issue is claimed to be a "process," which § 100(b) defines as a "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." Pp. 601–602.

(b) The machine-or-transformation test is not the sole test for patent eligibility under § 101. The Court's precedents establish that although that test may be a useful and important clue or investigative tool, it is not the sole test for deciding whether an invention is a patent-eligible "process" under § 101. In holding to the contrary, the Federal Circuit violated two principles of statutory interpretation: Courts "'should not read into the patent laws limitations and conditions which the legislature has not expressed,'" *Diamond* v. *Diehr*, 450 U. S. 175, 182, and, "[u]nless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning,'" *ibid.* The Court is unaware of any ordinary, contemporary, common meaning of "process" that would require it to be tied to a machine or the transformation of an article. Respondent Patent Director urges the Court to read § 101's other three patentable categories as confining "process" to a machine or transformation. However, the doctrine of *noscitur a sociis* is inapplicable here, for § 100(b) already explicitly defines "process," see *Burgess* v. *United States*, 553 U. S. 124, 130, and nothing about the section's inclusion of those other categories suggests that a "process" must be tied to one of them. Finally, the Federal Circuit incorrectly concluded that this Court has endorsed the machine-or-transformation test as the exclusive test. Recent authorities show that the test was never intended to be exhaustive or exclusive. See, *e. g.*, *Parker* v. *Flook*, 437 U. S. 584, 588, n. 9. Pp. 602–604.

(c) Section 101 similarly precludes a reading of the term "process" that would categorically exclude business methods. The term "method" within § 100(b)'s "process" definition, at least as a textual mat-

ter and before consulting other Patent Act limitations and this Court's precedents, may include at least some methods of doing business. The Court is unaware of any argument that the "ordinary, contemporary, common meaning," *Diehr*, *supra*, at 182, of "method" excludes business methods. Nor is it clear what a business method exception would sweep in and whether it would exclude technologies for conducting a business more efficiently. The categorical exclusion argument is further undermined by the fact that federal law explicitly contemplates the existence of at least some business method patents: Under § 273(b)(1), if a patent holder claims infringement based on "a method in [a] patent," the alleged infringer can assert a defense of prior use. By allowing this defense, the statute itself acknowledges that there may be business method patents. Section 273 thus clarifies the understanding that a business method is simply one kind of "method" that is, at least in some circumstances, eligible for patenting under § 101. A contrary conclusion would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous. See *Corley* v. *United States*, 556 U. S. 303, 314. Finally, while § 273 appears to leave open the possibility of some business method patents, it does not suggest broad patentability of such claimed inventions. Pp. 606–608.

(d) Even though petitioners' application is not categorically outside of § 101 under the two atextual approaches the Court rejects today, that does not mean it is a "process" under § 101. Petitioners seek to patent both the concept of hedging risk and the application of that concept to energy markets. Under *Gottschalk* v. *Benson*, 409 U. S. 63, *Flook*, and *Diehr*, however, these are not patentable processes but attempts to patent abstract ideas. Claims 1 and 4 explain the basic concept of hedging and reduce that concept to a mathematical formula. This is an unpatentable abstract idea, just like the algorithms at issue in *Benson* and *Flook*. Petitioners' remaining claims, broad examples of how hedging can be used in commodities and energy markets, attempt to patent the use of the abstract hedging idea, then instruct the use of well-known random analysis techniques to help establish some of the inputs into the equation. They add even less to the underlying abstract principle than the invention held patent ineligible in *Flook*. Pp. 609–612.

(e) Because petitioners' patent application can be rejected under the Court's precedents on the unpatentability of abstract ideas, the Court need not define further what constitutes a patentable "process," beyond pointing to the definition of that term provided in § 100(b) and looking to the guideposts in *Benson*, *Flook*, and *Diehr*. Nothing in today's opinion should be read as endorsing the Federal Circuit's past interpretations of § 101. See, *e. g.*, *State Street*, *supra*, at 1373. The

appeals court may have thought it needed to make the machine-or-transformation test exclusive precisely because its case law had not adequately identified less extreme means of restricting business method patents. In disapproving an exclusive machine-or-transformation test, this Court by no means desires to preclude the Federal Circuit's development of other limiting criteria that further the Patent Act's purposes and are not inconsistent with its text. Pp. 612–613.

KENNEDY, J., delivered the opinion of the Court, except for Parts II–B–2 and II–C–2. ROBERTS, C. J., and THOMAS and ALITO, JJ., joined the opinion in full, and SCALIA, J., joined except for Parts II–B–2 and II–C–2. STEVENS, J., filed an opinion concurring in the judgment, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 613. BREYER, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined as to Part II, *post*, p. 657.

J. Michael Jakes argued the cause for petitioners. With him on the briefs were *Erika H. Arner*, *Ronald E. Myrick*, and *Denise W. DeFranco*.

Deputy Solicitor General Stewart argued the cause for respondent. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Ginger D. Anders*, *Scott R. McIntosh*, *Cameron F. Kerry*, *Raymond T. Chen*, *Thomas W. Krause*, and *Scott C. Weidenfeller.**

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*Briefs of *amici curiae* urging reversal were filed for the American Intellectual Property Law Association by *William K. West, Jr.;* for the Association Internationale Pour la Protection de la Propriété Intellectuelle et al. by *R. Mark Halligan;* for AwakenIP, LLC, by *Joel H. Thornton* and *Jeffrey R. Kuester;* for Borland Software Corp. by *Scott S. Kokka;* for the Boston Patent Law Association by *Joel R. Leeman*, *Steven J. Henry*, and *Ilan N. Barzilay;* for Caris Diagnostics, Inc., by *Gideon A. Schor;* for the Eagle Forum Education and Legal Defense Fund by *Andrew L. Schlafly;* for Entrepreneurial Software Companies by *Robert Greene Sterne*, *Michael D. Specht*, and *Michelle K. Holoubek;* for the Fédération Internationale des Conseils en Propriété Industrielle by *Maxim H. Waldbaum;* for the Franklin Pierce Law Center by *Ann M. McCrackin* and *Thomas G. Field, Jr.;* for the Georgia Biomedical Partnership, Inc., by *William H. Kitchens;* for the Intellectual Property Section of the Nevada State Bar by *Robert C. Ryan*, *Charles Dominick Lombino*, and *Bryce K. Earl;* for Regulatory Datacorp, Inc., et al. by *John F. Duffy*, *John A.*

JUSTICE KENNEDY delivered the opinion of the Court, except as to Parts II–B–2 and II–C–2.†

The question in this case turns on whether a patent can be issued for a claimed invention designed for the business

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Squires, *Walter G. Hanchuk*, and *Charles M. Fish;* for the University of South Florida by *Jeff Lloyd;* and for Raymond C. Meiers by *Gregg W. Emch*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Carolyn B. Lamm* and *Thomas C. Goldstein;* for Bank of America Corp. et al. by *Seth P. Waxman*, *Randolph D. Moss*, *Catherine M. A. Carroll*, and *William F. Lee;* for Bloomberg L. P. by *Kelsey I. Nix;* for the Business Software Alliance by *Andrew J. Pincus* and *Dan Himmelfarb;* for the Center for Advanced Study and Research in Intellectual Property of the University of Washington School of Law et al. by *Richard H. Stern;* for the Computer & Communications Industry Association by *Glenn B. Manishin;* for Eleven Law Professors et al. by *Joshua D. Sarnoff, pro se*, and *Barbara A. Jones;* for Entrepreneurial and Consumer Advocates by *Jason M. Schultz* and *Pamela Samuelson;* for the Free Software Foundation by *Jerry Cohen;* for Internet Retailers by *Peter J. Brann;* for Microsoft Corp. et al. by *Mark A. Perry*, *Matthew D. McGill*, *Horacio E. Gutiérrez*, *T. Andrew Culbert*, *Jack E. Haken*, *Kevin C. Ecker*, and *Todd A. Holmbo;* for Red Hat, Inc., by *Robert H. Tiller;* for the Software Freedom Law Center by *Eben Moglen;* for the Software & Information Industry Association by *Scott E. Bain;* for the William Mitchell College of Law, Intellectual Property Institute, by *R. Carl Moy;* for Lee A. Hollaar et al. by *David M. Bennion;* for Mark Landesmann by *Mr. Landesmann, pro se;* and for Timothy F. McDonough by *William M. Lamoreaux*.

Briefs of *amici curiae* were filed for Accenture et al. by *Meredith Martin Addy*, *Charles M. McMahon*, and *Steven J. Shapiro;* for Adamas Pharmaceuticals, Inc., et al. by *Karen I. Boyd;* for the American Insurance Association et al. by *James R. Myers* and *Jesse J. Jenner;* for the American Medical Association et al. by *Katherine J. Strandburg*, *Jonathan E. Singer*, and *John A. Dragseth;* for the Austin Intellectual Property Law Association by *Jennifer C. Kuhn;* for the Biotechnology Industry Organization et al. by *E. Anthony Figg*, *Nancy J. Linck*, *Minaksi Bhatt*, *Martha Cassidy*, *Howard W. Bremer*, and *P. Martin Simpson, Jr.;* for the Conejo Valley Bar Association by *Steven C. Sereboff*, *M. Kala Sarvaiya*, *Mark A. Goldstein*, and *Michael D. Harris;* for Dolby Laboratories, Inc., et al. by *John L. Cooper*, *Nan E. Joesten*, and *Deepak Gupta;* for Double Rock Corp. et al. by *Charles R. Macedo*, *Anthony F. Lo Cicero*, and *Norajean McCaf-*

*[Footnote * is continued on p. 598; footnote † is on p. 598]*

world. The patent application claims a procedure for instructing buyers and sellers how to protect against the risk of price fluctuations in a discrete section of the economy. Three arguments are advanced for the proposition that the claimed invention is outside the scope of patent law: (1) It is not tied to a machine and does not transform an article; (2) it involves a method of conducting business; and (3) it is merely an abstract idea. The Court of Appeals ruled that the first mentioned of these, the so-called machine-or-transformation test, was the sole test to be used for determining the patentability of a "process" under the Patent Act, 35 U. S. C. § 101.

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frey; for the Federal Circuit Bar Association by *James F. McKeown;* for the Foundation for a Free Information Infrastructure et al. by *Allonn E. Levy;* for the Houston Intellectual Property Law Association by *Howard L. Speight;* for the Intellectual Property Law Association of Chicago by *Edward D. Manzo*, *Patrick G. Burns*, *Donald W. Rupert*, and *John R. Crossan;* for the Intellectual Property Owners Association by *George L. Graff*, *Eric E. Bensen*, and *Steven W. Miller;* for International Business Machines Corp. by *Catherine E. Stetson*, *Jessica L. Ellsworth*, and *Kenneth R. Corsello;* for Knowledge Ecology International by *Michael H. Davis;* for Legal OnRamp by *Catriona M. Collins;* for Medtronic, Inc., by *Lawrence M. Sung* and *Jeff E. Schwartz;* for Monogram Biosciences, Inc., et al. by *Narinder S. Banait*, *Tyler Baker*, *Daniel R. Brownstone*, *Stuart P. Meyer*, and *Robert R. Sachs;* for Novartis Corp. by *Jeffrey A. Lamken;* for the Pharmaceutical Research and Manufacturers of America by *Harry J. Roper*, *Paul M. Smith*, and *Marc A. Goldman;* for Prometheus Laboratories Inc. by *Richard P. Bress*, *J. Scott Ballenger*, and *Alexander Maltas;* for the San Diego Intellectual Property Law Association by *Robert C. Laurenson* and *Douglas E. Olson;* for Telecommunication Systems, Inc., by *Robert P. Greenspoon* and *William W. Flachsbart;* for TELES AG by *Thomas S. Biemer* and *Philip J. Foret;* for Time Systems, Inc., by *Stuart P. Meyer* and *Tyler A. Baker;* for the Washington State Patent Law Association by *Peter J. Knudsen* and *Michael J. Swope;* for Yahoo! Inc. by *Christopher J. Wright* and *Timothy J. Simeone;* for Dr. Ananda Chakrabarty by *F. Scott Kieff* and *Richard A. Epstein;* for Kevin Emerson Collins by *Mr. Collins*, *pro se;* for Peter S. Menell et al. by *Mr. Menell*, *pro se;* for Gary W. Odom et al. by *Jonathan E. Mansfield;* for Robert R. Sachs et al. by *Mr. Sachs* and *Daniel R. Brownstone*, both *pro se;* for John P. Sutton by *Mr. Sutton*, *pro se;* and for 20 Law and Business Professors by *Mark A. Lemley*, *Ted M. Sichelman*, and *Michael V. Risch*, all *pro se.*

†JUSTICE SCALIA does not join Parts II–B–2 and II–C–2.

I

Petitioners' application seeks patent protection for a claimed invention that explains how buyers and sellers of commodities in the energy market can protect, or hedge, against the risk of price changes. The key claims are claims 1 and 4. Claim 1 describes a series of steps instructing how to hedge risk. Claim 4 puts the concept articulated in claim 1 into a simple mathematical formula. Claim 1 consists of the following steps:

> "(a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumers;
>
> "(b) identifying market participants for said commodity having a counter-risk position to said consumers; and
>
> "(c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions." App. 19–20.

The remaining claims explain how claims 1 and 4 can be applied to allow energy suppliers and consumers to minimize the risks resulting from fluctuations in market demand for energy. For example, claim 2 claims "[t]he method of claim 1 wherein said commodity is energy and said market participants are transmission distributors." *Id.*, at 20. Some of these claims also suggest familiar statistical approaches to determine the inputs to use in claim 4's equation. For example, claim 7 advises using well-known random analysis techniques to determine how much a seller will gain "from each transaction under each historical weather pattern." *Id.*, at 21.

The patent examiner rejected petitioners' application, explaining that it " 'is not implemented on a specific apparatus and merely manipulates [an] abstract idea and solves a purely

mathematical problem without any limitation to a practical application, therefore, the invention is not directed to the technological arts.'" App. to Pet. for Cert. 148a. The Board of Patent Appeals and Interferences affirmed, concluding that the application involved only mental steps that do not transform physical matter and was directed to an abstract idea. *Id.*, at 181a–186a.

The United States Court of Appeals for the Federal Circuit heard the case en banc and affirmed. The case produced five different opinions. Students of patent law would be well advised to study these scholarly opinions.

Chief Judge Michel wrote the opinion of the court. The court rejected its prior test for determining whether a claimed invention was a patentable "process" under § 101—whether it produces a "'useful, concrete and tangible result'"—as articulated in *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368, 1373 (1998), and *AT&T Corp.* v. *Excel Communications, Inc.*, 172 F. 3d 1352, 1357 (1999). See *In re Bilski*, 545 F. 3d 943, 959–960, and n. 19 (CA Fed. 2008) (en banc). The court held that "[a] claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." *Id.*, at 954. The court concluded this "machine-or-transformation test" is "the sole test governing § 101 analyses," *id.*, at 955, and thus the "test for determining patent eligibility of a process under § 101," *id.*, at 956. Applying the machine-or-transformation test, the court held that petitioners' application was not patent eligible. *Id.*, at 963–966. Judge Dyk wrote a separate concurring opinion, providing historical support for the court's approach. *Id.*, at 966–976.

Three judges wrote dissenting opinions. Judge Mayer argued that petitioners' application was "not eligible for patent protection because it is directed to a method of conducting business." *Id.*, at 998. He urged the adoption of a "technological standard for patentability." *Id.*, at 1010. Judge

Rader would have found petitioners' claims were an unpatentable abstract idea. *Id.*, at 1011. Only Judge Newman disagreed with the court's conclusion that petitioners' application was outside of the reach of § 101. She did not say that the application should have been granted but only that the issue should be remanded for further proceedings to determine whether the application qualified as patentable under other provisions. *Id.*, at 997.

This Court granted certiorari. 556 U. S. 1268 (2009).

II

A

Section 101 defines the subject matter that may be patented under the Patent Act:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Section 101 thus specifies four independent categories of inventions or discoveries that are eligible for protection: processes, machines, manufactures, and compositions of matter. "In choosing such expansive terms . . . modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope." *Diamond* v. *Chakrabarty,* 447 U. S. 303, 308 (1980). Congress took this permissive approach to patent eligibility to ensure that "'ingenuity should receive a liberal encouragement.'" *Id.*, at 308–309 (quoting 5 Writings of Thomas Jefferson 75–76 (H. Washington ed. 1871)).

The Court's precedents provide three specific exceptions to § 101's broad patent-eligibility principles: "laws of nature, physical phenomena, and abstract ideas." *Chakrabarty, supra,* at 309. While these exceptions are not required by the statutory text, they are consistent with the notion that

a patentable process must be "new and useful." And, in any case, these exceptions have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years. See *Le Roy* v. *Tatham*, 14 How. 156, 174–175 (1853). The concepts covered by these exceptions are "part of the storehouse of knowledge of all men . . . free to all men and reserved exclusively to none." *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948).

The § 101 patent-eligibility inquiry is only a threshold test. Even if an invention qualifies as a process, machine, manufacture, or composition of matter, in order to receive the Patent Act's protection the claimed invention must also satisfy "the conditions and requirements of this title." § 101. Those requirements include that the invention be novel, see § 102, nonobvious, see § 103, and fully and particularly described, see § 112.

The present case involves an invention that is claimed to be a "process" under § 101. Section 100(b) defines "process" as:

> "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material."

The Court first considers two proposed categorical limitations on "process" patents under § 101 that would, if adopted, bar petitioners' application in the present case: the machine-or-transformation test and the categorical exclusion of business method patents.

B

1

Under the Court of Appeals' formulation, an invention is a "process" only if: "(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." 545 F. 3d, at 954. This Court has "more than once cautioned that courts 'should not read into the patent laws limitations and conditions which the legislature has not expressed.'" *Diamond* v. *Diehr*, 450 U. S. 175,

182 (1981) (quoting *Chakrabarty*, *supra*, at 308; some internal quotation marks omitted). In patent law, as in all statutory construction, "[u]nless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Diehr*, *supra*, at 182 (quoting *Perrin* v. *United States*, 444 U. S. 37, 42 (1979)). The Court has read the § 101 term "manufacture" in accordance with dictionary definitions, see *Chakrabarty*, *supra*, at 308 (citing *American Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1, 11 (1931)), and approved a construction of the term "composition of matter" consistent with common usage, see *Chakrabarty*, *supra*, at 308 (citing *Shell Development Co.* v. *Watson*, 149 F. Supp. 279, 280 (DC 1957)).

Any suggestion in this Court's case law that the Patent Act's terms deviate from their ordinary meaning has only been an explanation for the exceptions for laws of nature, physical phenomena, and abstract ideas. See *Parker* v. *Flook*, 437 U. S. 584, 588–589 (1978). This Court has not indicated that the existence of these well-established exceptions gives the Judiciary *carte blanche* to impose other limitations that are inconsistent with the text and the statute's purpose and design. Concerns about attempts to call any form of human activity a "process" can be met by making sure the claim meets the requirements of § 101.

Adopting the machine-or-transformation test as the sole test for what constitutes a "process" (as opposed to just an important and useful clue) violates these statutory interpretation principles. Section 100(b) provides that "[t]he term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." The Court is unaware of any "'ordinary, contemporary, common meaning,'" *Diehr*, *supra*, at 182, of the definitional terms "process, art or method" that would require these terms to be tied to a machine or to transform an article. Respondent urges the Court to look to the other patentable categories in § 101—machines, manufactures, and compositions of matter—to confine the meaning

of "process" to a machine or transformation, under the doctrine of *noscitur a sociis*. Under this canon, "an ambiguous term may be given more precise content by the neighboring words with which it is associated." *United States* v. *Stevens*, 559 U. S. 460, 474 (2010) (internal quotation marks omitted). This canon is inapplicable here, for § 100(b) already explicitly defines the term "process." See *Burgess* v. *United States*, 553 U. S. 124, 130 (2008) ("When a statute includes an explicit definition, we must follow that definition" (internal quotation marks omitted)).

The Court of Appeals incorrectly concluded that this Court has endorsed the machine-or-transformation test as the exclusive test. It is true that *Cochrane* v. *Deener*, 94 U. S. 780, 788 (1877), explained that a "process" is "an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." More recent cases, however, have rejected the broad implications of this dictum; and, in all events, later authority shows that it was not intended to be an exhaustive or exclusive test. *Gottschalk* v. *Benson*, 409 U. S. 63, 70 (1972), noted that "[t]ransformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines." At the same time, it explicitly declined to "hold that no process patent could ever qualify if it did not meet [machine-or-transformation] requirements." *Id.*, at 71. *Flook* took a similar approach, "assum[ing] that a valid process patent may issue even if it does not meet [the machine-or-transformation test]." 437 U. S., at 588, n. 9.

This Court's precedents establish that the machine-or-transformation test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101. The machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible "process."

It is true that patents for inventions that did not satisfy the machine-or-transformation test were rarely granted in earlier eras, especially in the Industrial Age, as explained by Judge Dyk's thoughtful historical review. See 545 F. 3d, at 966–976 (concurring opinion). But times change. Technology and other innovations progress in unexpected ways. For example, it was once forcefully argued that until recent times, "well-established principles of patent law probably would have prevented the issuance of a valid patent on almost any conceivable computer program." *Diehr*, 450 U. S., at 195 (STEVENS, J., dissenting). But this fact does not mean that unforeseen innovations such as computer programs are always unpatentable. See *id.*, at 192–193 (majority opinion) (holding a procedure for molding rubber that included a computer program is within patentable subject matter). Section 101 is a "dynamic provision designed to encompass new and unforeseen inventions." *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, 135 (2001). A categorical rule denying patent protection for "inventions in areas not contemplated by Congress . . . would frustrate the purposes of the patent law." *Chakrabarty*, 447 U. S., at 315.

The machine-or-transformation test may well provide a sufficient basis for evaluating processes similar to those in the Industrial Age—for example, inventions grounded in a physical or other tangible form. But there are reasons to doubt whether the test should be the sole criterion for determining the patentability of inventions in the Information Age. As numerous *amicus* briefs argue, the machine-or-transformation test would create uncertainty as to the patentability of software, advanced diagnostic medicine techniques, and inventions based on linear programming, data compression, and the manipulation of digital signals. See, *e. g.*, Brief for Business Software Alliance 24–25; Brief for Biotechnology Industry Organization et al. 14–27; Brief for

Boston Patent Law Association 8–15; Brief for Houston Intellectual Property Law Association 17–22; Brief for Dolby Laboratories, Inc., et al. 9–10.

In the course of applying the machine-or-transformation test to emerging technologies, courts may pose questions of such intricacy and refinement that they risk obscuring the larger object of securing patents for valuable inventions without transgressing the public domain. The dissent by Judge Rader refers to some of these difficulties. 545 F. 3d, at 1015. As a result, in deciding whether previously unforeseen inventions qualify as patentable "process[es]," it may not make sense to require courts to confine themselves to asking the questions posed by the machine-or-transformation test. Section 101's terms suggest that new technologies may call for new inquiries. See *Benson*, *supra*, at 71 (to "freeze process patents to old technologies, leaving no room for the revelations of the new, onrushing technology[,] . . . is not our purpose").

It is important to emphasize that the Court today is not commenting on the patentability of any particular invention, let alone holding that any of the above-mentioned technologies from the Information Age should or should not receive patent protection. This Age puts the possibility of innovation in the hands of more people and raises new difficulties for the patent law. With ever more people trying to innovate and thus seeking patent protections for their inventions, the patent law faces a great challenge in striking the balance between protecting inventors and not granting monopolies over procedures that others would discover by independent, creative application of general principles. Nothing in this opinion should be read to take a position on where that balance ought to be struck.

C

1

Section 101 similarly precludes the broad contention that the term "process" categorically excludes business methods.

The term "method," which is within § 100(b)'s definition of "process," at least as a textual matter and before consulting other limitations in the Patent Act and this Court's precedents, may include at least some methods of doing business. See, *e. g.*, Webster's New International Dictionary 1548 (2d ed. 1954) (defining "method" as "[a]n orderly procedure or process . . . regular way or manner of doing anything; hence, a set form of procedure adopted in investigation or instruction"). The Court is unaware of any argument that the "'ordinary, contemporary, common meaning,'" *Diehr*, *supra*, at 182, of "method" excludes business methods. Nor is it clear how far a prohibition on business method patents would reach, and whether it would exclude technologies for conducting a business more efficiently. See, *e. g.*, Hall, Business and Financial Method Patents, Innovation, and Policy, 56 Scottish J. Pol. Econ. 443, 445 (2009) ("There is no precise definition of . . . business method patents").

The argument that business methods are categorically outside of § 101's scope is further undermined by the fact that federal law explicitly contemplates the existence of at least some business method patents. Under 35 U. S. C. § 273(b)(1), if a patent holder claims infringement based on "a method in [a] patent," the alleged infringer can assert a defense of prior use. For purposes of this defense alone, "method" is defined as "a method of doing or conducting business." § 273(a)(3). In other words, by allowing this defense the statute itself acknowledges that there may be business method patents. Section 273's definition of "method," to be sure, cannot change the meaning of a prior-enacted statute. But what § 273 does is clarify the understanding that a business method is simply one kind of "method" that is, at least in some circumstances, eligible for patenting under § 101.

A conclusion that business methods are not patentable in any circumstances would render § 273 meaningless. This would violate the canon against interpreting any statutory

provision in a manner that would render another provision superfluous. See *Corley* v. *United States*, 556 U. S. 303, 314 (2009). This principle, of course, applies to interpreting any two provisions in the U. S. Code, even when Congress enacted the provisions at different times. See, *e. g.*, *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 529–530 (1939) (opinion of Stone, J.). This established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision. Finally, while § 273 appears to leave open the possibility of some business method patents, it does not suggest broad patentability of such claimed inventions.

2

Interpreting § 101 to exclude all business methods simply because business method patents were rarely issued until modern times revives many of the previously discussed difficulties. See *supra*, at 605–606. At the same time, some business method patents raise special problems in terms of vagueness and suspect validity. See *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 397 (2006) (KENNEDY, J., concurring). The Information Age empowers people with new capacities to perform statistical analyses and mathematical calculations with a speed and sophistication that enable the design of protocols for more efficient performance of a vast number of business tasks. If a high enough bar is not set when considering patent applications of this sort, patent examiners and courts could be flooded with claims that would put a chill on creative endeavor and dynamic change.

In searching for a limiting principle, this Court's precedents on the unpatentability of abstract ideas provide useful tools. See *infra*, at 609–612. Indeed, if the Court of Appeals were to succeed in defining a narrower category or class of patent applications that claim to instruct how business should be conducted, and then rule that the category is unpatentable because, for instance, it represents an attempt to

patent abstract ideas, this conclusion might well be in accord with controlling precedent. See *ibid.* But beyond this or some other limitation consistent with the statutory text, the Patent Act leaves open the possibility that there are at least some processes that can be fairly described as business methods that are within patentable subject matter under § 101.

Finally, even if a particular business method fits into the statutory definition of a "process," that does not mean that the application claiming that method should be granted. In order to receive patent protection, any claimed invention must be novel, § 102, nonobvious, § 103, and fully and particularly described, § 112. These limitations serve a critical role in adjusting the tension, ever present in patent law, between stimulating innovation by protecting inventors and impeding progress by granting patents when not justified by the statutory design.

III

Even though petitioners' application is not categorically outside of § 101 under the two broad and atextual approaches the Court rejects today, that does not mean it is a "process" under § 101. Petitioners seek to patent both the concept of hedging risk and the application of that concept to energy markets. App. 19–20. Rather than adopting categorical rules that might have wide-ranging and unforeseen impacts, the Court resolves this case narrowly on the basis of this Court's decisions in *Benson*, *Flook*, and *Diehr*, which show that petitioners' claims are not patentable processes because they are attempts to patent abstract ideas. Indeed, all Members of the Court agree that the patent application at issue here falls outside of § 101 because it claims an abstract idea.

In *Benson*, the Court considered whether a patent application for an algorithm to convert binary-coded decimal numerals into pure binary code was a "process" under § 101. 409 U. S., at 64–67. The Court first explained that "'[a] princi-

ple, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right.'" *Id.*, at 67 (quoting *Le Roy*, 14 How., at 175). The Court then held the application at issue was not a "process," but an unpatentable abstract idea. "It is conceded that one may not patent an idea. But in practical effect that would be the result if the formula for converting . . . numerals to pure binary numerals were patented in this case." 409 U. S., at 71. A contrary holding "would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself." *Id.*, at 72.

In *Flook*, the Court considered the next logical step after *Benson*. The applicant there attempted to patent a procedure for monitoring the conditions during the catalytic conversion process in the petrochemical and oil-refining industries. The application's only innovation was reliance on a mathematical algorithm. 437 U. S., at 585–586. *Flook* held the invention was not a patentable "process." The Court conceded the invention at issue, unlike the algorithm in *Benson*, had been limited so that it could still be freely used outside the petrochemical and oil-refining industries. 437 U. S., at 589–590. Nevertheless, *Flook* rejected "[t]he notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process." *Id.*, at 590. The Court concluded that the process at issue there was "unpatentable under § 101, not because it contain[ed] a mathematical algorithm as one component, but because once that algorithm [wa]s assumed to be within the prior art, the application, considered as a whole, contain[ed] no patentable invention." *Id.*, at 594. As the Court later explained, *Flook* stands for the proposition that the prohibition against patenting abstract ideas "cannot be circumvented by attempting to limit the use of the formula to a particular technological environ-

ment" or adding "insignificant postsolution activity." *Diehr*, 450 U. S., at 191–192.

Finally, in *Diehr*, the Court established a limitation on the principles articulated in *Benson* and *Flook*. The application in *Diehr* claimed a previously unknown method for "molding raw, uncured synthetic rubber into cured precision products," using a mathematical formula to complete some of its several steps by way of a computer. 450 U. S., at 177. *Diehr* explained that while an abstract idea, law of nature, or mathematical formula could not be patented, "an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Id.*, at 187. *Diehr* emphasized the need to consider the invention as a whole, rather than "dissect[ing] the claims into old and new elements and then . . . ignor[ing] the presence of the old elements in the analysis." *Id.*, at 188. Finally, the Court concluded that because the claim was not "an attempt to patent a mathematical formula, but rather [was] an industrial process for the molding of rubber products," it fell within §101's patentable subject matter. *Id.*, at 192–193.

In light of these precedents, it is clear that petitioners' application is not a patentable "process." Claims 1 and 4 in petitioners' application explain the basic concept of hedging, or protecting against risk: "Hedging is a fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class." 545 F. 3d, at 1013 (Rader, J., dissenting); see, *e. g.*, D. Chorafas, Introduction to Derivative Financial Instruments 75–94 (2008); C. Stickney, R. Weil, K. Schipper, & J. Francis, Financial Accounting: An Introduction to Concepts, Methods, and Uses 581–582 (13th ed. 2010); S. Ross, R. Westerfield, & B. Jordan, Fundamentals of Corporate Finance 743–744 (8th ed. 2008). The concept of hedging, described in claim 1 and reduced to a mathematical formula in claim 4, is an unpatentable abstract idea, just like the algorithms at issue in *Benson* and *Flook*. Allowing

petitioners to patent risk hedging would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.

Petitioners' remaining claims are broad examples of how hedging can be used in commodities and energy markets. *Flook* established that limiting an abstract idea to one field of use or adding token postsolution components did not make the concept patentable. That is exactly what the remaining claims in petitioners' application do. These claims attempt to patent the use of the abstract idea of hedging risk in the energy market and then instruct the use of well-known random analysis techniques to help establish some of the inputs into the equation. Indeed, these claims add even less to the underlying abstract principle than the invention in *Flook* did, for the *Flook* invention was at least directed to the narrower domain of signaling dangers in operating a catalytic converter.

* * *

Today, the Court once again declines to impose limitations on the Patent Act that are inconsistent with the Act's text. The patent application here can be rejected under our precedents on the unpatentability of abstract ideas. The Court, therefore, need not define further what constitutes a patentable "process," beyond pointing to the definition of that term provided in § 100(b) and looking to the guideposts in *Benson*, *Flook*, and *Diehr*.

And nothing in today's opinion should be read as endorsing interpretations of § 101 that the Court of Appeals for the Federal Circuit has used in the past. See, *e. g.*, *State Street*, 149 F. 3d, at 1373; *AT&T Corp.*, 172 F. 3d, at 1357. It may be that the Court of Appeals thought it needed to make the machine-or-transformation test exclusive precisely because its case law had not adequately identified less extreme means of restricting business method patents, including (but not limited to) application of our opinions in *Benson*, *Flook*, and *Diehr*. In disapproving an exclusive machine-

or-transformation test, we by no means foreclose the Federal Circuit's development of other limiting criteria that further the purposes of the Patent Act and are not inconsistent with its text.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

In the area of patents, it is especially important that the law remain stable and clear. The only question presented in this case is whether the so-called machine-or-transformation test is the exclusive test for what constitutes a patentable "process" under 35 U. S. C. § 101. It would be possible to answer that question simply by holding, as the entire Court agrees, that although the machine-or-transformation test is reliable in most cases, it is not the *exclusive* test.

I agree with the Court that, in light of the uncertainty that currently pervades this field, it is prudent to provide further guidance. But I would take a different approach. Rather than making any broad statements about how to define the term "process" in § 101 or tinkering with the bounds of the category of unpatentable, abstract ideas, I would restore patent law to its historical and constitutional moorings.

For centuries, it was considered well established that a series of steps for conducting business was not, in itself, patentable. In the late 1990's, the Federal Circuit and others called this proposition into question. Congress quickly responded to a Federal Circuit decision with a stopgap measure designed to limit a potentially significant new problem for the business community. It passed the First Inventor Defense Act of 1999 (1999 Act), 113 Stat. 1501A–555 (codified at 35 U. S. C. § 273), which provides a limited defense to claims of patent infringement, see § 273(b), for "method[s] of

doing or conducting business," § 273(a)(3). Following several more years of confusion, the Federal Circuit changed course, overruling recent decisions and holding that a series of steps may constitute a patentable process only if it is tied to a machine or transforms an article into a different state or thing. This "machine-or-transformation test" excluded general methods of doing business as well as, potentially, a variety of other subjects that could be called processes.

The Court correctly holds that the machine-or-transformation test is not the sole test for what constitutes a patentable process; rather, it is a critical clue.[1] But the Court is quite wrong, in my view, to suggest that any series of steps that is not itself an abstract idea or law of nature may constitute a "process" within the meaning of § 101. The language in the Court's opinion to this effect can only cause mischief. The wiser course would have been to hold that petitioners' method is not a "process" because it describes only a general method of engaging in business transactions—and business methods are not patentable. More precisely, although a process is not patent ineligible simply because it is useful for conducting business, a claim that merely describes a method of doing business does not qualify as a "process" under § 101.

I

Although the Court provides a brief statement of facts, *ante*, at 597–601, a more complete explication may be useful for those unfamiliar with petitioners' patent application and this case's procedural history.

Petitioners' patent application describes a series of steps for managing risk amongst buyers and sellers of commodities. The general method, described in claim 1, entails

[1] Even if the machine-or-transformation test may not define the scope of a patentable process, it would be a grave mistake to assume that anything with a "'useful, concrete and tangible result,'" *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368, 1373 (CA Fed. 1998), may be patented.

"managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price," and consists of the following steps:

> "(a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumers;
>
> "(b) identifying market participants for said commodity having a counter-risk position to said consumers; and
>
> "(c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions." App. 19–20.

Although the patent application makes clear that the "method can be used for any commodity to manage consumption risk in a fixed bill price product," *id.*, at 11, it includes specific applications of the method, particularly in the field of energy, as a means of enabling suppliers and consumers to minimize the risks resulting from fluctuations in demand during specified time periods, see *id.*, at 20–22. Energy suppliers and consumers may use that method to hedge their risks by agreeing upon a fixed series of payments at regular intervals throughout the year instead of charging or paying prices that fluctuate in response to changing weather conditions. The patent application describes a series of steps, including the evaluation of historical costs and weather variables and the use of economic and statistical formulas, to analyze these data and to estimate the likelihood of certain outcomes. See *id.*, at 12–19.

The patent examiner rejected petitioners' application on the ground that it "is not directed to the technological arts," insofar as it "is not implemented on a specific apparatus and merely manipulates [an] abstract idea and solves a purely

mathematical problem without any limitation to a practical application." App. to Pet. for Cert. 148a.

The Board of Patent Appeals and Interferences affirmed the examiner's decision, but it rejected the position that a patentable process must relate to "technological arts" or be performed on a machine. *Id.*, at 180a–181a. Instead, the Board denied petitioners' patent on two alternative, although similar, grounds: first, that the patent involves only mental steps that do not transform physical subject matter, *id.*, at 181a–184a; and, second, that it is directed to an "abstract idea," *id.*, at 184a–187a.

Petitioners appealed to the United States Court of Appeals for the Federal Circuit. After briefing and argument before a three-judge panel, the court *sua sponte* decided to hear the case en banc and ordered the parties to address: (1) whether petitioners' "claim 1 . . . claims patent-eligible subject matter under 35 U. S. C. § 101"; (2) "[w]hat standard should govern in determining whether a process is patent-eligible subject matter"; (3) "[w]hether the claimed subject matter is not patent-eligible because it constitutes an abstract idea or mental process"; (4) "[w]hether a method or process must result in a physical transformation of an article or be tied to a machine to be patent-eligible subject matter"; and (5) whether the court's decisions in *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368 (1998) *(State Street)*, and *AT&T Corp.* v. *Excel Communications, Inc.*, 172 F. 3d 1352 (1999), should be overruled in any respect. App. to Pet. for Cert. 144a–145a.

The en banc Court of Appeals affirmed the Board's decision. Eleven of the twelve judges agreed that petitioners' claims do not describe a patentable "process," § 101. Chief Judge Michel's opinion, joined by eight other judges, rejected several possible tests for what is a patent-eligible process, including whether the patent produces a "'useful, concrete and tangible result,'" whether the process relates to "technological arts," and "categorical exclusions" for certain proc-

esses such as business methods. *In re Bilski*, 545 F. 3d 943, 959–960 (2008). Relying on several of our cases in which we explained how to differentiate a claim on a "fundamental principle" from a claim on a "process," the court concluded that a "claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." *Id.*, at 954–955. The court further concluded that this "machine-or-transformation test" is "the *sole* test governing § 101 analyses," *id.*, at 955 (emphasis added), and therefore the "test for determining patent eligibility of a process under § 101," *id.*, at 956. Applying that test, the court held that petitioners' claim is not a patent-eligible process. *Id.*, at 963–966.

In a separate opinion reaching the same conclusion, Judge Dyk carefully reviewed the history of American patent law and English precedents upon which our law is based, and found that "the unpatentability of processes not involving manufactures, machines, or compositions of matter has been firmly embedded . . . since the time of the Patent Act of 1793." *Id.*, at 966. Judge Dyk observed, moreover, that "[t]here is no suggestion in any of this early consideration of process patents that processes for organizing human activity were or ever had been patentable." *Id.*, at 972.

Three judges wrote dissenting opinions, although two of those judges agreed that petitioners' claim is not patent eligible. Judge Mayer would have held that petitioners' claim "is not eligible for patent protection because it is directed to a method of conducting business." *Id.*, at 998. He submitted that "[t]he patent system is intended to protect and promote advances in science and technology, not ideas about how to structure commercial transactions." *Ibid.* "Affording patent protection to business methods lacks constitutional and statutory support, serves to hinder rather than promote innovation[,] and usurps that which rightfully belongs in the public domain." *Ibid.*

Judge Rader would have rejected petitioners' claim on the ground that it seeks to patent merely an abstract idea. *Id.*, at 1011.

Only Judge Newman disagreed with the court's conclusion that petitioners' claim seeks a patent on ineligible subject matter. Judge Newman urged that the en banc court's machine-or-transformation test ignores the text and history of § 101, *id.*, at 977–978, 985–990, is in tension with several decisions by this Court, *id.*, at 978–985, and the Federal Circuit, *id.*, at 990–992, and will invalidate thousands of patents that were issued in reliance on those decisions, *id.*, at 992–994.

II

Before explaining in more detail how I would decide this case, I will comment briefly on the Court's opinion. The opinion is less than pellucid in more than one respect, and, if misunderstood, could result in confusion or upset settled areas of the law. Three preliminary observations may be clarifying.

First, the Court suggests that the terms in the Patent Act must be read as lay speakers use those terms, and not as they have traditionally been understood in the context of patent law. See, *e. g.*, *ante*, at 603 (terms in § 101 must be viewed in light of their "'ordinary, contemporary, common meaning'"); *ante*, at 607 (patentable "method" is any "orderly procedure or process," "regular way or manner of doing anything," or "set form of procedure adopted in investigation or instruction" (internal quotation marks omitted)). As I will explain at more length in Part III, *infra*, if this portion of the Court's opinion were taken literally, the results would be absurd: Anything that constitutes a series of steps would be patentable so long as it is novel, nonobvious, and described with specificity. But the opinion cannot be taken literally on this point. The Court makes this clear when it accepts that the "atextual" machine-or-transformation test, *ante*, at 609, is "useful and important," *ante*, at 604, even though it

"violates" the stated "statutory interpretation principles," *ante,* at 603; and when the Court excludes processes that tend to pre-empt commonly used ideas, see *ante,* at 610–611.

Second, in the process of addressing the sole issue presented to us, the opinion uses some language that seems inconsistent with our centuries-old reliance on the machine-or-transformation criteria as clues to patentability. Most notably, the opinion for a plurality suggests that these criteria may operate differently when addressing technologies of a recent vintage. See *ante,* at 605 (machine-or-transformation test is useful "for evaluating processes similar to those in the Industrial Age," but is less useful "for determining the patentability of inventions in the Information Age"). In moments of caution, however, the opinion for the Court explains—correctly—that the Court is merely restoring the law to its historical state of rest. See *ante,* at 604 ("This Court's precedents establish that the machine-or-transformation test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101"). Notwithstanding this internal tension, I understand the Court's opinion to hold only that the machine-or-transformation test remains an important test for patentability. Few, if any, processes cannot effectively be evaluated using these criteria.

Third, in its discussion of an issue not contained in the questions presented—whether the particular series of steps in petitioners' application is an abstract idea—the Court uses language that could suggest a shift in our approach to that issue. Although I happen to agree that petitioners seek to patent an abstract idea, the Court does not show how this conclusion follows "clear[ly]," *ante,* at 611, from our case law. The patent now before us is not for "[a] principle, in the abstract," or a "fundamental truth." *Parker* v. *Flook,* 437 U. S. 584, 589 (1978) (internal quotation marks omitted). Nor does it claim the sort of phenomenon of nature or abstract idea that was embodied by the mathematical formula

at issue in *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972), and in *Flook*.

The Court construes petitioners' claims on processes for pricing as claims on "the basic concept of hedging, or protecting against risk," *ante*, at 611, and thus discounts the application's discussion of what sorts of data to use, and how to analyze those data, as mere "token postsolution components," *ante*, at 612. In other words, the Court artificially limits petitioners' claims to hedging, and then concludes that hedging is an abstract idea rather than a term that describes a category of processes including petitioners' claims. Why the Court does this is never made clear. One might think that the Court's analysis means that any process that utilizes an abstract idea is *itself* an unpatentable, abstract idea. But we have never suggested any such rule, which would undermine a host of patentable processes. It is true, as the Court observes, that petitioners' application is phrased broadly. See *ante*, at 611–612. But claim specification is covered by § 112, not § 101; and if a series of steps constituted an unpatentable idea merely because it was described without sufficient specificity, the Court could be calling into question some of our own prior decisions.[2] At points, the opinion suggests that novelty is the clue. See *ante*, at 610–611. But the fact that hedging is "'long prevalent in our system of commerce,'" *ante*, at 611, cannot justify the Court's conclusion, as "the proper construction of § 101 . . . does not involve the familiar issu[e] of novelty" that arises under § 102, *Flook*, 437 U. S., at 588. At other points, the opinion for a plurality suggests that the analysis turns on the category of patent involved. See, *e. g.*, *ante*, at 608 (courts

[2] For example, a rule that broadly phrased claims cannot constitute patentable processes could call into question our approval of Alexander Graham Bell's famous fifth claim on "'[t]he method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth,'" *The Telephone Cases*, 126 U. S. 1, 531 (1888).

should use the abstract-idea rule as a "too[l]" to set "a high enough bar" "when considering patent applications of this sort"). But we have never in the past suggested that the inquiry varies by subject matter.

The Court, in sum, never provides a satisfying account of what constitutes an unpatentable abstract idea. Indeed, the Court does not even explain if it is using the machine-or-transformation criteria. The Court essentially asserts its conclusion that petitioners' application claims an abstract idea. This mode of analysis (or lack thereof) may have led to the correct outcome in this case, but it also means that the Court's musings on this issue stand for very little.

III

I agree with the Court that the text of § 101 must be the starting point of our analysis. As I shall explain, however, the text must not be the end point as well.

Pursuant to its power "[t]o promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries," U. S. Const., Art. I, § 8, cl. 8, Congress has passed a series of patent laws that grant certain exclusive rights over certain inventions and discoveries as a means of encouraging innovation. In the latest iteration, the Patent Act of 1952 (1952 Act), Congress has provided that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title," 35 U. S. C. § 101, which include that the patent also be novel, § 102, and nonobvious, § 103. The statute thus authorizes four categories of subject matter that may be patented: processes, machines, manufactures, and compositions of matter. Section 101 imposes a threshold condition. "[N]o patent is available for a discovery, however useful, novel, and nonobvious, unless it falls within one of the express categories of patentable subject matter." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, 483 (1974).

Section 101 undoubtedly defines in "expansive terms" the subject matter eligible for patent protection, as the statute was meant to ensure that "'ingenuit[ies] receive a liberal encouragement.'" *Diamond* v. *Chakrabarty*, 447 U. S. 303, 308–309 (1980); see also *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, 130 (2001). Nonetheless, not every new invention or discovery may be patented. Certain things are "free for all to use." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 151 (1989).[3]

The text of the Patent Act does not on its face give much guidance about what constitutes a patentable process. The statute defines the term "process" as a "process, art or method [that] includes a new use of a known process, machine, manufacture, composition of matter, or material." § 100(b). But, this definition is not especially helpful, given that it also uses the term "process" and is therefore somewhat circular.

As lay speakers use the word "process," it constitutes any series of steps. But it has always been clear that, as used in § 101, the term does not refer to a "'process' in the ordinary sense of the word," *Flook*, 437 U. S., at 588; see also *Corning* v. *Burden*, 15 How. 252, 268 (1854) ("[T]he term process is often used in a more vague sense, in which it can-

[3] The Court quotes our decision in *Diamond* v. *Chakrabarty*, 447 U. S. 303 (1980), for the proposition that, "'[i]n choosing such expansive terms . . . modified by the comprehensive "any," Congress plainly contemplated that the patent laws would be given wide scope.'" *Ante*, at 601. But the Court fails to mention which terms we were discussing in *Chakrabarty:* the terms "manufacture" and "composition of matter." See 447 U. S., at 308 ("In choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope"). As discussed herein, Congress' choice of the term "process" reflected a background understanding of what sorts of series of steps could be patented, and likely reflected an intentional design to codify that settled, judicial understanding. This may not have been the case with the terms at issue in *Chakrabarty.*

not be the subject of a patent"). Rather, as discussed in some detail in Part IV, *infra*, the term "process" (along with the definitions given to that term) has long accumulated a distinctive meaning in patent law. When the term was used in the 1952 Act, it was neither intended nor understood to encompass *any* series of steps or any *way* to do any *thing*.

With that understanding in mind, the Government has argued that because "a word" in a statute "is given more precise content by the neighboring words with which it" associates, *United States* v. *Williams*, 553 U. S. 285, 294 (2008), we may draw inferences from the fact that "[t]he other three statutory categories of patent-eligible subject matter identified in Section 101—'machine, manufacture, or composition of matter'—all 'are things made by man, and involve technology.'" Brief for Respondent 26. Specifically, the Government submits, we may infer "that the term 'process' is limited to technological and industrial methods." *Ibid.* The Court rejects this submission categorically, on the ground that "§ 100(b) already explicitly defines the term 'process.'" *Ante*, at 604. But § 100(b) defines the term "process" by using the term "process," as well as several other general terms. This is not a case, then, in which we must *either* "follow" a definition, *ibid.*, or rely on neighboring words to understand the scope of an ambiguous term. The definition itself contains the very ambiguous term that we must define.

In my view, the answer lies in between the Government's and the Court's positions: The terms adjacent to "process" in § 101 provide a clue as to its meaning, although not a very strong clue. Section 101's list of categories of patentable subject matter is phrased in the disjunctive, suggesting that the term "process" has content distinct from the other items in the list. It would therefore be illogical to "rob" the word "process" of all independent meaning. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 338 (1979). Moreover, to the extent we can draw inferences about what is a "process" from common attributes in § 101, it is a dangerous endeavor to do so on the

basis of a perceived overarching theme. Given the many moving parts at work in the Patent Act, there is a risk of merely confirming our preconceived notions of what should be patentable or of seeing common attributes that track "the familiar issues of novelty and obviousness" that arise under other sections of the statute but are not relevant to § 101, *Flook*, 437 U. S., at 588. The placement of "process" next to other items thus cannot prove that the term is limited to any particular categories; it does, however, give reason to be skeptical that the scope of a patentable "process" extends to cover any series of steps at all.

The Court makes a more serious interpretive error. As briefly discussed in Part II, *supra*, the Court at points appears to reject the well-settled proposition that the term "process" in § 101 is not a " 'process' in the ordinary sense of the word," *Flook*, 437 U. S., at 588. Instead, the Court posits that the word "process" must be understood in light of its "ordinary, contemporary, common meaning," *ante*, at 603 (internal quotation marks omitted). Although this is a fine approach to statutory interpretation in general, it is a deeply flawed approach to a statute that relies on complex terms of art developed against a particular historical background.[4] Indeed, the approach would render § 101 almost comical. A process for training a dog, a series of dance steps, a method of shooting a basketball, maybe even words, stories, or songs if framed as the steps of typing letters or uttering sounds—all would be patent eligible. I am confident that the term "process" in § 101 is not nearly so capacious.[5]

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[4] For example, if this Court were to interpret the Sherman Act according to the Act's plain text, it could prohibit "the entire body of private contract," *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978).

[5] The Court attempts to avoid such absurd results by stating that these "[c]oncerns" "can be met by making sure the claim meets the requirements of § 101." *Ante*, at 603. Because the only limitation on the plain meaning of "process" that the Court acknowledges explicitly is the bar on abstract ideas, laws of nature, and the like, it is presumably this limitation that is

So is the Court, perhaps. What is particularly incredible about the Court's stated method of interpreting § 101 (other than that the method itself may be patent eligible under the Court's theory of § 101) is that the Court deviates from its own professed commitment to "ordinary, contemporary, common meaning." As noted earlier, the Court accepts a role for the "atextual" machine-or-transformation "clue." *Ante*, at 609, 604. The Court also accepts that we have "foreclose[d] a purely literal reading of § 101," *Flook*, 437 U. S., at 589, by holding that claims that are close to "laws of nature, natural phenomena, and abstract ideas," *Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981), do not count as "processes" under § 101, even if they can be colloquially described as such.[6] The Court attempts to justify this latter exception to § 101 as "a matter of statutory *stare decisis*." *Ante*, at 602. But it is strange to think that the very same term must be interpreted literally on some occasions, and in light of its historical usage on others.

In fact, the Court's understanding of § 101 is even more remarkable because its willingness to *exclude* general principles from the provision's reach is in tension with its apparent willingness to *include* steps for conducting business. The history of patent law contains strong norms against

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left to stand between all conceivable human activity and patent monopolies. But many processes that would make for absurd patents are not abstract ideas. Nor can the requirements of novelty, nonobviousness, and particular description pick up the slack. Cf. *ante*, at 609 (plurality opinion). A great deal of human activity was at some time novel and nonobvious.

[6] Curiously, the Court concedes that "these exceptions are not required by the statutory text," but urges that "they are *consistent* with the notion that a patentable process must be 'new and useful.'" *Ante*, at 601–602 (emphasis added). I do not see how these exceptions find a textual home in the term "new and useful." The exceptions may be consistent with those words, but they are sometimes inconsistent with the "ordinary, contemporary, common meaning," *ante*, at 603, 607 (internal quotation marks omitted), of the words "process" and "method."

patenting these two categories of subject matter. Both norms were presumably incorporated by Congress into the 1952 Act.

IV

Because the text of § 101 does not on its face convey the scope of patentable processes, it is necessary, in my view, to review the history of our patent law in some detail. This approach yields a much more straightforward answer to this case than the Court's. As I read the history, it strongly supports the conclusion that a method of doing business is not a "process" under § 101.

I am, of course, mindful of the fact that § 101 "is a dynamic provision designed to encompass new and unforeseen inventions," and that one must therefore view historical conceptions of patent-eligible subject matter at an appropriately high level of generality. *J. E. M. Ag Supply*, 534 U. S., at 135; see also *Chakrabarty*, 447 U. S., at 315–316. But it is nonetheless significant that while people have long innovated in fields of business, methods of doing business fall outside of the subject matter that has "historically been eligible to receive the protection of our patent laws," *Diehr*, 450 U. S., at 184, and likely go beyond what the modern patent "statute was enacted to protect," *Flook*, 437 U. S., at 593. It is also significant that when Congress enacted the 1952 Act, it did so against the background of a well-settled understanding that a series of steps for conducting business cannot be patented. These considerations ought to guide our analysis. As Justice Holmes noted long ago, sometimes, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921).

English Backdrop

The Constitution's Patent Clause was written against the "backdrop" of English patent practices, *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 5 (1966), and early American patent law was "largely based on and incorpo-

rated" features of the English patent system, E. Walterscheid, To Promote the Progress of Useful Arts: American Patent Law and Administration, 1798–1836, p. 109 (1998) (hereinafter Walterscheid, To Promote the Progress).[7] The governing English law, the Statute of Monopolies, responded to abuses whereby the Crown would issue letters patent, "granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public." *Graham*, 383 U. S., at 5. The statute generally prohibited the Crown from granting such exclusive rights, 21 Jam. 1, ch. 3, § 1 (1623), in 4 Statutes of the Realm 1213, but it contained exceptions that, *inter alia*, permitted grants of exclusive rights to the "working or makinge of any manner of new Manufactures," § 6.

Pursuant to that provision, patents issued for the "mode, method, or way of manufacturing," F. Campin, Law of Patents for Inventions 11 (1869) (emphasis deleted), and English courts construed the phrase "working or makinge of any manner of new Manufactures" to encompass manufacturing processes, see, *e. g.*, *Boulton* v. *Bull*, 2 H. Bl. 463, 471, 492, 126 Eng. Rep. 651, 655, 666 (C. P. 1795) (holding that the term "manufacture" "applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice"). Thus, English courts upheld James Watt's famous patent on a method for reducing the consumption of fuel in steam engines,[8] as well as a variety of patents issued for

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[7] See *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829) ("[M]any of the provisions of our patent act are derived from the principles and practice which have prevailed in the construction of that of England"); Proceedings in Congress During the Years 1789 and 1790 Relating to the First Patent and Copyright Laws, 22 J. Pat. Off. Soc. 352, 363 (1940) (explaining that the 1790 Patent Act was "framed according to the Course of Practice in the English Patent Office"); see also Walterscheid, The Early Evolution of the United States Patent Law: Antecedents, 76 J. Pat. & Trademark Off. Soc. 697, 698 (1994) (describing the role of the English backdrop).

[8] See *Hornblower* v. *Boulton*, 8 T. R. 95 (K. B. 1799).

methods of synthesizing substances or building mechanical devices.[9]

Although it is difficult to derive a precise understanding of what sorts of methods were patentable under English law, there is no basis in the text of the Statute of Monopolies, nor in pre-1790 English precedent, to infer that business methods could qualify.[10] There was some debate throughout the relevant time period about what processes could be patented. But it does not appear that anyone seriously believed that one could patent "a method for organizing human activity." 545 F. 3d, at 970 (Dyk, J., concurring).[11]

There were a small number of patents issued between 1623 and 1790 relating to banking or lotteries and one for a method of life insurance,[12] but these did not constitute the "prevail[ing]" "principles and practice" in England on which our patent law was based, *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829). Such patents were exceedingly rare, and some of

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[9] See, *e. g.*, *Roebuck and Garbett* v. *William Stirling & Son* (H. L. 1774), reprinted in 1 T. Webster, Reports and Notes of Cases on Letters Patent for Inventions 45 (1844) ("method of making acid spirit by burning sulphur and saltpetre, and collecting the condensed fumes"); *id.*, at 77 ("'method of producing a yellow colour for painting in oil or water, making white lead, and separating the mineral alkali from common salt, all to be performed in one single process'"); see also C. MacLeod, Inventing the Industrial Revolution: The English Patent System, 1660–1800, pp. 84–93, 100–104, 109–110, 152–155 (1988) (hereinafter MacLeod) (listing patents).

[10] Some English cases made reference to the permissibility of patents over new "trades." But so far as I can tell, the term "trade" referred not to the methods of conducting business but rather to methods of making and using physical items or to the object of the trade. See, *e. g.*, *Clothworkers of Ipswich Case*, Godb. 252, 254, 78 Eng. Rep. 147, 148 (K. B. 1615) ("[I]f a man hath brought in a new invention and a new trade within the kingdom . . . [the King] may grant by charter unto him").

[11] See also Pollack, The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History, 28 Rutgers Computer & Tech. L. J. 61, 94–96 (2002) (hereinafter Pollack) (describing English practice).

[12] See *id.*, at 95; B. Woodcroft, Alphabetical Index of Patentees of Inventions, from March 2, 1617 (14 James I) to October 1, 1852 (16 Victoriae) 383, 410 (2d ed. 1969) (hereinafter Woodcroft).

them probably were viewed not as inventions or discoveries but rather as special state privileges[13] that until the mid-1800's were recorded alongside inventions in the patent records, see MacLeod 1–2 (explaining that various types of patents were listed together). It appears that the only English patent of the time that can fairly be described as a business method patent was one issued in 1778 on a "Plan for assurances on lives of persons from 10 to 80 years of Age." Woodcroft 324.[14] And "[t]here is no indication" that this patent "was ever enforced or its validity tested," 545 F. 3d, at 974 (Dyk, J., concurring); the patent may thus have represented little more than the whim—or error—of a single patent clerk.[15]

In any event, these patents (or patent) were probably not known to the Framers of early patent law. In an era before computerized databases, organized case law, and treatises,[16] the American drafters probably would have known about particular patents only if they were well publicized or sub-

[13] See, *e. g.*, C. Ewen, Lotteries and Sweepstakes 70–71 (1932) (describing the "letters patent" to form a colony in Virginia and to operate lotteries to fund that colony).

[14] See also Renn, John Knox's Plan for Insuring Lives: A Patent of Invention in 1778, 101 J. Inst. Actuaries 285, 286 (1974) (hereinafter Renn) (describing the patent).

[15] "The English patent system" at that time "was one of simple registration. Extensive scrutiny was not expected of the law officers administering it." MacLeod 41. Thus, as one scholar suggested of the patent on life insurance, "perhaps the Law Officer was in a very good humour that day, or perhaps he had forgotten the wording of the statute; most likely he was concerned only with the promised 'very considerable Consumption of [Revenue] Stamps' which [the patent holder] declared, would 'contribute to the increase of the Public Revenues.'" Renn 285.

[16] See *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 381 (1996) ("[T]he state of patent law in the common-law courts before 1800 led one historian to observe that 'the reported cases are destitute of any decision of importance'" (quoting Hulme, On the Consideration of the Patent Grant, Past and Present, 13 L. Q. Rev. 313, 318 (1897))); MacLeod 1, 61–62 (explaining the dearth of clear case law); see also *Boulton* v. *Bull*, 2 H. Bl. 463, 491, 126 Eng. Rep. 651, 665 (C. P. 1795) (Eyre, C. J.) ("Patent rights are no where that I can find accurately discussed in our books").

ject to reported litigation. So far as I am aware, no published cases pertained to patents on business methods.

Also noteworthy is what was *not* patented under the English system. During the 17th and 18th centuries, Great Britain saw innovations in business organization,[17] business models,[18] management techniques,[19] and novel solutions to the challenges of operating global firms in which subordinate managers could be reached only by a long sea voyage.[20] Few if any of these methods of conducting business were patented.[21]

Early American Patent Law

At the Constitutional Convention, the Founders decided to give Congress a patent power so that it might "promote the Progress of . . . useful Arts." Art. I, §8, cl. 8. There is

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[17] See, *e. g.*, A. DuBois, The English Business Company After the Bubble Act, 1720–1800, pp. 38–40, 435–438 (1938); Harris, The Bubble Act: Its Passage and Its Effects on Business Organization, 54 J. Econ. Hist. 610, 624–625 (1994).

[18] See Pollack 97–100. For example, those who held patents on oil lamps developed firms that contracted to provide street lighting. See M. Falkus, Lighting in the Dark Ages of English Economic History: Town Streets Before the Industrial Revolutions, in Trade, Government and Economy in Pre-Industrial England 249, 255–257, 259–260 (D. Coleman & A. John eds. 1976).

[19] See, *e. g.*, G. Hammersley, The State and the English Iron Industry in the Sixteenth and Seventeenth Centuries, in *id.*, at 166, 173, 175–178 (describing the advent of management techniques for efficiently running a major ironworks).

[20] See, *e. g.*, Carlos & Nicholas, Agency Problems in Early Chartered Companies: The Case of the Hudson's Bay Company, 50 J. Econ. Hist. 853, 853–875 (1990).

[21] Nor, so far as I can tell, were business method patents common in the United States in the brief period between independence and the creation of our Constitution—despite the fact that it was a time of great business innovation, including new processes for engaging in risky trade and transport, one of which has been called "the quintessential business innovation of the 1780s." T. Doerflinger, A Vigorous Spirit of Enterprise: Merchants and Economic Development in Revolutionary Philadelphia 291 (1986) (describing new methods of conducting and financing trade with China).

little known history of that Clause.[22] We do know that the Clause passed without objection or debate.[23] This is striking because other proposed powers, such as a power to grant charters of incorporation, generated discussion about the fear that they might breed "monopolies."[24] Indeed, at the ratification conventions, some States recommended amendments that would have prohibited Congress from granting "'exclusive advantages of commerce.'"[25] If the original understanding of the Patent Clause included the authority to patent methods of doing business, it might not have passed so quietly.

In 1790, Congress passed the first Patent Act, an "Act to promote the progress of useful Arts" that authorized patents for persons who had "invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used," if "the invention or discovery [was] sufficiently useful and important." 1 Stat. 109–110. Three years later, Congress passed the Patent Act

[22] See Seidel, The Constitution and a Standard of Patentability, 48 J. Pat. Off. Soc. 5, 10 (1966) (hereinafter Seidel); Walterscheid, To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1, 26 (1994) (hereinafter Walterscheid, Background and Origin); Walterscheid, To Promote the Progress 59, and n. 12; Prager, A History of Intellectual Property From 1545 to 1787, 26 J. Pat. Off. Soc. 711, 746 (1944).

[23] Walterscheid, Background and Origin 26; 2 Records of the Federal Convention of 1787, pp. 509–510 (M. Farrand ed. 1966).

[24] J. Madison, Notes of Debates in the Federal Convention of 1787, pp. 638–639 (Ohio Univ. Press ed. 1966).

[25] See Walterscheid, Background and Origin 38, n. 124, 55–56 (collecting sources); see also The Objections of Hon. George Mason, One of the Delegates From Virginia, in the Late Continental Convention, to the Proposed Federal Constitution, Assigned as His Reasons for Not Signing the Same, 2 American Museum or Repository of Ancient and Modern Fugitive Pieces, etc. 534, 536 (1787); Ratification of the New Constitution by the Convention of the State of New York, 4 *id.*, at 153, 156 (1789); Remarks on the Amendments to the Federal Constitution Proposed by The Conventions of Massachusetts, New Hampshire, New York, Virginia, South and North Carolina, With the Minorities of Pennsylvania and Maryland by the Rev. Nicholas Collin, D. D., 6 *id.*, at 303.

of 1793 and slightly modified the language to cover "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter." 1 Stat. 319.

The object of the constitutional patent power and the statutory authorization for process patents in the early patent Acts was the term "useful art." It is not evident from the face of the statutes or the Constitution whether the objects of the patent system were "arts" that are also useful, or rather a more specific category, the class of arts known as "useful arts." Cf. *Graham*, 383 U. S., at 12 (describing the "'new and useful' tests which have always existed in the statutory scheme" and apply to all categories of subject matter). However, we have generally assumed that "useful art," at least as it is used in the Patent Act, is itself a term of art. See *Burden*, 15 How., at 267–268.

The word "art" and the phrase "useful arts" are subject to many meanings. There is room on the margins to debate exactly what qualifies as either. There is room, moreover, to debate at what level of generality we should understand these broad and historical terms, given that "[a] rule that unanticipated inventions are without protection would conflict with the core concept of the patent law," *Chakrabarty*, 447 U. S., at 316. It appears, however, that regardless of how one construes the term "useful arts," business methods are not included.

Noah Webster's first American dictionary[26] defined the term "art" as the "disposition or modification of *things* by

[26] Some scholars suggest that Webster's "close proximity to the Constitutional Convention coupled with his familiarity with the delegates makes it likely that he played some indirect role in the development" of the Constitution's Intellectual Property Clause—a Clause that established not only the power to create patents but also copyrights, a subject in which Webster had great interest. Donner, Copyright Clause of the U. S. Constitution: Why Did the Framers Include It With Unanimous Approval? 36 Am. J. Legal Hist. 361, 372 (1992). But there is no direct evidence of this fact. See Walterscheid, Background and Origin 40–41.

human skill, to answer the purpose intended," and differentiated between "*useful* or *mechanic*" arts, on the one hand, and "*liberal* or *polite*" arts, on the other. 1 An American Dictionary of the English Language (1828) (facsimile edition) (emphasis added). Although other dictionaries defined the word "art" more broadly,[27] Webster's definition likely conveyed a message similar to the meaning of the word "manufactures" in the earlier English statute. And we know that the term "useful arts" was used in the founding era to refer to manufacturing and similar applied trades.[28] See Coulter, The Field of the Statutory Useful Arts, 34 J. Pat. Off. Soc. 487, 493–500 (1952); see also Thomas, The Patenting of the Liberal Professions, 40 Boston College L. Rev. 1139, 1164 (1999) ("[The Framers of the Constitution] undoubtedly contemplated the industrial, mechanical and manual arts of the late eighteenth century, in contrast to the seven 'liberal arts' and the four 'fine arts' of classical learning"). Indeed, just

[27] See, *e. g.*, 1 S. Johnson, Dictionary of the English Language (1773) (listing as definitions of an "art": "[t]he power of doing something not taught by nature and instinct," "[a] science; as, the liberal *arts*," "[a] trade," "[a]rtfulness; skill; dexterity," "[c]unning," and "[s]peculation"). One might question the breadth of these definitions. This same dictionary offered as an example of "doing something not taught by nature and instinct," the art of "*dance*"; and as an example of a "trade," the art of "making sugar." *Ibid.*

[28] For examples of this usage, see Book of Trades or Library of Useful Arts (1807) (describing in a three-volume work 68 trades, each of which is the means of creating a product, such as feather worker or cork cutter); 1 J. Bigelow, The Useful Arts Considered in Connexion With the Applications of Science (1840) (surveying a history of what we would today call mechanics, technology, and engineering). See also D. Defoe, A General History of Discoveries and Improvements, in Useful Arts (1727); T. Coxe, An Address to an Assembly of the Friends of American Manufactures 17–18 (1787); G. Logan, A Letter to the Citizens of Pennsylvania, on the Necessity of Promoting Agriculture, Manufactures, and the Useful Arts 12–13 (2d ed. 1800); W. Kenrick, An Address to the Artists and Manufacturers of Great Britain 21–38 (1774); cf. *Corning* v. *Burden*, 15 How. 252, 267 (1854) (listing the "arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, [and] smelting ores").

days before the Constitutional Convention, one delegate listed examples of American progress in "manufactures and the useful arts," all of which involved the creation or transformation of physical substances. See T. Coxe, An Address to an Assembly of the Friends of American Manufactures 17–18 (1787) (listing, *inter alia*, meal, ships, liquors, potash, gunpowder, paper, starch, articles of iron, stone work, carriages, and harnesses). Numerous scholars have suggested that the term "useful arts" was widely understood to encompass the fields that we would now describe as relating to technology or "technological arts."[29]

Thus, fields such as business and finance were not generally considered part of the "useful arts" in the founding era. See, *e. g.*, The Federalist No. 8, p. 69 (C. Rossiter ed. 1961) (A. Hamilton) (distinguishing between "the arts of industry, and the science of finance"); 30 The Writings of George

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[29] See, *e. g.*, 1 D. Chisum, Patents Gl–23 (2010); Lutz, Patents and Science: A Clarification of the Patent Clause of the U. S. Constitution, 18 Geo. Wash. L. Rev. 50, 54 (1949–1950); Samuelson, *Benson* Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions, 39 Emory L. J. 1025, 1033, n. 24 (1990); Seidel 10, 13; see also *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 154 (1950) (Douglas, J., concurring) (explaining that in the Framers' view, an "invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge"); *In re Waldbaum*, 457 F. 2d 997, 1003 (CCPA 1972) (Rich, J., concurring) ("'The phrase "technological arts," as we have used it, is synonymous with the phrase "useful arts" as it appears in Article I, Section 8 of the Constitution'"); *Paulik* v. *Rizkalla*, 760 F. 2d 1270, 1276 (CA Fed. 1985) (explaining that "useful arts" is "the process today called technological innovation"); Thomas, The Post-Industrial Patent System, 10 Ford. Intell. Prop. Media & Ent. L. J. 3, 32–55 (1999) (cataloguing early understandings of technological arts). This view may be supported, for example, by an 1814 grant to Harvard University to create a "Professorship on the Application of Science to the Useful Arts," something that today might be akin to applied science or engineering. See M. James, Engineering an Environment for Change: Bigelow, Peirce, and Early Nineteenth-Century Practical Education at Harvard, in Science at Harvard University: Historical Perspectives 59 (C. Elliott & M. Rossiter eds. 1992).

Washington 1745–1799, p. 186 (J. Fitzpatrick ed. 1939) (writing in a letter that "our commerce has been considerably curtailed," but "the useful arts have been almost imperceptibly pushed to a considerable degree of perfection"). Indeed, the same delegate to the Constitutional Convention who gave an address in which he listed triumphs in the useful arts distinguished between those arts and the conduct of business. He explained that investors were now attracted to the "manufactures and the useful arts," much as they had long invested in "commerce, navigation, stocks, banks, and insurance companies." T. Coxe, A Statement of the Arts and Manufactures of the United States of America for the Year 1810 (1814), in 2 American State Papers, Finance 666, 688 (1832).

Some scholars have remarked, as did Thomas Jefferson, that early patent statutes neither included nor reflected any serious debate about the precise scope of patentable subject matter. See, *e. g.*, *Graham*, 383 U. S., at 9–10 (discussing Thomas Jefferson's observations). It has been suggested, however, that "[p]erhaps this was in part a function of an understanding—shared widely among legislators, courts, patent office officials, and inventors—about what patents were meant to protect. Everyone knew that manufactures and machines were at the core of the patent system." Merges, Property Rights for Business Concepts and Patent System Reform, 14 Berkeley Tech. L. J. 577, 585 (1999) (hereinafter Merges). Thus, although certain processes, such as those related to the technology of the time, might have been considered patentable, it is possible that "[a]gainst this background, it would have been seen as absurd for an entrepreneur to file a patent" on methods of conducting business. *Ibid.*

Development of American Patent Law

During the first years of the patent system, no patents were issued on methods of doing business.[30] Indeed, for

[30] See Walterscheid, To Promote the Progress 173–178; Pollack 107–108.

some time, there were serious doubts as to "the patentability of processes per se," as distinct from the physical end product or the tools used to perform a process. *Id.*, at 581–582.[31]

Thomas Jefferson was the "'first administrator of our patent system'" and "the author of the 1793 Patent Act." *Graham*, 383 U. S., at 7. We have said that his "conclusions as to conditions for patentability . . . are worthy of note." *Ibid.* During his time administering the system, Jefferson "saw clearly the difficulty" of deciding what should be patentable.[32] *Id.*, at 9. He drafted the 1793 Act, *id.*, at 7, and, years later, explained that in that Act "'the whole was turned over to the judiciary, to be matured into a system, under which every one might know when his actions were safe and lawful,'" *id.*, at 10 (quoting Letter to Issac McPherson, in VI Writings of Thomas Jefferson 181–182 (H. Washington ed. 1861)). As the Court has explained, "Congress agreed with Jefferson . . . that the courts should develop additional conditions for patentability." *Graham*, 383 U. S., at 10. Thus "[a]lthough the Patent Act was amended, revised or codified some 50 times between 1790 and 1950, Congress steered clear" of adding statutory requirements of patentability. *Ibid.* For nearly 160 years, Congress retained the term "useful arts," see, *e. g.*, Act of July 4, 1836, ch. 357, 5 Stat. 117, leaving "wide latitude for judicial construction . . . to keep pace with industrial development," Berman, Method Claims, 17 J. Pat. Off. Soc. 713, 714 (1935) (hereinafter Berman).

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[31] These doubts ended by the time of *Cochrane* v. *Deener*, 94 U. S. 780 (1877), in which we held that "a process may be patentable, irrespective of the particular form of the instrumentalities used," and therefore one may patent "an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." *Id.*, at 787–788.

[32] A skeptic of patents, Jefferson described this as "drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." 13 Writings of Thomas Jefferson 335 (Memorial ed. 1904).

Although courts occasionally struggled with defining what was a patentable "art" during those 160 years, they consistently rejected patents on methods of doing business. The rationales for those decisions sometimes varied. But there was an overarching theme, at least in dicta: Business methods are not patentable arts. See, *e. g.*, *United States Credit System Co.* v. *American Credit Indemnity Co.*, 53 F. 818, 819 (CCNY 1893) ("method of insuring against loss by bad debts" could not be patented "as an art"); *Hotel Security Checking Co.* v. *Lorraine Co.*, 160 F. 467, 469 (CA2 1908) ("A system of transacting business disconnected from the means for carrying out the system is not, within the most liberal interpretation of the term, an art"); *Guthrie* v. *Curlett*, 10 F. 2d 725, 726 (CA2 1926) (method of abbreviating rail tariff schedules, "if it be novel, is not the kind of art protected by the patent acts"); *In re Patton*, 127 F. 2d 324, 327–328 (CCPA 1942) (holding that novel " 'interstate and national fire-fighting system' " was not patentable because, *inter alia*, "a system of transacting business, apart from the means for carrying out such system, is not" an art within the meaning of the patent law, "nor is an abstract idea or theory, regardless of its importance or . . . ingenuity"); *Loew's Drive-In Theatres, Inc.* v. *Park-In Theatres, Inc.*, 174 F. 2d 547, 552 (CA1 1949) ("[A] system for the transaction of business, such, for example, as the cafeteria system for transacting the restaurant business . . . however novel, useful, or commercially successful is not patentable apart from the means for making the system practically useful, or carrying it out"); *Joseph E. Seagram & Sons, Inc.* v. *Marzall*, 180 F. 2d 26, 28 (CADC 1950) (method of focus-group testing for beverages is not patentable subject matter); see also *In re Howard*, 394 F. 2d 869, 872 (CCPA 1968) (Kirkpatrick, J., concurring) (explaining that a "method of doing business" cannot be patented). Between 1790 and 1952, this Court never addressed the patentability of business methods. But we consistently focused the inquiry on whether an "art" was connected to a machine or physical

transformation,[33] an inquiry that would have excluded methods of doing business.

By the early 20th century, it was widely understood that a series of steps for conducting business could not be patented. A leading treatise, for example, listed "'systems' of business" as an "unpatentable subjec[t]." 1 A. Deller, Walker on Patents § 18, p. 62 (1937).[34] Citing many of the cases listed above, the treatise concluded that a "method of transacting business" is not an "'art.'" *Id.*, § 22, at 69; see also L. Amdur, Patent Law and Practice § 39, p. 53 (1935) (listing "Methods of doing business" as an "Unpatentable [A]r[t]"); Berman 718 ("[C]ases have been fairly unanimous in denying patentability to such methods"); Tew, Method of Doing Business, 16 J. Pat. Off. Soc. 607 (1934) ("It is probably settled by long practice and many precedents that 'methods of doing business,' as these words are generally understood, are unpatentable"). Indeed, "[u]ntil recently" it was still "considered well established that [business] methods were non-statutory." 1 R. Moy, Walker on Patents § 5:28, p. 5–104 (4th ed. 2009).[35]

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[33] See, *e. g.*, *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 383, 385–386 (1909); *The Telephone Cases*, 126 U. S., at 533–537; *Cochrane*, 94 U. S., at 787–788; *Burden*, 15 How., at 267–268.

[34] See also 1 A. Deller, Walker on Patents § 26, p. 152 (2d ed. 1964) (A "'system' or method of transacting business is not [a process], nor does it come within any other designation of patentable subject matter").

[35] Although a few patents issued before 1952 related to methods of doing business, see United States Patent and Trademark Office, Automated Financial or Management Data Processing Methods, online at http://www.uspto.gov/web/menu/busmethp/index.html (as visited June 26, 2010, and available in Clerk of Court's case file), these patents were rare, often issued through self-registration rather than any formalized patent examination, generally were not upheld by courts, and arguably are distinguishable from pure patents on business methods insofar as they often involved the manufacture of new objects. See *In re Bilski*, 545 F. 3d 943, 974, and n. 18 (CA Fed. 2008) (case below) (Dyk, J., concurring); Pollack 74–75; Walterscheid, To Promote the Progress 243.

Modern American Patent Law

By the mid-1900's, many courts were construing the term "art" by using words such as "method, process, system, or like terms." Berman 713; see *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 382 (1909) ("The word 'process' has been brought into the decisions because it is supposedly an equivalent form of expression or included in the statutory designation of a new and useful art").[36] Thus in 1952, when Congress updated the patent laws as part of its ongoing project to revise the United States Code, it changed the operative language in § 101, replacing the term "art" with "process" and adding a definition of "process" as a "process, art or method," § 100(b).

That change was made for clarity and did not alter the scope of a patentable "process." See *Diehr*, 450 U. S., at 184. The new terminology was added only in recognition of the fact that courts had been interpreting the category "art" by using the terms "process or method"; Congress thus wanted to avoid "the necessity of explanation that the word 'art' as used in this place means 'process or method.'" S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952) (hereinafter S. Rep. 1979); accord, H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952) (hereinafter H. R. Rep. 1923); see also *id.*, at 17 (explaining that "[t]he word 'art'" in § 101 "has been interpreted by the courts as being practically synonymous with process or method," and that the switch to the word "'[p]rocess'" was intended only for clarity).[37]

It appears that when Congress changed the language in § 101 to incorporate the prevailing judicial terminology, it merely codified the prevailing judicial interpretation of that

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[36] For examples of such usage, see *The Telephone Cases*, 126 U. S., at 533, and *Burden*, 15 How., at 267.

[37] See also 98 Cong. Rec. A415 (1952) (remarks of Rep. Bryson) (describing, after the fact, the 1952 Act, and explaining that "[t]he word 'art' was changed to 'process' in order to clarify its meaning. No change in substance was intended").

category of subject matter. See *Diehr*, 450 U. S., at 184; see also *Barber* v. *Gonzales*, 347 U. S. 637, 641 (1954) ("While it is true that statutory language should be interpreted whenever possible according to common usage, some terms acquire a special technical meaning by a process of judicial construction"). Both the Senate and House Committee Reports explained that the word "process" was used in § 101 "to clarify the present law as to the patentability of certain types of processes or methods as to which some insubstantial doubts have been expressed." S. Rep. 1979, at 5; accord, H. R. Rep. 1923, at 6. And both noted that those terms were used to convey the prevailing meaning of the term "art," "as interpreted" by courts, S. Rep. 1979, at 17; accord, H. R. Rep. 1923, at 17. Indeed, one of the main drafters of the Act explained that the definition of the term "process" in § 100(b) reflects "how the courts have construed the term 'art.'" Tr. of Address by Judge Giles S. Rich to the New York Patent Law Association 7–8 (Nov. 6, 1952).

As discussed above, by this time, courts had consistently construed the term "art" to exclude methods of doing business. The 1952 Act likely captured that same meaning.[38] Cf. *Graham*, 383 U. S., at 16–17 (reasoning that because a provision of the 1952 Act "paraphrases language which has often been used in decisions of the courts" and was "added to the statute for uniformity and definiteness," that provision should be treated as "a codification of judicial precedents" (internal quotation marks omitted)).[39] Indeed, Judge Rich,

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[38] The 1952 Act also retained the language "invents or discovers," which by that time had taken on a connotation that would tend to exclude business methods. See B. Evans & C. Evans, A Dictionary of Contemporary American Usage 137 (1957) (explaining that "discover; invent" means "to make or create something new, especially, in modern usage, something ingeniously devised to perform mechanical operations").

[39] As explained in Part II, *supra*, the Court engages in a Jekyll-and-Hyde form of interpretation with respect to the word "process" in

the main drafter of the 1952 Act, later explained that "the invention of a more effective organization of the materials in, and the techniques of teaching a course in physics, chemistry, or Russian is not a patentable invention because it is outside of the enumerated categories of 'process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.' " Principles of Patentability, 28 Geo. Wash. L. Rev. 393, 394 (1960). "Also outside that group," he added, was a process for doing business: "the greatest inventio[n] of our times, the diaper service." *Ibid.*[40]

"Anything Under the Sun"

Despite strong evidence that Congress has consistently authorized patents for a limited class of subject matter and that the 1952 Act did not alter the nature of the then-existing limits, petitioners and their *amici* emphasize a single phrase in the 1952 Act's legislative history, which suggests that the

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§ 101. It rejects the interpretation I proffer because the words "process" and "method" do not, on their face, distinguish between different series of acts. *Ante*, at 606–607. But it also rejects many sorts of processes without a textual basis for doing so. See *ante*, at 601–602, 604, 609–612. And while the Court rests a great deal of weight on *Parker* v. *Flook*, 437 U. S. 584 (1978), for its analysis of abstract ideas, the Court minimizes *Flook*'s rejection of "a purely literal reading of § 101," as well as *Flook*'s reliance on the historical backdrop of § 101 and our understanding of what "the statute was enacted to protect," *id.*, at 588–590, 593; see also *Diamond* v. *Diehr*, 450 U. S. 175, 192 (1981) (explaining that a "claim satisfies the requirements of § 101" when it "is performing a function which the patent laws were designed to protect").

[40] Forty years later, Judge Rich authored the *State Street* opinion that some have understood to make business methods patentable. But *State Street* dealt with whether a piece of software could be patented and addressed only claims directed at machines, not processes. His opinion may therefore be better understood merely as holding that an otherwise patentable process is not unpatentable simply because it is directed toward the conduct of doing business—an issue the Court has no occasion to address today. See 149 F. 3d, at 1375.

statutory subject matter " 'include[s] anything under the sun that is made by man.' " Brief for Petitioners 19 (quoting *Chakrabarty*, 447 U. S., at 309, in turn quoting S. Rep. 1979, at 5). Similarly, the Court relies on language from our opinion in *Chakrabarty* that was based in part on this piece of legislative history. See *ante*, at 601, 602–603.

This reliance is misplaced. We have never understood that piece of legislative history to mean that any series of steps is a patentable process. Indeed, if that were so, then our many opinions analyzing what is a patentable process were simply wastes of pages in the U. S. Reports. And to accept that errant piece of legislative history as widening the scope of the patent law would contradict other evidence in the congressional record, as well as our presumption that the 1952 Act merely codified the meaning of "process" and did not expand it, see *Diehr*, 450 U. S., at 184.

Taken in context, it is apparent that the quoted language has a far less expansive meaning. The full sentence in the Committee Reports reads: "A person may have 'invented' a machine or a manufacture, which may include anything under the sun that is made by man, but it is not necessarily patentable under section 101 unless the conditions of [this] title are fulfilled." S. Rep. 1979, at 5; H. R. Rep. 1923, at 6. Viewed as a whole, it seems clear that this language does not purport to explain that "anything under the sun" is patentable. Indeed, the language may be understood to state the exact opposite: that "[a] person may have 'invented' . . . anything under the sun," but that thing "is not necessarily patentable under section 101." Thus, even in the *Chakrabarty* opinion, which relied on this quote, we cautioned that the 1952 Reports did not "suggest that § 101 has no limits or that it embraces every discovery." 447 U. S., at 309.

Moreover, even if the language in the Committee Reports was meant to flesh out the meaning of any portion of § 101, it did not purport to define the term "process." The language refers only to "manufacture[s]" and "machine[s]," tangible

objects "made by man." It does not reference the "process" category of subject matter (nor could a process be comfortably described as something "*made* by man"). The language may also be understood merely as defining the term "invents" in § 101. As Judge Dyk explained in his opinion below, the phrase "made by man" "is reminiscent" of a 1790's description of the limits of English patent law, that an "invention must be 'made by man' " and cannot be " 'a philosophical principle only, neither organized or capable of being organized' from a patentable manufacture." 545 F. 3d, at 976 (quoting *Hornblower* v. *Boulton*, 8 T. R. 95, 98, 101 Eng. Rep. 1285, 1288 (K. B. 1799)).

The 1952 Act, in short, cannot be understood as expanding the scope of patentable subject matter by suggesting that any series of steps may be patented as a "process" under § 101. If anything, the 1952 Act appears to have codified the conclusion that subject matter which was understood not to be patentable in 1952 was to remain unpatentable.

Our recent case law reinforces my view that a series of steps for conducting business is not a "process" under § 101. Since Congress passed the 1952 Act, we have never ruled on whether that Act authorizes patents on business methods. But we have cast significant doubt on that proposition by giving substantial weight to the machine-or-transformation test, as general methods of doing business do not pass that test. And more recently, Members of this Court have noted that patents on business methods are of "suspect validity." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 397 (2006) (KENNEDY, J., concurring).

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Since at least the days of Assyrian merchants, people have devised better and better ways to conduct business. Yet it appears that neither the Patent Clause, nor early patent law, nor the current § 101 contemplated or was publicly understood to mean that such innovations are patentable. Al-

though it may be difficult to define with precision what is a patentable "process" under § 101, the historical clues converge on one conclusion: A business method is not a "process." And to the extent that there is ambiguity, we should be mindful of our judicial role. "[W]e must proceed cautiously when we are asked to extend patent rights" into an area that the Patent Act likely was not "enacted to protect," *Flook*, 437 U. S., at 596, 593, lest we create a legal regime that Congress never would have endorsed, and that can be repaired only by disturbing settled property rights.

V

Despite the strong historical evidence that a method of doing business does not constitute a "process" under § 101, petitioners nonetheless argue—and the Court suggests in dicta, *ante*, at 607–608—that a subsequent law, the First Inventor Defense Act of 1999, "must be read together" with § 101 to make business methods patentable. Brief for Petitioners 29. This argument utilizes a flawed method of statutory interpretation and ignores the motivation for the 1999 Act.

In 1999, following a Federal Circuit decision that intimated business methods could be patented, see *State Street*, 149 F. 3d 1368, Congress moved quickly to limit the potential fallout. Congress passed the 1999 Act, codified at 35 U. S. C. § 273, which provides a limited defense to claims of patent infringement, see § 273(b), regarding certain "method[s] of doing or conducting business," § 273(a)(3).

It is apparent, both from the content and history of the 1999 Act, that Congress did not in any way ratify *State Street* (or, as petitioners contend, the broadest possible reading of *State Street*). The 1999 Act merely limited one potential effect of that decision: that businesses might suddenly find themselves liable for innocently using methods they assumed could not be patented. The 1999 Act did not purport to amend the limitations in § 101 on eligible subject matter.

Indeed, Congress placed the statute in Part III of Title 35, which addresses "Patents and Protection of Patent Rights," rather than in Part II, which contains § 101 and addresses "Patentability of Inventions and Grant of Patents." Particularly because petitioners' reading of the 1999 Act would expand § 101 to cover a category of processes that have not "historically been eligible" for patents, *Diehr*, 450 U. S., at 184, we should be loath to conclude that Congress effectively amended § 101 without saying so clearly. We generally presume that Congress "does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

The 1999 Act therefore is, at best, merely evidence of 1999 legislative views on the meaning of the earlier, 1952 Act. "[T]he views of a subsequent Congress," however, "form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). When a later statute is offered as "an expression of how the . . . Congress interpreted a statute passed by another Congress . . . a half century before," "such interpretation has very little, if any, significance." *Rainwater* v. *United States*, 356 U. S. 590, 593 (1958).

Furthermore, even assuming that Congress' views at the turn of the 21st century could potentially serve as a valid basis for interpreting a statute passed in the mid-20th century, the First Inventor Defense Act does not aid petitioners because it does not show that the later Congress itself understood § 101 to cover business methods. If anything, it shows that a few judges on the Federal Circuit understood § 101 in that manner and that Congress understood what those judges had done. The 1999 Act appears to reflect surprise and perhaps even dismay that business methods might be patented. Thus, in the months following *State Street*, congressional authorities lamented that "business methods and processes . . . until recently were thought not to be patent-

able," H. R. Rep. No. 106–464, p. 121 (1999); accord, H. R. Rep. No. 106–287, pt. 1, p. 31 (1999).[41] The fact that Congress decided it was appropriate to create a new *defense* to claims that business method patents were being infringed merely demonstrates recognition that such claims could create a significant new problem for the business community.

The Court nonetheless states that the 1999 Act "acknowledges that there may be business method patents," thereby "clarify[ing]" its "understanding" of § 101. *Ante*, at 607. More specifically, the Court worries that if we were to interpret the 1952 Act to exclude business methods, our interpretation "would render § 273 meaningless." *Ibid.* I agree that "[a] statute should be construed so that effect is given to all its provisions." *Corley* v. *United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). But it is a different matter altogether when the Court construes one statute, the 1952 Act, to give effect to a different statute, the 1999 Act. The canon on which the Court relies is predicated upon the idea that "[a] statute is passed as a whole." 2A N. Singer & J. Singer, Statutes and Statutory Construction § 46:5, p. 189 (7th ed. 2007). But the two statutes in question were not passed as a whole.

Put another way, we ordinarily assume, quite sensibly, that Congress would not in one statute include two provisions that are at odds with each other. But as this case shows, that sensible reasoning can break down when applied to dif-

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[41] See also 145 Cong. Rec. 30985 (1999) (remarks of Sen. Schumer) (explaining that "[i]n *State Street*, the Court did away with the so-called 'business methods' exception to statutory patentable subject matter," and "[t]he first inventor defense will provide . . . important, needed protections in the face of the uncertainty presented by . . . the *State Street* case"); *id.*, at 31007 (remarks of Sen. DeWine) ("Virtually no one in the industry believed that these methods or processes were patentable"); *id.*, at 19281 (remarks of Rep. Manzullo) ("Before the State Street Bank and Trust case . . . it was universally thought that methods of doing or conducting business were not patentable items").

ferent statutes.[42] The 1999 Act was passed to limit the impact of the Federal Circuit's then-recent statements on the 1952 Act. Although repudiating that judicial dictum (as we should) might effectively render the 1999 Act a nullity going forward, such a holding would not mean that it was a nullity when Congress enacted it. Section 273 may have been a technically unnecessary response to confusion about patentable subject matter, but it appeared necessary in 1999 in light of what was being discussed in legal circles at the time.[43] Consider the logical implications of the Court's approach to this question: If, tomorrow, Congress were to conclude that patents on business methods are so *important* that the special infringement defense in § 273 ought to be abolished, and thus repealed that provision, this could paradoxically strengthen the case *against* such patents because there would no longer be a § 273 that "acknowledges . . . business method patents," *ante*, at 607. That is not a sound method of statutory interpretation.

In light of its history and purpose, I think it obvious that the 1999 Congress would never have enacted § 273 if it had foreseen that this Court would rely on the provision as a

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[42] The Court opines that "[t]his principle, *of course*, applies to interpreting any two provisions in the U. S. Code, even when Congress enacted the provisions at different times." *Ante*, at 608 (emphasis added). The only support the Court offers for this proposition is a 1939 opinion for three Justices, in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 528–530 (opinion of Stone, J.). But that opinion is inapposite. Although Justice Stone stated that two provisions "must be read together," *id.*, at 530, he did so to explain that an ambiguity in a later-in-time statute must be understood in light of the earlier-in-time framework against which the ambiguous statute was passed, *id.*, at 528–530, particularly because the later statute explicitly stated that it "'shall not be construed to apply'" to the provision created by an earlier Act, *id.*, at 528.

[43] I am not trying to "overcome" an "established rule of statutory interpretation" with "judicial speculation as to the subjective intent of various legislators," *ante*, at 608, but, rather, I am explaining why the Court has illogically expanded the canon upon which it relies beyond that canon's logical underpinnings.

basis for concluding that business methods are patentable. Section 273 is a red herring; we should be focusing our attention on § 101 itself.

VI

The constitutionally mandated purpose and function of the patent laws bolster the conclusion that methods of doing business are not "processes" under § 101.

The Constitution allows Congress to issue patents "[t]o promote the Progress of . . . useful Arts," Art. I, § 8, cl. 8. This clause "is both a grant of power and a limitation." *Graham*, 383 U. S., at 5. It "reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" *Bonito Boats*, 489 U. S., at 146. "This is the standard expressed in the Constitution and it may not be ignored. And it is in this light that patent validity 'requires reference to [the] standard written into the Constitution.'" *Graham*, 383 U. S., at 6 (quoting *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 154 (1950) (Douglas, J., concurring) (emphasis deleted)); see also *Grant* v. *Raymond*, 6 Pet. 218, 241–242 (1832) (explaining that patent "laws which are passed to give effect to this [constitutional] purpose ought, we think, to be construed in the spirit in which they have been made").[44]

Thus, although it is for Congress to "implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim," *Graham*,

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[44] See also *Quanta Computer, Inc.* v. *LG Electronics, Inc.*, 553 U. S. 617, 626 (2008) ("'[T]he primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is "to promote the progress of science and useful arts"'" (quoting *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 511 (1917))); *Pfaff* v. *Wells Electronics, Inc.*, 525 U. S. 55, 63 (1998) ("[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology").

383 U. S., at 6, we interpret ambiguous patent laws as a set of rules that "wee[d] out those inventions which would not be disclosed or devised but for the inducement of a patent," *id.*, at 11, and that "embod[y]" the "careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy," *Bonito Boats*, 489 U. S., at 146. And absent a discernible signal from Congress, we proceed cautiously when dealing with patents that press on the limits of the "'standard written into the Constitution,'" *Graham*, 383 U. S., at 6, for at the "fringes of congressional power," "more is required of legislatures than a vague delegation to be filled in later," *Barenblatt* v. *United States*, 360 U. S. 109, 139–140 (1959) (Black, J., dissenting); see also *Greene* v. *McElroy*, 360 U. S. 474, 507 (1959) ("[D]ecisions of great constitutional import and effect" "requir[e] careful and purposeful consideration by those responsible for enacting and implementing our laws"). We should not casually risk exceeding the constitutional limitation on Congress' behalf.

The Court has kept this "constitutional standard" in mind when deciding what is patentable subject matter under § 101. For example, we have held that no one can patent "laws of nature, natural phenomena, and abstract ideas." *Diehr*, 450 U. S., at 185. These "are the basic tools of scientific and technological work," *Benson*, 409 U. S., at 67, and therefore, if patented, would stifle the very progress that Congress is authorized to promote, see, *e. g.*, *O'Reilly* v. *Morse*, 15 How. 62, 113 (1854) (explaining that Morse's patent on electromagnetism for writing would pre-empt a wide swath of technological developments).

Without any legislative guidance to the contrary, there is a real concern that patents on business methods would press on the limits of the "standard expressed in the Constitution," *Graham*, 383 U. S., at 6 (emphasis deleted), more likely stifling progress than "promot[ing]" it. U. S. Const., Art. I, § 8,

cl. 8. I recognize that not all methods of doing business are the same, and that therefore the constitutional "balance," *Bonito Boats,* 489 U. S., at 146, may vary within this category. Nevertheless, I think that this balance generally supports the historic understanding of the term "process" as excluding business methods. And a categorical analysis fits with the purpose, as Thomas Jefferson explained, of ensuring that "'every one might know when his actions were safe and lawful,'" *Graham,* 383 U. S., at 10; see also *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U. S. 722, 730–731 (2002) ("The monopoly is a property right; and like any property right, its boundaries should be clear. This clarity is essential to promote progress"); *Diehr*, 450 U. S., at 219 (STEVENS, J., dissenting) (it is necessary to have "rules that enable a conscientious patent lawyer to determine with a fair degree of accuracy" what is patentable).

On one side of the balance is whether a patent monopoly is necessary to "motivate the innovation," *Pfaff* v. *Wells Electronics, Inc.*, 525 U. S. 55, 63 (1998). Although there is certainly disagreement about the need for patents, scholars generally agree that when innovation is expensive, risky, and easily copied, inventors are less likely to undertake the guaranteed costs of innovation in order to obtain the mere possibility of an invention that others can copy.[45] Both common sense and recent economic scholarship suggest that these dynamics of cost, risk, and reward vary by the type of thing being patented.[46] And the functional case that patents promote progress generally is stronger for subject matter that has "historically been eligible to receive the protection of our patent laws," *Diehr*, 450 U. S., at 184, than for methods of doing business.

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[45] See generally W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 13–15 (2003).

[46] See, *e. g.*, Burk & Lemley, Policy Levers in Patent Law, 89 Va. L. Rev. 1575, 1577–1589 (2003) (hereinafter Burk & Lemley).

Many have expressed serious doubts about whether patents are necessary to encourage business innovation.[47] Despite the fact that we have long assumed business methods could not be patented, it has been remarked that "the chief business of the American people is business."[48] Federal Express developed an overnight delivery service and a variety of specific methods (including shipping through a central hub and online package tracking) without a patent. Although counterfactuals are a dubious form of analysis, I find it hard to believe that many of our entrepreneurs forwent business innovation because they could not claim a patent on their new methods.

"[C]ompanies have ample incentives to develop business methods even without patent protection, because the competitive marketplace rewards companies that use more efficient business methods." Burk & Lemley 1618.[49] Innovators often capture advantages from new business methods notwithstanding the risk of others copying their innovation. Some business methods occur in secret and therefore can be protected with trade secrecy.[50] And for those methods that occur in public, firms that innovate often capture long-term benefits from doing so, thanks to various first-mover advantages, including lock-ins, branding, and networking effects.[51]

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[47] See, *e. g.*, *id.*, at 1618; Carrier, Unraveling the Patent-Antitrust Paradox, 150 U. Pa. L. Rev. 761, 826 (2002) (hereinafter Carrier); Dreyfuss, Are Business Method Patents Bad for Business? 16 Santa Clara Computer & High Tech. L. J. 263, 274–277 (2000) (hereinafter Dreyfuss); Posner, The Law and Economics of Intellectual Property, 131 Daedalus 5 (Spring 2002).

[48] C. Coolidge, The Press Under a Free Government, in Foundations of the Republic: Speeches and Addresses 187 (1926).

[49] See also Pollack 75–76 ("Since business methods are 'useful' when they directly earn revenue, they are inherently unlikely to be under-produced").

[50] See R. Levin et al., Appropriating the Returns From Industrial Research and Development, in 3 Brookings Papers on Economic Activity 794–795 (1987).

[51] See Burk & Lemley 1618; Dreyfuss 275; see generally Carrier 821–823. Concededly, there may be some methods of doing business that do not confer

Business innovation, moreover, generally does not entail the same kinds of risk as does more traditional, technological innovation. It generally does not require the same "enormous costs in terms of time, research, and development," *Bicron*, 416 U. S., at 480, and thus does not require the same kind of "compensation to [innovators] for their labor, toil, and expense," *Seymour* v. *Osborne*, 11 Wall. 516, 533–544 (1871).[52]

Nor, in many cases, would patents on business methods promote progress by encouraging "public disclosure." *Pfaff*, 525 U. S., at 63; see also *Brenner* v. *Manson*, 383 U. S. 519, 533 (1966) ("[O]ne of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions"). Many business methods are practiced in public, and therefore a patent does not necessarily encourage the dissemination of anything not already known. And for the methods practiced in private, the benefits of disclosure may be small: Many such methods are distributive, not productive—that is, they do not generate any efficiency but only provide a means for competitors to one-up each other in a battle for pieces of the pie. And as the Court has explained, "it is hard to see how the public would be benefited by disclosure" of certain business tools, since the nondisclosure of these tools "encourages businesses to initiate new and individualized plans of operation," which, "in turn, leads to a greater variety of business methods." *Bicron*, 416 U. S., at 483.

In any event, even if patents on business methods were useful for encouraging innovation and disclosure, it would

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sufficient first-mover advantages. See Abramowicz & Duffy, Intellectual Property for Market Experimentation, 83 N. Y. U. L. Rev. 337, 340–342 (2008).

[52] See Burk & Lemley 1618; Carrier 826; Olson, Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter, 82 Temp. L. Rev. 181, 231 (2009).

still be questionable whether they would, on balance, facilitate or impede the progress of American business. For even when patents encourage innovation and disclosure, "*too much* patent protection can impede rather than 'promote the Progress of . . . useful Arts.'" *Laboratory Corp. of America Holdings* v. *Metabolite Laboratories, Inc.*, 548 U. S. 124, 126–127 (2006) (BREYER, J., dissenting from dismissal of certiorari). Patents "can discourage research by impeding the free exchange of information," for example, by forcing people to "avoid the use of potentially patented ideas, by leading them to conduct costly and time-consuming searches of existing or pending patents, by requiring complex licensing arrangements, and by raising the costs of using the patented" methods. *Id.*, at 127. Although "[e]very patent is the grant of a privilege of exacting tolls from the public," *Great Atlantic,* 340 U. S., at 154 (Douglas, J., concurring), the tolls of patents on business methods may be especially high.

The primary concern is that patents on business methods may prohibit a wide swath of legitimate competition and innovation. As one scholar explains, "it is useful to conceptualize knowledge as a pyramid: the big ideas are on top; specific applications are at the bottom." Dreyfuss 275. The higher up a patent is on the pyramid, the greater the social cost and the greater the hindrance to further innovation.[53] Thus, this Court stated in *Benson* that "[p]henomena of nature . . . , mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work," 409 U. S., at 67; see also *Joseph E. Seagram & Sons, Inc.*, 180 F. 2d, at 28 ("To give appellant a monopoly, through the issuance of a patent, upon so great an area . . . would in our view impose without warrant of law a serious restraint upon the advance of science and industry").

[53] See Dreyfuss 276; Merges & Nelson, On the Complex Economics of Patent Scope, 90 Colum. L. Rev. 839, 873–878 (1990).

Business methods are similarly often closer to "big ideas," as they are the basic tools of *commercial* work. They are also, in many cases, the basic tools of further business innovation: Innovation in business methods is often a sequential and complementary process in which imitation may be a "*spur* to innovation" and patents may "become an *impediment*." Bessen & Maskin, Sequential Innovation, Patents, and Imitation, 40 RAND J. Econ. 611, 613 (2009).[54] "Think how the airline industry might now be structured if the first company to offer frequent flyer miles had enjoyed the sole right to award them." Dreyfuss 264. "[I]mitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats*, 489 U. S., at 146.

If business methods could be patented, then many business decisions, no matter how small, could be *potential* patent violations. Businesses would either live in constant fear of litigation or would need to undertake the costs of searching through patents that describe methods of doing business, attempting to decide whether their innovation is one that remains in the public domain. See Long, Information Costs in Patent and Copyright, 90 Va. L. Rev. 465, 487–488 (2004) (hereinafter Long). But as we have long explained, patents should not "embarras[s] the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith." *Atlantic Works* v. *Brady*, 107 U. S. 192, 200 (1883).[55]

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[54] See also Raskind, The *State Street Bank* Decision: The Bad Business of Unlimited Patent Protection for Methods of Doing Business, 10 Ford. Intell. Prop. Media & Ent. L. J. 61, 102 (1999) ("Interactive emulation more than innovation is the driving force of business method changes").

[55] There is substantial academic debate, moreover, about whether the normal process of screening patents for novelty and obviousness can function effectively for business methods. The argument goes that because business methods are both vague and not confined to any one industry, there is not a well-confined body of prior art to consult, and therefore

These effects are magnified by the "potential vagueness" of business method patents, *eBay Inc.*, 547 U. S., at 397 (KENNEDY, J., concurring). When it comes to patents, "clarity is essential to promote progress." *Festo Corp.*, 535 U. S., at 730–731. Yet patents on methods of conducting business generally are composed largely or entirely of intangible steps. Compared to "the kinds of goods . . . around which patent rules historically developed," it thus tends to be more costly and time consuming to search through, and to negotiate licenses for, patents on business methods. See Long 539, 470.[56]

The breadth of business methods, their omnipresence in our society, and their potential vagueness also invite a particularly pernicious use of patents that we have long criticized. As early as the 19th century, we explained that the patent laws are not intended to "creat[e] a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts." *Atlantic Works*, 107 U. S., at 200. Yet business method patents may have begun to do exactly that. See *eBay Inc.*, 547 U. S., at 396–397 (opinion of KENNEDY, J.).

These many costs of business method patents not only may stifle innovation, but they are also likely to "stifle competi-

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many "bad" patents are likely to issue, a problem that would need to be sorted out in later litigation. See, *e. g.*, Dreyfuss 268–270; Eisenberg, Analyze This: A Law and Economics Agenda for the Patent System, 53 Vand. L. Rev. 2081, 2090 (2000); Merges 589–590.

[56] See also J. Bessen & M. Meurer, Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk 46–72 (2008) (hereinafter Bessen & Meurer); P. Menell & S. Scotchmer, Intellectual Property Law, in 2 Handbook of Law and Economics 1500–1501, 1506 (M. Polinsky & S. Shavell eds. 2007). Concededly, alterations in the remedy structure, such as the First Inventor Defense Act of 1999, § 4301 *et seq.*, 113 Stat. 1536, codified at 35 U. S. C. § 273, mitigate these costs.

tion," *Bonito Boats*, 489 U. S., at 146. Even if a business method patent is ultimately held invalid, patent holders may be able to use it to threaten litigation and to bully competitors, especially those that cannot bear the costs of a drawn-out, fact-intensive patent litigation.[57] That can take a particular toll on small and upstart businesses.[58] Of course, patents always serve as a barrier to competition for the type of subject matter that is patented. But patents on business methods are patents on business itself. Therefore, unlike virtually every other category of patents, they are by their very nature likely to depress the dynamism of the marketplace.[59]

* * *

The constitutional standard for patentability is difficult to apply with any precision, and Congress has significant discretion to "implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim," *Graham*, 383 U. S., at 6. But Congress has not, either explicitly or implicitly, determined that patents on methods of doing business would effectuate this aim. And as I understand their practical consequences, it is hard to see how they would.

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[57] See generally Farrell & Shapiro, How Strong Are Weak Patents? 98 Am. Econ. Rev. 1347 (2008); Meurer, Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation, 44 Boston College L. Rev. 509 (2003); Moore, Populism and Patents, 82 N. Y. U. L. Rev. 69, 90–91 (2007).

[58] See Bessen & Meurer 176; Lessig, The Death of Cyberspace, 57 Wash. & Lee L. Rev. 337, 346–347 (2000).

[59] Congress and the courts have worked long and hard to create and administer antitrust laws that ensure businesses cannot prevent each other from competing vigorously. If methods of conducting business were themselves patentable, then virtually any novel, nonobvious business method could be granted a federally protected monopoly. The tension this might create with our antitrust regime provides yet another reason for skepticism that Congress would have wanted the patent laws to extend to business methods.

VII

The Constitution grants to Congress an important power to promote innovation. In its exercise of that power, Congress has established an intricate system of intellectual property. The scope of patentable subject matter under that system is broad. But it is not endless. In the absence of any clear guidance from Congress, we have only limited textual, historical, and functional clues on which to rely. Those clues all point toward the same conclusion: that petitioners' claim is not a "process" within the meaning of § 101 because methods of doing business are not, in themselves, covered by the statute. In my view, acknowledging as much would be a far more sensible and restrained way to resolve this case. Accordingly, while I concur in the judgment, I strongly disagree with the Court's disposition of this case.

JUSTICE BREYER, with whom JUSTICE SCALIA joins as to Part II, concurring in the judgment.

I

I agree with JUSTICE STEVENS that a "general method of engaging in business transactions" is not a patentable "process" within the meaning of 35 U. S. C. § 101. *Ante*, at 614 (opinion concurring in judgment). This Court has never before held that so-called "business methods" are patentable, and, in my view, the text, history, and purposes of the Patent Act make clear that they are not. *Ante*, at 621–657 (same). I would therefore decide this case on that ground, and I join JUSTICE STEVENS' opinion in full.

I write separately, however, in order to highlight the substantial *agreement* among many Members of the Court on many of the fundamental issues of patent law raised by this case. In light of the need for clarity and settled law in this highly technical area, I think it appropriate to do so.

II

In addition to the Court's unanimous agreement that the claims at issue here are unpatentable abstract ideas, it is my view that the following four points are consistent with both the opinion of the Court and JUSTICE STEVENS' opinion concurring in the judgment:

First, although the text of § 101 is broad, it is not without limit. See *ante*, at 601–602 (opinion of the Court); *ante*, at 622 (opinion of STEVENS, J.). "[T]he underlying policy of the patent system [is] that 'the things which are worth to the public the embarrassment of an exclusive patent,' . . . must outweigh the restrictive effect of the limited patent monopoly." *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 10–11 (1966) (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 Writings of Thomas Jefferson 181 (H. Washington ed.)). The Court has thus been careful in interpreting the Patent Act to "determine not only what is protected, but also what is free for all to use." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 151 (1989). In particular, the Court has long held that "[p]henomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable" under § 101, since allowing individuals to patent these fundamental principles would "wholly pre-empt" the public's access to the "basic tools of scientific and technological work." *Gottschalk* v. *Benson*, 409 U. S. 63, 67, 72 (1972); see also, *e. g.*, *Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981); *Diamond* v. *Chakrabarty*, 447 U. S. 303, 309 (1980).

Second, in a series of cases that extend back over a century, the Court has stated that "[t]ransformation and reduction of an article to a different state or thing is *the clue* to the patentability of a process claim that does not include particular machines." *Diehr*, *supra*, at 184 (emphasis added; internal quotation marks omitted); see also, *e. g.*, *Benson*, *supra*, at 70; *Parker* v. *Flook*, 437 U. S. 584, 588, n. 9 (1978); *Cochrane* v. *Deener*, 94 U. S. 780, 788 (1877). Application of

this test, the so-called "machine-or-transformation test," has thus repeatedly helped the Court to determine what is "a patentable 'process.'" *Flook*, *supra*, at 589.

Third, while the machine-or-transformation test has always been a "useful and important clue," it has never been the "sole test" for determining patentability. *Ante*, at 604; see also *ante*, at 614 (opinion of STEVENS, J.); *Benson*, *supra*, at 71 (rejecting the argument that "no process patent could ever qualify" for protection under § 101 "if it did not meet the [machine-or-transformation] requirements"). Rather, the Court has emphasized that a process claim meets the requirements of § 101 when, "considered as a whole," it "is performing a function which the patent laws were designed to protect (*e. g.*, transforming or reducing an article to a different state or thing)." *Diehr*, *supra*, at 192. The machine-or-transformation test is thus an *important example* of how a court can determine patentability under § 101, but the Federal Circuit erred in this case by treating it as the *exclusive test*.

Fourth, although the machine-or-transformation test is not the only test for patentability, this by no means indicates that anything which produces a "'useful, concrete and tangible result,'" *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368, 1373 (CA Fed. 1998), is patentable. "[T]his Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary." *Laboratory Corp. of America Holdings* v. *Metabolite Laboratories, Inc.*, 548 U. S. 124, 136 (2006) (BREYER, J., dissenting from dismissal of certiorari as improvidently granted); see also, *e. g.*, *O'Reilly* v. *Morse*, 15 How. 62, 117 (1854); *Flook*, *supra*, at 590. Indeed, the introduction of the "useful, concrete and tangible result" approach to patentability, associated with the Federal Circuit's *State Street* decision, preceded the granting of patents that "ranged from the somewhat ridiculous to the truly absurd." *In re Bilski*, 545 F. 3d 943, 1004

(CA Fed. 2008) (Mayer, J., dissenting) (citing patents on, *inter alia*, a "method of training janitors to dust and vacuum using video displays," a "system for toilet reservations," and a "method of using color-coded bracelets to designate dating status in order to limit 'the embarrassment of rejection' "); see also Brief for Respondent 40–41, and n. 20 (listing dubious patents). To the extent that the Federal Circuit's decision in this case rejected that approach, nothing in today's decision should be taken as disapproving of that determination. See *ante*, at 612; *ante*, at 614, n. 1 (opinion of STEVENS, J.).

In sum, it is my view that, in reemphasizing that the "machine-or-transformation" test is not necessarily the *sole* test of patentability, the Court intends neither to deemphasize the test's usefulness nor to suggest that many patentable processes lie beyond its reach.

III

With these observations, I concur in the Court's judgment.

Syllabus

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, AKA HASTINGS CHRISTIAN FELLOWSHIP *v.* MARTINEZ ET AL.

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

No. 08–1371. Argued April 19, 2010—Decided June 28, 2010

Respondent Hastings College of the Law (Hastings), a school within the University of California public school system, extends official recognition to student groups through its "Registered Student Organization" (RSO) program. Several benefits attend this school-approved status, including the use of school funds, facilities, and channels of communication, as well as Hastings' name and logo. In exchange for recognition, RSOs must abide by certain conditions. Critical here, all RSOs must comply with the school's Nondiscrimination Policy, which tracks state law barring discrimination on a number of bases, including religion and sexual orientation. Hastings interprets this policy, as it relates to the RSO program, to mandate acceptance of all comers: RSOs must allow any student to participate, become a member, or seek leadership positions, regardless of her status or beliefs.

At the beginning of the 2004–2005 academic year, the leaders of an existing Christian RSO formed petitioner Christian Legal Society (CLS) by affiliating with a national Christian association that charters student chapters at law schools throughout the country. These chapters must adopt bylaws that, *inter alia*, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman. CLS interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct" or holds religious convictions different from those in the Statement of Faith. Hastings rejected CLS's application for RSO status on the ground that the group's bylaws did not comply with Hastings' open-access policy because they excluded students based on religion and sexual orientation.

CLS filed this suit for injunctive and declaratory relief under 42 U. S. C. §1983, alleging that Hastings' refusal to grant the group RSO status violated its First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. On cross-motions for summary judgment, the District Court ruled for Hastings.

The court held that the all-comers condition on access to a limited public forum was both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech. Nor, in the court's view, did Hastings impermissibly impair CLS's right to expressive association: Hastings did not order CLS to admit any student, nor did the school proscribe any speech; Hastings merely placed conditions on the use of school facilities and funds. The court also rejected CLS's free exercise argument, stating that the Nondiscrimination Policy did not single out religious beliefs, but rather was neutral and of general applicability. The Ninth Circuit affirmed, ruling that the all-comers condition on RSO recognition was reasonable and viewpoint neutral.

Held:

1. The Court considers only whether a public institution's conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution. CLS urges the Court to review, instead, the Nondiscrimination Policy as written—prohibiting discrimination on enumerated bases, including religion and sexual orientation. The policy's written terms, CLS contends, target solely those groups that organize around religious beliefs or that disapprove of particular sexual behavior, and leave other associations free to limit membership to persons committed to the group's ideology. This argument flatly contradicts the joint stipulation of facts the parties submitted at the summary-judgment stage, which specified: "Hastings requires that [RSOs] allow any student to participate, . . . regardless of [her] status or beliefs. For example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs . . . ." This Court has long recognized that parties are bound by, and cannot contradict, their stipulations. See, *e. g.*, *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 226. The Court therefore rejects CLS's attempt to escape from the stipulation and shift its target to Hastings' policy as written. Pp. 675–678.

2. The all-comers policy is a reasonable, viewpoint-neutral condition on access to the RSO forum; it therefore does not transgress First Amendment limitations. Pp. 678–697.

(a) The Court's limited-public-forum decisions supply the appropriate framework for assessing both CLS's free-speech and expressive-association claims; those decisions recognize that a governmental entity, in regulating property in its charge, may impose restrictions on speech that are reasonable in light of the purposes of the forum and viewpoint neutral, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829. CLS urges the Court to apply to its expressive-association claim a different line of cases—decisions in which the Court

has rigorously reviewed restrictions on associational freedom in the context of public accommodations, *e. g.*, *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623. But, because CLS's expressive-association and free-speech arguments merge—*who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed—it makes little sense to treat the claims as discrete. Instead, three observations lead the Court to analyze CLS's arguments under limited-public-forum precedents.

First, the same considerations that have led the Court to apply a less restrictive level of scrutiny to speech in limited public forums, as compared to other environments, apply with equal force to expressive association occurring in a limited public forum. Speech and expressive-association rights are closely linked. See *id.*, at 622. When these intertwined rights arise in exactly the same context, it would be anomalous for a speech restriction to survive constitutional review under the limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. Second, the strict scrutiny the Court has applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State's authority to "reserv[e] [them] for certain groups." *Rosenberger*, 515 U. S., at 829. Third, this case fits comfortably within the limited-public-forum category, for CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The Court's expressive-association decisions, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. See, *e. g.*, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 648. Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. Pp. 678–683.

(b) In three cases, this Court held that public universities had unconstitutionally singled out student groups for disfavored treatment because of their points of view. See *Healy* v. *James*, 408 U. S. 169; *Widmar* v. *Vincent*, 454 U. S. 263; and *Rosenberger*. Most recently and comprehensively, in *Rosenberger*, the Court held that a university generally may not withhold benefits from student groups because of their religious outlook. "Once it has opened a limited [public] forum," the Court emphasized, "the State must respect the lawful boundaries it has itself set." 515 U. S., at 829. It may "not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint." *Ibid.* Pp. 683–685.

(c) Hastings' all-comers policy is reasonable, taking into account the RSO forum's function and "all the surrounding circumstances." *Corne-*

lius v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 809. Pp. 685–694.

(1) The Court's inquiry is shaped by the educational context in which it arises: "First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U. S., at 268, n. 5. This Court is the final arbiter of whether a public university has exceeded constitutional constraints. The Court has, however, cautioned courts to resist "substitut[ing] their own notions of sound educational policy for those of . . . school authorities," for judges lack the on-the-ground expertise and experience of school administrators. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 206. Because schools enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate," *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 240, the Court approaches its task here mindful that Hastings' decisions about the character of its student-group program are due decent respect. Pp. 685–687.

(2) The justifications Hastings asserts in support of its all-comers policy are reasonable in light of the RSO forum's purposes. First, the policy ensures that the leadership, educational, and social opportunities afforded by RSOs are available to all students. RSOs are eligible for financial assistance drawn from mandatory student-activity fees; the policy ensures that no Hastings student is forced to fund a group that would reject her as a member. Second, the policy helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. CLS's proposal that Hastings permit exclusion because of *belief* but forbid discrimination due to *status* would impose on Hastings the daunting task of trying to determine whether a student organization cloaked prohibited status exclusion in belief-based garb. Third, Hastings reasonably adheres to the view that its policy, to the extent it brings together individuals with diverse backgrounds and beliefs, encourages tolerance, cooperation, and learning among students. Fourth, the policy incorporates state-law discrimination proscriptions, thereby conveying Hastings' decision to decline to subsidize conduct disapproved by the State. So long as a public school does not contravene constitutional limits, its choice to advance state-law goals stands on firm footing. Pp. 687–690.

(3) Hastings' policy is all the more creditworthy in light of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 53. Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and certain bulletin boards to advertise events. Although CLS could not take ad-

vantage of RSO-specific methods of communication, the advent of electronic media and social-networking sites lessens the importance of those channels. Private groups, such as fraternities and sororities, commonly maintain a presence at universities without official school affiliation. CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. "The variety and type of alternative modes of access present here," in short, "compare favorably with those in other [limited public] forum cases where [the Court has] upheld restrictions." *Id.*, at 53–54. Pp. 690–691.

(4) CLS's arguments that the all-comers policy is not reasonable are unavailing. CLS contends that there can be no diversity of viewpoints in a forum when groups are not permitted to form around viewpoints, but this argument confuses CLS's preferred policy with constitutional limitation—the *advisability* of Hastings' policy does not control its *permissibility.* A State's restriction on access to a limited public forum, moreover, "need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U. S., at 808. CLS's contention that Hastings' policy will facilitate hostile takeovers of RSOs by student saboteurs bent on subverting a group's mission is more hypothetical than real; there is no history or prospect of RSO hijackings at Hastings. Cf. *National Endowment for Arts* v. *Finley,* 524 U. S. 569, 584. Finally, CLS's assertion that Hastings lacks any legitimate interest in urging religious groups not to favor co-religionists erroneously focuses on the benefits the group must forgo, while ignoring the interests of those it seeks to fence out. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership. Pp. 692–694.

(d) Hastings' all-comers policy is viewpoint neutral. Pp. 694–697.

(1) The policy draws no distinction between groups based on their message or perspective; its requirement that *all* student groups accept *all* comers is textbook viewpoint neutral. Pp. 694–695.

(2) Conceding that the policy is nominally neutral, CLS asserts that it systematically—and impermissibly—burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream. This argument fails because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791. Hastings' requirement that RSOs accept all comers, the Court is satisfied, is "justified without reference to the content [or viewpoint] of the regulated speech." *Ibid.*

It targets the *act* of rejecting would-be group members without reference to the reasons motivating that behavior. Pp. 695–697.

3. Neither lower court addressed CLS's argument that Hastings selectively enforces its all-comers policy. This Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider this argument if, and to the extent, it is preserved. Pp. 697–698.

319 Fed. Appx. 645, affirmed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., *post*, p. 698, and KENNEDY, J., *post*, p. 703, filed concurring opinions. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 706.

Michael W. McConnell argued the cause for petitioner. With him on the briefs were *Kimberlee Wood Colby*, *Gregory S. Baylor*, *Timothy J. Tracey*, and *M. Casey Mattox*.

Gregory G. Garre argued the cause for respondents. With him on the brief for respondents Hastings College of the Law were *Maureen E. Mahoney*, *J. Scott Ballenger*, *Lori Alvino McGill*, and *Ethan P. Schulman*. *Paul M. Smith*, *Duane C. Pozza*, *Shannon P. Minter*, and *Christopher F. Stoll* filed a brief for respondent-intervenor Hastings Outlaw.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Michael A. Cox*, Attorney General of Michigan, *B. Eric Restuccia*, Solicitor General, *Joel D. McGormley*, and *Laura L. Moody*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *Jon Bruning* of Nebraska, *Gary K. King* of New Mexico, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia; for Advocates International by *Samuel E. Ericsson* and *Samuel B. Casey;* for Agudath Israel of America by *Jeffrey Ira Zuckerman* and *David Zwiebel;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Walter M. Weber*, *Paul D. Clement*, and *Adam M. Conrad;* for the American Islamic Congress et al. by *Douglas Laycock*, *Kevin J. Hasson*, *Eric C. Rassbach*, and *Han-*

JUSTICE GINSBURG delivered the opinion of the Court.

In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universi-

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nah C. Smith; for the Boy Scouts of America by *George A. Davidson*, *Carla A. Kerr*, *Scott H. Christensen*, and *David K. Park;* for the Cato Institute by *Richard A. Epstein* and *Ilya Shapiro;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso* and *Edwin Meese III;* for Christian Medical and Dental Associations et al. by *Thomas C. Berg*, *Richard W. Garnett IV*, *Kelly J. Shackelford*, and *Hiram S. Sasser III;* for Commissioned II Love Outreach Ministries et al. by *Steven W. Fitschen;* for Eugene H. Merrill et al. by *Timothy Belz* and *Carl H. Esbeck;* for the Foundation for Individual Rights in Education et al. by *Harvey A. Silverglate* and *Greg Lukianoff;* for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart;* for Liberty Counsel et al. by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister;* for the Pacific Justice Institute et al. by *Peter D. Lepiscopo;* for The Rutherford Institute by *John W. Whitehead* and *James J. Knicely;* for the Union of Orthodox Jewish Congregations of America by *Nathan J. Diament*, *Michael S. Lazaroff*, and *Mark D. Harris;* and for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr.*, and *Jeffrey Hunter Moon.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Carolyn B. Lamm*, *A. Stephen Hut, Jr.*, and *Paul R. Q. Wolfson;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Matthew A. Coles*, *James D. Esseks*, *Daniel Mach*, and *Heather L. Weaver;* for the American Council on Education et al. by *H. Christopher Bartolomucci* and *Ada Meloy;* for the American Humanist Association et al. by *Robert V. Ritter;* for the American Jewish Committee et al. by *Samuel Estreicher*, *D. Theodore Rave, Jr.*, *Kara H. Stein*, *Ayesha N. Khan*, and *David Saperstein;* for the Anti-Defamation League et al. by *Robert G. Sugarman*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for Associated Students of the University of California, Hastings College of Law, by *Simon J. Frankel* and *Kelly P. Finley;* for the Association of American Law Schools by *Sherry F. Colb;* for the Center for Inquiry by *Carmine D. Boccuzzi*, *Jorge G. Tenreiro*, *Ronald A. Lindsay*, and *Derek C. Araujo;* for the International Municipal Lawyers Association et al. by *Deanne E. Maynard*, *Seth M. Galanter*, *Charles W. Thompson, Jr.*, and *John Daniel Reaves;* for the Lambda Legal Defense and Education Fund, Inc., et al. by *Clifford M. Sloan*, *Bradley A. Klein*, *Jon W. Davidson*, *Susan L. Sommer*, *Gary D. Buseck*, and *Mary L. Bonauto;* for the National LGBT Bar Association et al. by *Michael T. Reynolds;* for the Na-

ties from denying student organizations access to school-sponsored forums because of the groups' viewpoints. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Healy* v. *James*, 408 U. S. 169 (1972). This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program.

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tional School Boards Association et al. by *Lisa S. Blatt, Trenton H. Norris, Francisco M. Negrón, Jr.,* and *Naomi E. Gittins;* and for State Universities et al. by *Andrew J. Pincus, Charles Rothfeld,* and *Scott L. Shuchart.*

Briefs of *amici curiae* were filed for the Commonwealth of Massachusetts et al. by *Martha Coakley,* Attorney General of Massachusetts, *Irving L. Gornstein, Kathryn E. Tarbert,* and *Walter Dellinger,* and by the Attorneys General for their respective States as follows: *Douglas F. Gansler* of Maryland and *William H. Sorrell* of Vermont; for the Association of Christian Schools International et al. by *Stuart J. Lark;* for the Baptist Joint Committee for Religious Liberty et al. by *J. Brent Walker, K. Hollyn Hollman,* and *James T. Gibson;* for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly;* for Gays and Lesbians for Individual Liberty by *Thomas G. Hungar;* for the Society of American Law Teachers by *Robert M. Abrahams* and *Daniel L. Greenberg;* and for Students for Life America et al. by *James Bopp, Jr.*

In accord with the District Court and the Court of Appeals, we reject CLS's First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

I

Founded in 1878, Hastings was the first law school in the University of California public school system. Like many institutions of higher education, Hastings encourages students to form extracurricular associations that "contribute to the Hastings community and experience." App. 349. These groups offer students "opportunities to pursue academic and social interests outside of the classroom [to] further their education" and to help them "develo[p] leadership skills." *Ibid.*

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. *Id.*, at 217. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual

Student Organizations Fair designed to advance recruitment efforts. *Id.*, at 216–219. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. *Id.*, at 218–219. Finally, Hastings allows officially recognized groups to use its name and logo. *Id.*, at 216.

In exchange for these benefits, RSOs must abide by certain conditions. Only a "non-commercial organization whose membership is limited to Hastings students may become [an RSO]." App. to Pet. for Cert. 83a. A prospective RSO must submit its bylaws to Hastings for approval, *id.*, at 83a–84a; and if it intends to use the Law School's name or logo, it must sign a license agreement, App. 219. Critical here, all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students." *Ibid.*[1]

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

> "[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings'] policy on nondiscrimination is to comply fully with applicable law.
>
> "[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." *Id.*, at 220.

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[1] These policies and regulations address a wide range of matters, for example, alcoholic beverages at campus events, bake sales, and blood drives. App. 246.

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." *Id.*, at 221.[2] Other law schools have adopted similar all-comers policies. See, *e. g.*, Georgetown University Law Center, Office of Student Life: Student Organizations, available at http://www.law.georgetown.edu/StudentLife/StudentOrgs/NewGroup.htm (All Internet materials as visited June 24, 2010, and included in Clerk of Court's case file) (Membership in registered groups must be "open to all students."); Hofstra Law School Student Handbook 2009–2010, p. 49, available at http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf ("[Student] organizations are open to all students."). From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stir-

[2] "Th[is] policy," Hastings clarifies, "does not foreclose neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Brief for Hastings 5. So long as all students have the *opportunity* to participate on equal terms, RSOs may require them, *inter alia*, to pay dues, maintain good attendance, refrain from gross misconduct, or pass a skill-based test, such as the writing competitions administered by law journals. See *ibid.* The dissent trumpets these neutral, generally applicable membership requirements, arguing that, in truth, Hastings has a "some-comers," not an all-comers, policy. *Post*, at 707, 708, 713–714, 715, 727–728, 737 (opinion of Alito, J.). Hastings' open-access policy, however, requires only that student organizations open eligibility for membership and leadership regardless of a student's status or beliefs; dues, attendance, skill measurements, and comparable uniformly applied standards are fully compatible with the policy. The dissent makes much of Hastings' observation that groups have imposed "even conduct requirements." *Post*, at 714, 728 (internal quotation marks omitted). But the very example Hastings cites leaves no doubt that the Law School was referring to boilerplate good-behavior standards, *e. g.*, "[m]embership may cease . . . if the member is found to be involved in gross misconduct," App. 173 (cited in Brief for Hastings 5).

ring this litigation, "no student organization at Hastings . . . ever sought an exemption from the Policy." App. 221.

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization—which had been an RSO at Hastings for a decade—formed CLS by affiliating with the national Christian Legal Society (CLS-National). *Id.*, at 222–223, 225. CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. *Id.*, at 225. CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. *Id.*, at 225–226; App. to Pet. for Cert. 101a.[3] Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." App. 226. CLS also excludes students who hold religious convictions different from those in the Statement of Faith. *Id.*, at 227.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. *Id.*, at 227–228. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy

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[3] The Statement of Faith provides:

"Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God." App. 226.

because CLS barred students based on religion and sexual orientation. *Id.*, at 228.

CLS formally requested an exemption from the Nondiscrimination Policy, *id.*, at 281, but Hastings declined to grant one. "[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.*, at 294. If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." *Ibid.* CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. *Id.*, at 219, 233. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004–2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. *Id.*, at 229. It also hosted a beach barbeque, Thanksgiving dinner, campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet, and other informal social activities. *Ibid.*

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U. S. C. §1983. Its complaint alleged that Hastings' refusal to grant the organization RSO status violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief.[4]

On cross-motions for summary judgment, the U. S. District Court for the Northern District of California ruled in favor

[4] The District Court allowed respondent Hastings Outlaw, an RSO committed to "combating discrimination based on sexual orientation," *id.*, at 97, to intervene in the suit, *id.*, at 104.

of Hastings. The Law School's all-comers condition on access to a limited public forum, the court held, was both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech. App. to Pet. for Cert. 27a–38a.

Nor, in the District Court's view, did the Law School impermissibly impair CLS's right to expressive association. "Hastings is not directly ordering CLS to admit [any] studen[t]," the court observed, *id.*, at 42a; "[r]ather, Hastings has merely placed conditions on" the use of its facilities and funds, *ibid.* "Hastings' denial of official recognition," the court added, "was not a substantial impediment to CLS's ability to meet and communicate as a group." *Id.*, at 49a.

The court also rejected CLS's Free Exercise Clause argument. "[T]he Nondiscrimination Policy does not target or single out religious beliefs," the court noted; rather, the policy "is neutral and of general applicability." *Id.*, at 63a. "CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation," the court explained, "but that does not convert the reason for Hastings' [Nondiscrimination Policy] to be one that is religiously-based." *Id.*, at 63a–64a.

On appeal, the Ninth Circuit affirmed in an opinion that stated, in full:

> "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. *Truth v. Kent Sch. Dist.*, 542 F. 3d 634, 649–50 (9th Cir. 2008)." *Christian Legal Soc. Chapter of Univ. of Cal.* v. *Kane*, 319 Fed. Appx. 645, 645–646 (CA9 2009).

We granted certiorari, 558 U. S. 1076 (2009), and now affirm the Ninth Circuit's judgment.

II

Before considering the merits of CLS's constitutional arguments, we must resolve a preliminary issue: CLS urges us to review the Nondiscrimination Policy as written—prohibiting discrimination on several enumerated bases, including religion and sexual orientation—and not as a requirement that all RSOs accept all comers. The written terms of the Nondiscrimination Policy, CLS contends, "targe[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior," and leave other associations free to limit membership and leadership to individuals committed to the group's ideology. Brief for Petitioner 19 (internal quotation marks omitted). For example, "[a] political . . . group can insist that its leaders support its purposes and beliefs," CLS alleges, but "a religious group cannot." *Id.*, at 20.

CLS's assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. In that filing, the parties specified:

> "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." App. 221 (Joint Stipulation ¶ 18) (emphasis added; citations omitted).[5]

[5] In its briefs before the District Court and the Court of Appeals, CLS several times affirmed that Hastings imposes an all-comers rule on RSOs. See, *e. g.*, Plaintiff's Notice of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in No. C 04 4484 JSW (ND Cal.), p. 4 ("Hastings interprets the [Nondiscrimination Policy] such that student organizations must allow *any* student, regardless of their status or beliefs, to participate in the group's activities and meetings and to become voting members and leaders of the group."); Brief for Ap-

Under the District Court's local rules, stipulated facts are deemed "undisputed." Civil Local Rule 56–2 (ND Cal. 2010). See also Pet. for Cert. 2 ("The material facts of this case are undisputed.").[6]

Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established." *H. Hackfeld & Co.* v. *United States*, 197 U. S. 442, 447 (1905).[7] This entitlement

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pellant in No. 06–15956 (CA9), pp. 29–30 ("Hastings illustrates the application of the Nondiscrimination Policy by explaining that for the Hastings Democratic Caucus to gain recognition, it must open its leadership and voting membership to Republicans."). In a hearing before the District Court, CLS's counsel reiterated that "it's important to understand what Hastings' policy is. According to . . . the stipulated facts, Hastings requires . . . that registered student organizations allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs." App. 438 (capitalization and internal quotation marks omitted). And at oral argument in this Court, counsel for CLS acknowledged that "the Court needs to reach the constitutionality *of the all-comers policy* as applied to CLS in this case." Tr. of Oral Arg. 59 (emphasis added). We repeat, in this regard, that Hastings' all-comers policy is hardly novel. Other law schools have adopted similar requirements. See *supra*, at 671; Brief for Association of American Law Schools as *Amicus Curiae* 20, n. 5.

[6] The dissent spills considerable ink attempting to create uncertainty about when the all-comers policy was adopted. See *post*, at 707, 708, 710, 711–712, 712, 713, 715, 716. What counts, however, is the parties' unqualified agreement that the all-comers policy *currently* governs. CLS's suit, after all, seeks only declaratory and injunctive—that is, prospective—relief. See App. 80 (First Amended Verified Complaint for Declaratory and Injunctive Relief).

[7] Record evidence, moreover, corroborates the joint stipulation concerning Hastings' all-comers policy. The Law School's then-Chancellor and Dean testified, for example, that "in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." App. 343. Hastings' Director of Student Services confirmed that RSOs must "be open to all students"—"even to students who may disagree with [an RSO's] purposes." *Id.*, at 320 (internal quotation marks omitted). See also *id.*, at 349 ("Hastings interprets the Nondiscrimination Policy as requiring that student organizations wish-

is the bookend to a party's undertaking to be bound by the factual stipulations it submits. See *post*, at 715 (ALITO, J., dissenting) (agreeing that "the parties must be held to their Joint Stipulation"). As a leading legal reference summarizes:

> "[Factual stipulations are] binding and conclusive . . . , and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, . . . or to maintain a contention contrary to the agreed statement, . . . or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 C. J. S., Stipulations § 93 (2000) (footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 226 (2000). Time and again, the dissent races away from the facts to which CLS stipulated. See, *e. g.*, *post*, at 707, 708, 710, 711–712, 713, 716, 728–729.[8] But factual stipulations are "formal con-

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ing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization.").

[8] In an effort to undermine the stipulation, the dissent emphasizes a sentence in Hastings' answer to CLS's first amended complaint which, the dissent contends, casts doubt on Hastings' fidelity to its all-comers policy. See *post*, at 711, 716. In context, Hastings' answer—which responded to CLS's allegation that the Law School singles out religious groups for discriminatory treatment—is sensibly read to convey that Hastings' policies and regulations apply to all groups equally. See App. 79 (denying that the Nondiscrimination Policy imposes on religious organizations restraints that are not applied to political, social, and cultural groups). In any event, the parties' joint stipulation supersedes the answer, to the extent of any conflict between the two filings. See *Pepper & Tanner, Inc.* v. *Shamrock Broadcasting, Inc.*, 563 F. 2d 391, 393 (CA9 1977) (Parties' "stipulation of facts . . . superseded all prior pleadings and controlled the subsequent course of the action.").

cessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission . . . is conclusive in the case." 2 K. Broun, McCormick on Evidence § 254, p. 181 (6th ed. 2006) (footnote omitted). See also, *e. g.*, *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").[9]

In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement, as described in the parties' accord. See 319 Fed. Appx., at 645–646; App. to Pet. for Cert. 32a; *id.*, at 36a. We reject CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written. This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.[10]

III

A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and

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[9] The dissent indulges in make-believe when it suggests that we are making factual findings about Hastings' all-comers policy. *Post*, at 707, 708. As CLS's petition for certiorari stressed, *"[t]he material facts of this case are undisputed."* Pet. for Cert. 2 (emphasis added). We take the facts as the joint stipulation describes them, see *supra*, at 675–677 and this page; our decision respects, while the dissent ignores, the conclusive effect of the parties' accord.

[10] The dissent, in contrast, devotes considerable attention to CLS's arguments about the Nondiscrimination Policy as written. *Post*, at 707, 708, 710, 723–727. We decline to address these arguments, not because we agree with the dissent that the Nondiscrimination Policy is "plainly" unconstitutional, *post*, at 723, but because, as noted, *supra*, at 675–677 and this page, that constitutional question is not properly presented.

expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.[11] Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985) (internal quotation marks omitted), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, *e. g.*, *Rosenberger*, 515 U. S., at 829. See also, *e. g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 392–393 (1993); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983).[12]

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[11] In conducting forum analysis, our decisions have sorted government property into three categories. First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 469 (2009). Second, governmental entities create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose"; speech restrictions in such a forum "are subject to the same strict scrutiny as restrictions in a traditional public forum." *Id.*, at 469–470. Third, governmental entities establish limited public forums by opening property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.*, at 470. As noted in text, "[i]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral." *Ibid.*

[12] Our decisions make clear, and the parties agree, that Hastings, through its RSO program, established a limited public forum. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995); Tr. of Oral Arg. 24 (counsel for CLS); Brief for Petitioner 25–26; Brief for Hastings 27–28; Brief for Hastings Outlaw 27.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced "through . . . significantly less restrictive [means]." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984). See also, *e. g.*, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 648 (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*, 468 U. S., at 623. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." *Dale*, 530 U. S., at 659.

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. See Brief for Petitioner 35 (expressive association in this case is "the functional equivalent of speech itself"). It therefore makes little sense to treat CLS's speech and association claims as discrete. See *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 300 (1981). Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments, see *supra*, at 679, and n. 11, apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. See *Roberts*, 468 U. S., at 622 (Associational freedom is "implicit in the right to engage in activities protected by the First

Amendment."). When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. Accord Brief for State Universities et al. as *Amici Curiae* 37–38. That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role. See Brief for Petitioner 18.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may "reserv[e] [them] for certain groups." *Rosenberger*, 515 U. S., at 829. See also *Perry Ed. Assn.*, 460 U. S., at 49 ("Implicit in the concept" of a limited public forum is the State's "right to make distinctions in access on the basis of . . . speaker identity."); *Cornelius*, 473 U. S., at 806 ("[A] speaker may be excluded from" a limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created.").

An example sharpens the tip of this point: Schools, including Hastings, see App. to Pet. for Cert. 83a, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents. See, *e. g.*, Volokh, Freedom of Expressive Association and Government Subsidies, 58 Stan. L. Rev. 1919, 1940 (2006). The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to "confin[e] a [speech] forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U. S., at 829. See also *Healy*, 408 U. S., at 189 ("Associational activities need not be tolerated where they infringe reasonable campus rules.").

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition.[13] The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. See, *e. g.*, *Dale*, 530 U. S., at 648 (regulation "forc[ed] [the Boy Scouts] to accept members it [did] not desire" (internal quotation marks omitted)); *Roberts*, 468 U. S., at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than" forced inclusion of unwelcome participants.).[14]

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. See, *e. g.*, *Grove City College* v. *Bell*, 465 U. S. 555, 575–576 (1984); *Bob Jones Univ.* v. *United States*, 461

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[13] The fact that a university "expends funds to encourage a diversity of views from private speakers," this Court has held, does not justify it in "discriminat[ing] based on the viewpoint of private persons whose speech it facilitates." *Rosenberger*, 515 U. S., at 834. Applying limited-public-forum analysis (which itself prohibits viewpoint discrimination) to CLS's expressive-association claim, we emphasize, does not upset this principle.

[14] CLS also brackets with expressive-association precedents our decision in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995). There, a veterans group sponsoring a St. Patrick's Day parade challenged a state law requiring it to allow gay individuals to march in the parade behind a banner celebrating their Irish heritage and sexual orientation. *Id.*, at 572. In evaluating that challenge, the *Hurley* Court focused on the veterans group's interest in controlling the message conveyed by the organization. See *id.*, at 573–581. Whether *Hurley* is best conceptualized as a speech or association case (or both), however, that precedent is of little help to CLS. *Hurley* involved the application of a statewide public-accommodations law to the most traditional of public forums: the street. That context differs markedly from the limited public forum at issue here: a university's application of an all-comers policy to its student-organization program.

U. S. 574, 602–604 (1983). Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. Cf. *Norwood* v. *Harrison*, 413 U. S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

B

As earlier pointed out, *supra*, at 667–668, 678–679, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). 408 U. S., at 170. Characterizing SDS's mission as violent and disruptive, and finding the organization's philosophy repugnant, the college completely banned the SDS chapter from campus; in its effort to sever all channels of communication between students and the group, university officials went so far as to disband a meeting of SDS members in a campus coffee shop. *Id.*, at 174–176. The college, we noted, could require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law," including "reasonable standards respecting conduct." *Id.*, at 193. But a public educational institution exceeds constitutional bounds, we held, when it "restrict[s] speech or association simply because

it finds the views expressed by [a] group to be abhorrent." *Id.*, at 187–188.[15]

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. 454 U. S., at 264–265. "A university's mission is education," we observed, "and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.*, at 268, n. 5. But because the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to

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[15] The dissent relies heavily on *Healy*, *post*, at 718–721, but its otherwise exhaustive account of the case elides the very fact the *Healy* Court identified as dispositive: The President of the college explicitly denied the student group official recognition *because of* the group's viewpoint. See 408 U. S., at 187 ("The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition."). In this case, in contrast, Hastings denied CLS recognition not because the school wanted to silence the "viewpoint that CLS sought to express through its membership requirements," *post*, at 721, n. 2, but because CLS, insisting on preferential treatment, declined to comply with the open-access policy applicable to all RSOs, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 390 (1992) ("Where the [State] does not target conduct on the basis of its expressive content, *acts* are not shielded from regulation *merely because they express a discriminatory . . . philosophy.*" (emphasis added)). As discussed *infra*, at 694–698, Hastings' all-comers policy is paradigmatically viewpoint neutral. The dissent's contention that "the identity of the student group" is the only "way of distinguishing *Healy*," *post*, at 721, is thus untenable.

The dissent's description of *Healy* also omits the *Healy* Court's observation that "[a] college administration may . . . requir[e] . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. . . . It merely constitutes an agreement to conform with reasonable standards respecting conduct. . . . [T]he benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees." 408 U. S., at 193–194.

strict scrutiny. *Id.*, at 269–270. The school's interest "in maintaining strict separation of church and State," we held, was not "sufficiently compelling to justify . . . [viewpoint] discrimination against . . . religious speech." *Id.*, at 270, 276 (internal quotation marks omitted).

Most recently and comprehensively, in *Rosenberger*, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. 515 U. S., at 825–827. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.*, at 831, 830.

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. "Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." *Id.*, at 829. The constitutional constraints on the boundaries the State may set bear repetition here: "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint." *Ibid.* (internal quotation marks omitted).

C

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances." *Cornelius*, 473 U. S., at 809.

1

Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed,

"must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U. S., at 268, n. 5 (internal quotation marks omitted). This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cf. *Pell* v. *Procunier*, 417 U. S. 817, 827 (1974) ("Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."). Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 206 (1982). See also, *e. g.*, *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 273 (1988) (noting our "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Healy*, 408 U. S., at 180 ("[T]his Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 507 (1969))).

A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. See *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 831, n. 4 (2002) (involvement in student groups is "a significant contributor to the breadth and quality of the educational experience" (internal quotation marks omitted)). Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in

which their students participate." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 240 (1990). We therefore "approach our task with special caution," *Healy*, 408 U. S., at 171, mindful that Hastings' decisions about the character of its student-group program are due decent respect.[16]

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement.[17] First, the open-access pol-

[16] The dissent mischaracterizes the nature of the respect we accord to Hastings. See *post*, at 707, 720–721, 732. As noted *supra*, at 685–686 and this page, this Court, exercising its independent judgment, must "interpre[t] and appl[y] . . . the right to free speech." *Post*, at 721. But determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators. See, *e. g.*, *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 206 (1982).

[17] Although the dissent maintains it is "content to address the constitutionality of Hastings' actions under our limited public forum cases," *post*, at 722, it resists the import of those cases at every turn. For example, although the dissent acknowledges that a university has the authority to set the boundaries of a limited public forum, *post*, at 722, 729, the dissent refuses to credit Hastings' all-comers policy as one of those boundaries. See *post*, at 729 (insisting that "Hastings' regulations . . . impose only two substantive limitations: A group . . . must have student members and must be noncommercial."). In short, "the design of the RSO forum," *post*, at 731, which the dissent discusses at length, *post*, at 729–735, is of its own tailoring.

Another example: The dissent pointedly observes that "[w]hile there can be no question that the State of California could not impose [an all-comers] restrictio[n] on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints." *Post*, at 731. As noted *supra*, at 678–679, and n. 11, this difference reflects the lesser standard of scrutiny applicable to limited public forums compared to other forums. The dissent fights the distinction between state *prohibition* and state *support*, but its real quarrel is with our limited-public-forum doctrine, which recognizes that distinction. CLS, it bears repetition, remains free to express

icy "ensures that the leadership, educational, and social opportunities afforded by registered student organizations are available to all students." Brief for Hastings 32; see Brief for American Civil Liberties Union et al. as *Amici Curiae* 11. Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students." Brief for Hastings 32. RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees, see *supra*, at 669; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.[18]

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. See Tr. of Oral Arg. 18. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

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whatever it will, but it cannot insist on an exemption from Hastings' embracive all-comers policy.

[18] CLS notes that its "activities—its Bible studies, speakers, and dinners—are open to all students," even if attendees are barred from membership and leadership. Reply Brief 20. Welcoming all comers as guests or auditors, however, is hardly equivalent to accepting all comers as full-fledged participants.

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Brief for Petitioner 35–36 (emphasis deleted). Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence* v. *Texas*, 539 U. S. 558, 575 (2003) ("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." (emphasis added)); *id.*, at 583 (O'Connor, J., concurring in judgment) ("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, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). See also Brief for Lambda Legal Defense and Education Fund, Inc., et al. as *Amici Curiae* 7–20.

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." App. 349.[19] And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys

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[19] CLS's predecessor organization, the Hastings Christian Fellowship (HCF), experienced these benefits firsthand when it welcomed an openly gay student as a member during the 2003–2004 academic year. That student, testified another HCF member, "was a joy to have" in the group and brought a unique perspective to Bible-study discussions. See App. 325, 327.

the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove." Brief for Hastings 35; *id.*, at 33–34 (citing Cal. Educ. Code Ann. § 66270 (West Supp. 2010) (prohibiting discrimination on various bases)). State law, of course, may not *command* that public universities take action impermissible under the First Amendment. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.[20]

3

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Ed. Assn.*, 460 U. S., at 53. If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers. See *ibid.*; *Cornelius*, 473 U. S., at 809; *Greer* v. *Spock*, 424 U. S. 828, 839 (1976); *Pell*, 417 U. S., at 827–828.

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. App. 232–233. Although CLS could not take advantage of RSO-specific methods of communication, see *supra*, at 669–670,

[20] Although the Law School has offered multiple justifications for its all-comers policy, we do not suggest that each of them is necessary for the policy to survive constitutional review.

the advent of electronic media and social-networking sites reduces the importance of those channels. See App. 114–115 (CLS maintained a Yahoo! message group to disseminate information to students.); *Christian Legal Society* v. *Walker*, 453 F. 3d 853, 874 (CA7 2006) (Wood, J., dissenting) ("Most universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace . . . . If CLS had its own website, any student at the school with access to Google—that is, all of them—could easily have found it."). See also Brief for Associated Students of the University of California, Hastings College of Law, as *Amicus Curiae* 14–18 (describing host of ways CLS could communicate with Hastings' students outside official channels).

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation.[21] Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. App. 224, 229–230. "The variety and type of alternative modes of access present here," in short, "compare favorably with those in other [limited public] forum cases where we have upheld restrictions on access." *Perry Ed. Assn.*, 460 U. S., at 53–54. It is beyond dissenter's license, we note again, see *supra*, at 687–688, n. 17, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking.

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[21] See, *e. g.*, Baker, Despite Lack of University Recognition, Pi Kappa Theta Continues To Grow, The New Hampshire, Sept. 28, 2009, pp. 1, 5 (unrecognized fraternity able to grow despite severed ties with the University of New Hampshire); Battey, Final Clubs Provide Controversial Social Outlet, Yale Daily News, Apr. 5, 2006, pp. 1, 4 (Harvard social clubs, known as "final clubs," "play a large role in the experience of . . . students" even though "they became completely disassociated from the university in 1984").

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." Brief for Petitioner 49. "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." *Id.*, at 50; accord *post*, at 730 (ALITO, J., dissenting). This catchphrase confuses CLS's preferred policy with constitutional limitation—the *advisability* of Hastings' policy does not control its *permissibility*. See *Wood* v. *Strickland*, 420 U. S. 308, 326 (1975). Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U. S., at 808.[22]

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO hijackings at Hastings. Cf. *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 584 (1998) ("[W]e are reluctant . . . to invalidate legislation on the basis of its hypothetical application to situations not before the Court." (internal quotation marks omitted)). Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their

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[22] CLS's concern, shared by the dissent, see *post*, at 729–731, that an all-comers policy will squelch diversity has not been borne out by Hastings' experience. In the 2004–2005 academic year, approximately 60 student organizations, representing a variety of interests, registered with Hastings, from the Clara Foltz Feminist Association, to the Environmental Law Society, to the Hastings Chinese Law and Culture Society. App. 215, 237–238. Three of these sixty registered groups had a religious orientation: Hastings Association of Muslim Law Students, Hastings Jewish Law Students Association, and Hastings Koinonia. *Id.*, at 215–216.

personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. See *supra*, at 671, n. 2. Several RSOs at Hastings limit their membership rolls and officer slates in just this way. See, *e. g.*, App. 192 (members must "[p]ay their dues on a timely basis" and "attend meetings regularly"); *id.*, at 173 (members must complete an application and pay dues; "[a]ny active member who misses a semester of regularly scheduled meetings shall be dropped from rolls"); App. to Pet. for Cert. 129a ("Only Hastings students who have held membership in this organization for a minimum of one semester shall be eligible to be an officer.").[23]

Hastings, furthermore, could reasonably expect more from its law students than the disruptive behavior CLS hypothesizes—and to build this expectation into its educational approach. A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy. See Tr. of Oral Arg. 41 (counsel for Hastings); Brief for Hastings 38.

Finally, CLS asserts (and the dissent repeats, *post*, at 733–734) that the Law School lacks any legitimate interest—let

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[23] As Hastings notes, other "checks [are also] in place" to prevent RSO sabotage. Brief for Hastings 43, n. 16. "The [Law] School's student code of conduct applies to RSO activities and, *inter alia*, prohibits obstruction or disruption, disorderly conduct, and threats." *Ibid.* (internal quotation marks and brackets omitted).

alone one reasonably related to the RSO forum's purposes—in urging "religious groups not to favor co-religionists for purposes of their religious activities." Brief for Petitioner 43; *id.*, at 50. CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.[24]

D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

1

Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, as earlier recounted, *supra*, at 683–685, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-

[24] In arguing that the all-comers policy is not reasonable in light of the RSO forum's purposes, the dissent notes that Title VII, which prohibits employment discrimination on the basis of religion, among other categories, provides an exception for religious associations. *Post*, at 733, n. 8. The question here, however, is not whether Hastings *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their faith. It is instead whether Hastings *must* grant that exemption. This Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–882 (1990), unequivocally answers no to that latter question. See also *infra*, at 697, n. 27.

comers condition on access to RSO status, in short, is textbook viewpoint neutral.[25]

2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." Brief for Petitioner 51; cf. *post*, at 706 (ALITO, J., dissenting) (charging that Hastings' policy favors "political[ly] correc[t]" student expression). This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). See also *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 763 (1994) ("[T]he fact that the injunction covered people with

[25] Relying exclusively on *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000), the dissent "would not be so quick to jump to th[e] conclusion" that the all-comers policy is viewpoint neutral. *Post*, at 735, and 736, n. 10. Careful consideration of *Southworth*, however, reveals how desperate the dissent's argument is. In *Southworth*, university students challenged a mandatory student-activity fee used to fund student groups. Finding the political and ideological speech of certain groups offensive, the student-challengers argued that imposition of the fee violated their First Amendment rights. 529 U. S., at 221. This Court upheld the university's choice to subsidize groups whose expression some students found distasteful, but we admonished that the university could not "prefer some viewpoints to others" in the distribution of funds. *Id.*, at 233. We cautioned that the university's referendum process, which allowed students to vote on whether a student organization would receive financial support, risked violation of this principle by allowing students to select groups to fund based on their viewpoints. *Id.*, at 235. In this case, in contrast, the all-comers policy governs *all* RSOs; Hastings does not pick and choose which organizations must comply with the policy on the basis of viewpoint. App. 221. *Southworth* accordingly provides no support for the dissent's warped analysis.

a particular viewpoint does not itself render the injunction content or viewpoint based.").

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 390 (1992). See also *Roberts*, 468 U. S., at 623 (State's nondiscrimination law did not "distinguish between prohibited and permitted activity on the basis of viewpoint."); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987) (same).

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." *Ward*, 491 U. S., at 791 (internal quotation marks omitted; emphasis deleted). The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 488 (1993). CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its *own* viewpoint-based objections to . . . nondiscrimination laws (which it is entitled to have and [to] voice) with viewpoint *discrimination*." Brief for Hastings 31.[26]

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[26] Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one. Cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 60

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS's free-speech and expressive-association claims.[27]

IV

In its reply brief, CLS contends that "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext." Reply Brief 23. Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance.[28] On remand, the Ninth Circuit may con-

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(2006) ("As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."). Today's decision thus continues this Court's tradition of "protect[ing] the freedom to express 'the thought that we hate.'" *Post*, at 706 (ALITO, J., dissenting) (quoting *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)).

[27] CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Brief for Petitioner 40–41. Our decision in *Smith*, 494 U. S. 872, forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. *Id.*, at 878–882. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.

[28] Finding the Ninth Circuit's analysis cursory, the dissent repeatedly urges us to resolve the pretext question. See, *e. g.*, *post*, at 707, 735–739, and 721, n. 2. In doing so, the dissent forgets that "we are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves. That is especially true when we agree to review an issue on the understanding that "[t]he material facts . . . are undisputed," as CLS's petition for certiorari emphasized was the case here. Pet. for Cert. 2.

sider CLS's pretext argument if, and to the extent, it is preserved.[29]

* * *

For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

The Court correctly confines its discussion to the narrow issue presented by the record, see *ante,* at 675–678, and correctly upholds the all-comers policy. I join its opinion without reservation. Because the dissent has volunteered an argument that the school's general Nondiscrimination Policy would be "plainly" unconstitutional if applied to this case, *post,* at 723 (opinion of ALITO, J.), a brief response is appropriate. In my view, both policies are plainly legitimate.

The Hastings College of the Law's (Hastings) Nondiscrimination Policy contains boilerplate language used by institutions and workplaces across the country: It prohibits "unlawfu[l]" discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." App. 220. Petitioner, the Hastings chapter of the Christian Legal Society (CLS), refused to comply. As the Court explains, *ante,* at 671–672, CLS was unwilling to admit members unless they affirmed their belief in certain Christian doctrines and refrained from "participation in or advocacy of a sexually immoral lifestyle," App. 146. CLS, in short, wanted to receive the school's formal recognition—and the benefits that attend formal recognition—while continuing to

[29] The dissent's pretext discussion presents a one-sided summary of the record evidence, *post,* at 735–739, an account depending in large part on impugning the veracity of a distinguished legal scholar and a well-respected school administrator, *post,* at 708, 710, 711–712, 712, 713, 714, 716, 728–729, 737, 738. See also *supra,* at 676–677, n. 7.

exclude gay and non-Christian students (as well as, it seems, students who advocate for gay rights).

In the dissent's view, by refusing to grant CLS an exemption from the Nondiscrimination Policy, Hastings violated CLS's rights, for by proscribing unlawful discrimination on the basis of religion, the policy discriminates unlawfully on the basis of religion. There are numerous reasons why this counterintuitive theory is unsound. Although the First Amendment may protect CLS's discriminatory practices off campus, it does not require a public university to validate or support them.

As written, the Nondiscrimination Policy is content and viewpoint neutral. It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all. The policy is "directed at the organization's activities rather than its philosophy," *Healy* v. *James*, 408 U. S. 169, 188 (1972). Those who hold religious beliefs are not "singled out," *post*, at 724 (ALITO, J., dissenting); those who engage in discriminatory *conduct* based on someone else's religious status and belief are singled out.[1] Regardless of

[1] The dissent appears to accept that Hastings may prohibit discrimination on the basis of religious *status*, though it rejects the notion that Hastings may do the same for religious *belief*. See, *e. g.*, *post*, at 726, n. 5, 732–733. If CLS sought to exclude a Muslim student in virtue of the fact that he "is" Muslim, the dissent suggests, there would be no problem in Hastings forbidding that. But if CLS sought to exclude the same student in virtue of the fact that he subscribes to the Muslim faith, Hastings must stand idly by. This proposition is not only unworkable in practice but also flawed in conception. A person's religion often simultaneously constitutes or informs a status, an identity, a set of beliefs and practices, and much else besides. (So does sexual orientation for that matter, see *ante*, at 689, notwithstanding the dissent's view that a rule excluding those who engage in "unrepentant homosexual conduct," App. 226, does not discriminate on the basis of status or identity, *post*, at 727.) Our First Amendment doctrine has never required university administrators to undertake the impossible task of separating out belief-based from status-based religious discrimination.

whether they are the product of secular or spiritual feeling, hateful or benign motives, all acts of religious discrimination are equally covered. The discriminator's beliefs are simply irrelevant. There is, moreover, no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views. The policy's religion clause was plainly meant to promote, not to undermine, religious freedom.

To be sure, the policy may end up having greater consequence for religious groups—whether and to what extent it will is far from clear *ex ante*—inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths. But there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations. And it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.[2] The dissent has thus given no reason to be skeptical of the basic design, function, or rationale of the Nondiscrimination Policy.

What the policy does reflect is a judgment that discrimination by school officials or organizations on the basis of certain

[2] See, *e. g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 763 (1994); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385 (1992); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623, 628 (1984); cf. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–879 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Courts and commentators have applied this insight to the exact situation posed by the Nondiscrimination Policy. See, *e. g.*, *Christian Legal Society* v. *Walker*, 453 F. 3d 853, 866 (CA7 2006) (stating that "[t]here can be little doubt that" comparable nondiscrimination policy "is viewpoint neutral on its face"); *Truth* v. *Kent School Dist.*, 542 F. 3d 634, 649–650 (CA9 2008) (similar); Volokh, Freedom of Expressive Association and Government Subsidies, 58 Stan. L. Rev. 1919, 1930–1938 (2006).

factors, such as race and religion, is less tolerable than discrimination on the basis of other factors. This approach may or may not be the wisest choice in the context of a Registered Student Organization (RSO) program. But it is at least a reasonable choice. Academic administrators routinely employ antidiscrimination rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination, including sexual orientation discrimination.[3] Applied to the RSO context, these values can, in turn, advance numerous pedagogical objectives. See *post*, at 705–706 (KENNEDY, J., concurring).

It is critical, in evaluating CLS's challenge to the Nondiscrimination Policy, to keep in mind that an RSO program is a *limited* forum—the boundaries of which may be *delimited* by the proprietor. When a religious association, or a secular association, operates in a wholly public setting, it must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to outsiders. Profound constitutional problems would arise if the State of California tried to "demand that all Christian groups admit members who believe that Jesus was merely human." *Post*, at 731 (ALITO, J., dissenting). But the CLS chapter that brought this lawsuit does not want to be just a Christian group; it aspires to be a recognized student organization. The Hastings College of the Law is not a legislature. And no state actor has demanded that anyone do anything outside the confines of a discrete, voluntary academic program. Although it may be the case that to some "university students,

[3] In a case about an antidiscrimination policy that, even if ill advised, is explicitly directed at *preventing* religious discrimination, it is rather hard to swallow the dissent's ominous closing remarks. See *post*, at 741 (suggesting that today's decision "point[s] a judicial dagger at the heart of" religious groups in the United States (internal quotation marks omitted)). Although the dissent is willing to see pernicious antireligious motives and implications where there are none, it does not seem troubled by the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are.

the campus is their world," *post,* at 718 (internal quotation marks omitted), it does not follow that the campus ought to be equated with the public square.

The campus is, in fact, a world apart from the public square in numerous respects, and religious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities' judgments and let them manage their own affairs.

The RSO forum is no different. It is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make. When any given group refuses to comply with the rules, the RSO sponsor need not admit that group at the cost of undermining the program and the values reflected therein. On many levels, a university administrator has a "greater interest in the content of student activities than the police chief has in the content of a soapbox oration." *Widmar* v. *Vincent,* 454 U. S. 263, 280 (1981) (STEVENS, J., concurring in judgment).

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct," App. 226. The expressive association argument it presses, however, is hardly limited to these facts.

Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.

JUSTICE KENNEDY, concurring.

To be effective, a limited forum often will exclude some speakers based on their affiliation (*e. g.*, student versus nonstudent) or based on the content of their speech, interests, and expertise (*e. g.*, art professor not chosen as speaker for conference on public transit). When the government does exclude from a limited forum, however, other content-based judgments may be impermissible. For instance, an otherwise qualified and relevant speaker may not be excluded because of hostility to his or her views or beliefs. See *Healy* v. *James*, 408 U. S. 169, 187–188 (1972).

In *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), the essential purpose of the limited forum was to facilitate the expression of differing views in the context of student publications. The forum was limited because it was confined: first, to student-run groups; and second, to publications. The forum was created in the long tradition of using newspapers and other publications to express differing views and also in the honored tradition of a university setting that stimulates the free exchange of ideas. See *id.*, at 835 ("[I]n the University setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"). These considerations supported the Court's conclusion that, under the First Amendment, a limited forum for student-run publications did not permit the exclusion of a paper for the reason that it was devoted to expressing religious views.

Rosenberger is distinguishable from the instant case in various respects. Not least is that here the school policy in question is not content based either in its formulation or evi-

dent purpose; and were it shown to be otherwise, the case likely should have a different outcome. Here, the policy applies equally to all groups and views. And, given the stipulation of the parties, there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint.

An objection might be that the all-comers policy, even if not so designed or intended, in fact makes it difficult for certain groups to express their views in a manner essential to their message. A group that can limit membership to those who agree in full with its aims and purposes may be more effective in delivering its message or furthering its expressive objectives; and the Court has recognized that this interest can be protected against governmental interference or regulation. See *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000). By allowing like-minded students to form groups around shared identities, a school creates room for self-expression and personal development. See *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229 (2000) ("The University's whole justification for [its student activity program] is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors").

In the instant case, however, if the membership qualification were enforced, it would contradict a legitimate purpose for having created the limited forum in the first place. Many educational institutions, including respondent Hastings College of the Law, have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. See *id.*, at 233. Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities, such as those in the Hastings "Registered Student Organization" program, facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self. See *Board of Ed. of Independ-*

ent School Dist. No. 92 of Pottawatomie Cty. v. *Earls*, 536 U. S. 822, 831, n. 4 (2002) (participation in extracurricular activities is "'a significant contributor to the breadth and quality of the educational experience'"). The Hastings program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 312, 313, n. 48 (1978) (opinion of Powell, J.) ("[A] great deal of learning . . . occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world" (alteration in original; internal quotation marks omitted)).

Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

The school's objectives thus might not be well served if, as a condition to membership or participation in a group, students were required to avow particular personal beliefs or to disclose private, off-campus behavior. Students whose views are in the minority at the school would likely fare worse in that regime. Indeed, were those sorts of requirements to become prevalent, it might undermine the principle that in a university community—and in a law school community specifically—speech is deemed persuasive based on its

substance, not the identity of the speaker. The era of loyalty oaths is behind us. A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discussion. The school's policy therefore represents a permissible effort to preserve the value of its forum.

In addition to a circumstance, already noted, in which it could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, petitioner also would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views. But that has not been shown to be so likely or self-evident as a matter of group dynamics in this setting that the Court can declare the school policy void without more facts; and if there were a showing that in a particular case the purpose or effect of the policy was to stifle speech or make it ineffective, that, too, would present a case different from the one before us.

These observations are offered to support the analysis set forth in the opinion of the Court, which I join.

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

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States* v. *Schwimmer*, 279 U. S. 644, 654–655 (1929) (Holmes, J., dissenting). Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

The Hastings College of the Law, a state institution, permits student organizations to register with the law school

and severely burdens speech by unregistered groups. Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS). CLS claims that Hastings refused to register the group because the law school administration disapproves of the group's viewpoint and thus violated the group's free speech rights.

Rejecting this argument, the Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit *any* student who wishes to join. Deferring broadly to the law school's judgment about the permissible limits of student debate, the Court concludes that this "accept-all-comers" policy, *ante*, at 668, is both viewpoint neutral and consistent with Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups.

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups—groups to which, as Hastings candidly puts it, these institutions "do not wish to . . . lend their name[s]." Brief for Respondent Hastings College of the Law 11; see also *id.*, at 35.

I

The Court provides a misleading portrayal of this case. As related by the Court, (1) Hastings, for the past 20 years, has required any student group seeking registration to admit any student who wishes to join, *ante*, at 671–672; (2) the ef-

fects of Hastings' refusal to register CLS have been of questionable importance, see *ante*, at 690–691; and (3) this case is about CLS's desire to obtain "a state subsidy," *ante*, at 682. I begin by correcting the picture.

A

The Court bases all of its analysis on the proposition that the relevant Hastings' policy is the so-called accept-all-comers policy. This frees the Court from the difficult task of defending the constitutionality of either the policy that Hastings actually—and repeatedly—invoked when it denied registration, *i. e.*, the school's written Nondiscrimination Policy, or the policy that Hastings belatedly unveiled when it filed its brief in this Court. Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began.

The events that gave rise to this litigation began in 2004, when a small group of Hastings students sought to register a Hastings chapter of CLS, a national organization of Christian lawyers and law students. All CLS members must sign a Statement of Faith affirming belief in fundamental Christian doctrines, including the belief that the Bible is "the inspired Word of God." App. 226. In early 2004, the national organization adopted a resolution stating that "[i]n view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." *Id.*, at 146. The resolution made it clear that "a sexually immoral lifestyle," in CLS's view, includes engaging in "acts of sexual conduct outside of God's design for marriage between one man and one woman." *Ibid.* It was shortly after this resolution was passed that

the Hastings chapter of CLS applied to register with the law school.

Hastings sponsors an active program of "registered student organizations" (RSOs) pursuant to the law school's avowed responsibility to "ensure an opportunity for the expression of a variety of viewpoints" and promote "the highest standards of . . . freedom of expression," App. to Pet. for Cert. 82a, 74a. During the 2004–2005 school year, Hastings had more than 60 registered groups, including political groups (*e. g.*, the Hastings Democratic Caucus and the Hastings Republicans), religious groups (*e. g.*, the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students), groups that promote social causes (*e. g.*, both pro-choice and pro-life groups), groups organized around racial or ethnic identity (*e. g.*, the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus on gender or sexuality (*e. g.*, the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings). See App. 236–245; Brief for Petitioner 3–4.

Not surprisingly many of these registered groups were and are dedicated to expressing a message. For example, Silenced Right, a pro-life group, taught that "all human life from the moment of conception until natural death is sacred and has inherent dignity," App. 244, while Law Students for Choice aimed to "defend and expand reproductive rights," *id.*, at 243. The American Constitution Society sought "to counter . . . a narrow conservative vision" of "American law," *id.*, at 236, and the UC Hastings Student Animal Defense Fund aimed "at protecting the lives and advancing the interests of animals through the legal system," *id.*, at 245.

Groups that are granted registration are entitled to meet on university grounds and to access multiple channels for communicating with students and faculty—including posting messages on designated bulletin boards, sending mass

e-mails to the student body, distributing material through the Student Information Center, and participating in the annual student organizations fair. App. to Pet. for Cert. 7a, 85a. They may also apply for limited travel funds, *id.*, at 7a, which appear to total about $4,000 to $5,000 per year, App. 217—or less than $85 per registered group. Most of the funds available to RSOs come from an annual student activity fee that every student must pay. See App. to Pet. for Cert. 89a–93a.

When CLS applied for registration, Judy Hansen Chapman, the Director of Hastings' Office of Student Services, sent an e-mail to an officer of the chapter informing him that "CLS's bylaws did not appear to be compliant" with the Hastings Nondiscrimination Policy, App. 228, 277, a written policy that provides in pertinent part that "[t]he University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation," *id.*, at 220. As far as the record reflects, Ms. Chapman made no mention of an accept-all-applicants policy.

A few days later, three officers of the chapter met with Ms. Chapman, and she reiterated that the CLS bylaws did not comply with "the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization." *Id.*, at 228. About a week later, Hastings sent CLS a letter to the same effect. *Id.*, at 228–229, 293–295. On both of these occasions, it appears that not a word was said about an accept-all-comers policy.

When CLS refused to change its membership requirements, Hastings denied its request for registration—thus making CLS the only student group whose application for registration has ever been rejected. Brief in Opposition 4.

In October 2004, CLS brought this action under 42 U. S. C. § 1983 against the law school's dean and other school officials, claiming, among other things, that the law school, by

enacting and enforcing the Nondiscrimination Policy, had violated CLS's First Amendment right to freedom of speech. App. 78.

In May 2005, Hastings filed an answer to CLS's first amended complaint and made an admission that is significant for present purposes. In its complaint, CLS had alleged that the Nondiscrimination Policy discriminates against religious groups because it prohibits those groups "from selecting officers and members dedicated to a particular set of religious ideals or beliefs" but "permits political, social and cultural student organizations to select officers and members dedicated to their organization's ideals and beliefs." *Id.*, at 79. In response, Hastings admitted that its Nondiscrimination Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." *Id.*, at 93. The Court states that "Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers." *Ante*, at 671. But this admission in Hastings' answer shows that Hastings had not adopted this interpretation when its answer was filed.

Within a few months, however, Hastings' position changed. In July 2005, Mary Kay Kane, then the dean of the law school, was deposed, and she stated: "It is my view that in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." App. 343. In a declaration filed in October 2005, Ms. Chapman provided a more developed explanation, stating: "Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization." *Id.*, at 349.

Hastings claims that this accept-all-comers policy has existed since 1990 but points to no evidence that the policy was ever put in writing or brought to the attention of mem-

bers of the law school community prior to the dean's deposition. Indeed, Hastings has adduced no evidence of the policy's existence before that date. And while Dean Kane and Ms. Chapman stated, well after this litigation had begun, that Hastings had such a policy, neither they nor any other Hastings official has ever stated in a deposition, affidavit, or declaration when this policy took effect.

Hastings' effort to portray the accept-all-comers policy as merely an interpretation of the Nondiscrimination Policy runs into obvious difficulties. First, the two policies are simply not the same: The Nondiscrimination Policy proscribes discrimination on a limited number of specified grounds, while the accept-all-comers policy outlaws all selectivity. Second, the Nondiscrimination Policy applies to everything that Hastings does, and the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty.

In an effort to circumvent this problem, the Court writes that "Hastings interprets the Nondiscrimination Policy, *as it relates to the RSO program*, to mandate acceptance of all comers." *Ante*, at 671 (emphasis added). This puts Hastings in the implausible position of maintaining that the Nondiscrimination Policy means one thing as applied to the RSO program and something quite different as applied to all of Hastings' other activities. But the Nondiscrimination Policy by its terms applies fully to all components of the law school, "including administration [and] faculty." App. 220.

Third, the record is replete with evidence that, at least until Dean Kane unveiled the accept-all-comers policy in July 2005, Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints. For example, the bylaws of the Hastings Democratic Caucus provided that "any full-time student at Hastings may become a member of HDC *so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization* as

stated in Article 3, Section 1." App. to Pet. for Cert. 118a (emphasis added). The constitution of the Association of Trial Lawyers of America at Hastings provided that every member must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." *Id.*, at 110a. A student could become a member of the Vietnamese American Law Society so long as the student did not "exhibit a consistent disregard and lack of respect for the objective of the organization," which centers on a "celebrat[ion] [of] Vietnamese culture." *Id.*, at 146a–147a. Silenced Right limited voting membership to students who "are committed" to the group's "mission" of "spread[ing] the pro-life message." *Id.*, at 142a–143a. La Raza limited voting membership to "students of Raza background." App. 192. Since Hastings requires any student group applying for registration to submit a copy of its bylaws, see *id.*, at 249–250, Hastings cannot claim that it was unaware of such provisions. And as noted, CLS was denied registration precisely because Ms. Chapman reviewed its bylaws and found them unacceptable.

We are told that, when CLS pointed out these discrepancies during this litigation, Hastings took action to ensure that student groups were in fact complying with the law school's newly disclosed accept-all-comers policy. For example, Hastings asked La Raza to revise its bylaws to allow all students to become voting members. App. to Pet. for Cert. 66a. See also Brief for State of Michigan et al. as *Amici Curiae* 2, n. 1 (relating anecdotally that Hastings recently notified the Hastings Democrats that "to maintain the Club's standing as a student organization," it must "open its membership to all students, irrespective of party affiliation"). These belated remedial efforts suggest, if anything, that Hastings had no accept-all-comers policy until this litigation was well under way.

Finally, when Hastings filed its brief in this Court, its policy, which had already evolved from a policy prohibiting certain specified forms of discrimination into an accept-all-

comers policy, underwent yet another transformation. Now, Hastings claims that it does not really have an accept-all-comers policy; it has an accept-*some*-comers policy. Hastings' current policy, we are told, "does not foreclose neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Brief for Respondent Hastings College of the Law 5. Hastings' brief goes on to note with seeming approval that some registered groups have imposed "even conduct requirements." *Ibid.* Hastings, however, has not told us which "conduct requirements" are allowed and which are not—although presumably requirements regarding sexual conduct fall into the latter category.

When this case was in the District Court, that court took care to address both the Nondiscrimination Policy and the accept-all-comers policy. See, *e. g.*, App. to Pet. for Cert. 8a–9a, 16a–17a, 21a–24a, 26a, 27a, 32a, 44a, 63a. On appeal, however, a panel of the Ninth Circuit, like the Court today, totally ignored the Nondiscrimination Policy. CLS's argument in the Ninth Circuit centered on the Nondiscrimination Policy, and CLS argued strenuously, as it had in the District Court, that prior to the former dean's deposition, numerous groups had been permitted to restrict membership to students who shared the groups' views.[1] Nevertheless, the

[1] CLS consistently argued in the courts below that Hastings had applied its registration policy in a discriminatory manner. See, *e. g.*, Plaintiff's Notice of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in No. C 04–4484–JSW (ND Cal.), pp. 6–7 ("Hastings allows other registered student organizations to require that their members and/or leaders agree with the organization's beliefs and purposes"). CLS took pains to bring forward evidence to substantiate this claim. See *supra*, at 712–713.

CLS's brief in the Court of Appeals reiterated its contention that Hastings had not required all RSOs to admit all student applicants. CLS's brief stated that "Hastings allows other registered student organizations to require that their leaders and/or members agree with the organization's beliefs and purposes." Brief for Appellant in No. 06–15956 (CA9), pp. 14–15 (citing examples). See also *id.*, at 54–55 ("Hastings routinely recognizes student groups that limit membership or leadership on the

Ninth Circuit disposed of CLS's appeal with a two-sentence, not-precedential opinion that solely addressed the accept-all-comers policy. *Christian Legal Soc. Chapter of Univ. of Cal.* v. *Kane*, 319 Fed. Appx. 645–646 (2009).

Like the majority of this Court, the Ninth Circuit relied on the following Joint Stipulation, which the parties filed in December 2005, well after Dean Kane's deposition:

> "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." App. 221.

Citing the binding effect of stipulations, the majority sternly rejects what it terms "CLS's unseemly attempt to escape from the stipulation and shift its target to [the Nondiscrimination Policy]." *Ante*, at 678.

I agree that the parties must be held to their Joint Stipulation, but the terms of the stipulation should be respected. What was admitted in the Joint Stipulation filed in December 2005 is that Hastings had an accept-all-comers policy. CLS did not stipulate that its application had been denied more than a year earlier pursuant to such a policy. On the contrary, the Joint Stipulation notes that the reason repeatedly given by Hastings at that time was that the CLS bylaws did not comply with *the Nondiscrimination Policy*. See App. 228–229. Indeed, the parties did not even stipulate that the accept-all-comers policy existed in the fall of 2004. In addition, Hastings itself is now attempting to walk away from this stipulation by disclosing that its real policy is an accept-some-comers policy.

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basis of belief. . . . Hastings' actual practice demonstrates that the forum is not reserved to student organizations that do not discriminate on the basis of belief"). Responding to these arguments, the law school remarked that CLS "repeatedly asserts that 'Hastings routinely recognizes student groups that limit membership or leadership on the basis of belief.' " Brief for Appellees in No. 06–15956 (CA9), p. 4.

The majority's insistence on the binding effect of stipulations contrasts sharply with its failure to recognize the binding effect of a party's admissions in an answer. See *American Title Insurance Co.* v. *Lacelaw Corp.*, 861 F. 2d 224, 226 (CA9 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them"); *Bakersfield Westar Ambulance, Inc.* v. *Community First Bank*, 123 F. 3d 1243, 1248 (CA9 1997) (quoting *Lacelaw*, *supra*). As noted above, Hastings admitted in its answer, which was filed prior to the former dean's deposition, that at least as of that time, the law school did not follow an accept-all-comers policy and instead allowed "political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." App. 93.

B

The Court also distorts the record with respect to the effect on CLS of Hastings' decision to deny registration. The Court quotes a letter written by Hastings' general counsel in which she stated that Hastings "'would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities.'" *Ante*, at 673 (quoting App. 294). Later in its opinion, the Court reiterates that "Hastings offered CLS access to school facilities to conduct meetings," *ante*, at 690, but the majority does not mention that this offer was subject to important qualifications. As Hastings' attorney put it in the District Court, Hastings told CLS: "'Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations.' We offered that." App. 442.

The Court also fails to mention what happened when CLS attempted to take advantage of Hastings' offer. On August 19, 2005, the local CLS president sent an e-mail to Ms. Chapman requesting permission to set up an "advice

table" on a campus patio on August 23 and 24 so that members of CLS could speak with students at the beginning of the fall semester. *Id.*, at 298. This request—merely to set up a table on a patio—could hardly have interfered with any other use of the law school's premises or cost the school any money. But although the request was labeled "time sensitive," *ibid.*, Ms. Chapman did not respond until the dates in question had passed, and she then advised the student that all further inquiries should be made through CLS's attorney, *id.*, at 297–298.

In September 2005, CLS tried again. Through counsel, CLS sought to reserve a room on campus for a guest speaker who was scheduled to appear on a specified date. *Id.*, at 302–303. Noting Ms. Chapman's tardy response on the prior occasion, the attorney asked to receive a response before the scheduled date, but once again no answer was given until after the date had passed. *Id.*, at 300.

Other statements in the majority opinion make it seem as if the denial of registration did not hurt CLS at all. The Court notes that CLS was able to hold Bible-study meetings and other events. *Ante*, at 673. And "[a]lthough CLS could not take advantage of RSO-specific methods of communication," the Court states, "the advent of electronic media and social-networking sites reduces the importance of those channels." *Ante*, at 690–691.

At the beginning of the 2005 school year, the Hastings CLS group had seven members, App. to Pet. for Cert. 13a, so there can be no suggestion that the group flourished. And since one of CLS's principal claims is that it was subjected to discrimination based on its viewpoint, the majority's emphasis on CLS's ability to endure that discrimination—by using private facilities and means of communication—is quite amazing.

This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never

before taken the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.

C

Finally, I must comment on the majority's emphasis on funding. According to the majority, CLS is "seeking what is effectively a state subsidy," *ante*, at 682, and the question presented in this case centers on the "use of school funds," *ante*, at 668. In fact, funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. As CLS notes: "[T]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen." Reply Brief for Petitioner 13.

II

To appreciate how far the Court has strayed, it is instructive to compare this case with *Healy* v. *James*, 408 U. S. 169 (1972), our only First Amendment precedent involving a public college's refusal to recognize a student group. The group in *Healy* was a local chapter of the Students for a Democratic Society (SDS). When the students who applied for recognition of the chapter were asked by a college committee whether they would "'respond to issues of violence as other S.D.S. chapters have,'" their answer was that their "'action would have to be dependent upon each issue.'" *Id.*, at 172–173. They similarly refused to provide a definitive answer when asked whether they would be willing to "use any means possible" to achieve their aims. *Id.*, at 173. The president of the college refused to allow the group to be rec-

ognized, concluding that the philosophy of the SDS was "antithetical to the school's policies" and that it was doubtful that the local chapter was independent of the national organization, the "'published aims and philosophy'" of which included "'disruption and violence.'" *Id.*, at 174–175, and n. 4.

The effects of nonrecognition in *Healy* were largely the same as those present here. The SDS was denied the use of campus facilities, as well as access to the customary means used for communication among the members of the college community. *Id.*, at 176, 181–182.

The lower federal courts held that the First Amendment rights of the SDS chapter had not been violated, and when the case reached this Court, the college, much like today's majority, sought to minimize the effects of nonrecognition, arguing that the SDS members "still may meet as a group off campus, that they still may distribute written material off campus, and that they still may meet together informally on campus . . . as individuals." *Id.*, at 182–183.

This Court took a different view. The Court held that the denial of recognition substantially burdened the students' right to freedom of association. After observing that "[t]he primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes," *id.*, at 181, the Court continued:

> "Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other stu-

dents. Such impediments cannot be viewed as insubstantial." *Id.*, at 181–182 (footnote omitted).

It is striking that all of these same burdens are now borne by CLS. CLS is prevented from using campus facilities—unless at some future time Hastings chooses to provide a timely response to a CLS request and allow the group, as a favor or perhaps in exchange for a fee, to set up a table on the patio or to use a room that would otherwise be unoccupied. And CLS, like the SDS in *Healy*, has been cut off from "the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181–182.

It is also telling that the *Healy* Court, unlike today's majority, refused to defer to the college president's judgment regarding the compatibility of "sound educational policy" and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president's decision to deny recognition in *Healy.* Respondents in that case emphasized that the college president, not the courts, had the responsibility of administering the institution and that the courts should allow him "'wide discretion . . . in determining what actions are most compatible with its educational objectives.'" Brief for Respondents in *Healy* v. *James*, O. T. 1971, No. 71–452, pp. 7–8. A supporting *amicus* contended that college officials "must be allowed a very broad discretion in formulating and implementing policies." Brief for Board of Trustees, California State Colleges 6. Another argued that universities should be permitted to impose restrictions on speech that would not be tolerated elsewhere. Brief for American Association of Presidents of Independent Colleges and Universities 11–12.

The *Healy* Court would have none of this. Unlike the Court today, the *Healy* Court emphatically rejected the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large." 408 U. S., at 180. And on one key question after

another—whether the local SDS chapter was independent of the national organization, whether the group posed a substantial threat of material disruption, and whether the students' responses to the committee's questions about violence and disruption signified a willingness to engage in such activities—the Court drew its own conclusions, which differed from the college president's.

The *Healy* Court was true to the principle that when it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment. We do not defer to Congress on such matters, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 129 (1989), and there is no reason why we should bow to university administrators.

In the end, I see only two possible distinctions between *Healy* and the present case. The first is that *Healy* did not involve any funding, but as I have noted, funding plays only a small part in this case. And if *Healy* would otherwise prevent Hastings from refusing to register CLS, I see no good reason why the potential availability of funding should enable Hastings to deny all of the other rights that go with registration.

This leaves just one way of distinguishing *Healy:* the identity of the student group. In *Healy*, the Court warned that the college president's views regarding the philosophy of the SDS could not "justify the denial of First Amendment rights." 408 U. S., at 187. Here, too, disapproval of CLS cannot justify Hastings' actions.[2]

[2] The Court attempts to distinguish *Healy* on the ground that there the college "explicitly denied the student group official recognition *because of* the group's viewpoint." *Ante*, at 684, n. 15. The same, however, is true here. CLS was denied recognition under the Nondiscrimination Policy because of the viewpoint that CLS sought to express through its membership requirements. See *supra*, at 710; *infra*, at 723–728. And there is strong evidence that Hastings abruptly shifted from the Nondiscrimination Policy to the accept-all-comers policy as a pretext for viewpoint discrimination. See *infra*, at 737–739.

III

The Court pays little attention to *Healy* and instead focuses solely on the question whether Hastings' registration policy represents a permissible regulation in a limited public forum. While I think that *Healy* is largely controlling, I am content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion.

In this case, the forum consists of the RSO program. Once a public university opens a limited public forum, it "must respect the lawful boundaries it has itself set." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). The university "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.' " *Ibid.* (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985)). And the university must maintain strict viewpoint neutrality. *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 234 (2000); *Rosenberger*, *supra*, at 829.

This requirement of viewpoint neutrality extends to the expression of religious viewpoints. In an unbroken line of decisions analyzing private religious speech in limited public forums, we have made it perfectly clear that "[r]eligion is [a] viewpoint from which ideas are conveyed." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 112, and n. 4 (2001). See *Rosenberger*, *supra*, at 831; *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 393–394 (1993); *Widmar* v. *Vincent*, 454 U. S. 263, 277 (1981).

We have applied this analysis in cases in which student speech was restricted because of the speaker's religious viewpoint, and we have consistently concluded that such restrictions constitute viewpoint discrimination. *E. g.*, *Rosenberger*, *supra*, at 845–846; *Widmar*, *supra*, at 267, n. 5, 269, 277; see also *Good News Club*, *supra*, at 106–107, 109–110;

Lamb's Chapel, *supra*, at 392–393, 394. We have also stressed that the rules applicable in a limited public forum are particularly important in the university setting, where "the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, *supra*, at 835.

IV

Analyzed under this framework, Hastings' refusal to register CLS pursuant to its Nondiscrimination Policy plainly fails.[3] As previously noted, when Hastings refused to register CLS, it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation.

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[3] CLS sought a declaratory judgment that this policy is unconstitutional and an injunction prohibiting its enforcement. See App. 80. Particularly in light of Hastings' practice of changing its announced policies, these requests are not moot. It is well settled that the voluntary cessation of allegedly unlawful conduct does not moot a case in which the legality of that conduct is challenged. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982); see also *Allee* v. *Medrano*, 416 U. S. 802, 810–811 (1974); *DeFunis* v. *Odegaard*, 416 U. S. 312, 318 (1974) *(per curiam)*. If the rule were otherwise, the courts would be compelled to leave "'[t]he defendant . . . free to return to his old ways.'" *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (quoting *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953)). Here, there is certainly a risk that Hastings will "return to [its] old ways," and therefore CLS's requests for declaratory and injunctive relief with respect to the Nondiscrimination Policy are not moot. If, as the Court assumes, the parties stipulated that the only relevant policy is the accept-all-comers policy, then the District Court should not have addressed the constitutionality of the Nondiscrimination Policy. But the District Court approved both policies, and the Court of Appeals affirmed the judgment. That judgment remains binding on CLS, so it is only appropriate that CLS be permitted to challenge that determination now. The question of the constitutionality of the Nondiscrimination Policy falls comfortably within the question presented, and CLS raised that issue in its brief. See Brief for Petitioner 41–46.

As interpreted by Hastings and applied to CLS, both of these grounds constituted viewpoint discrimination.

Religion. The First Amendment protects the right of " 'expressive association' "—that is, the "right to associate for the purpose of speaking." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 68 (2006) (quoting *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 644 (2000)). And the Court has recognized that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.*, at 648.

With one important exception, the Hastings Nondiscrimination Policy respected that right. As Hastings stated in its answer, the Nondiscrimination Policy "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." App. 93. But the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination. "By the very terms of the [Nondiscrimination Policy], the University . . . select[ed] for disfavored treatment those student [groups] with religious . . . viewpoints." *Rosenberger*, *supra*, at 831. It is no wonder that the Court makes no attempt to defend the constitutionality of the Nondiscrimination Policy.

Unlike the Court, JUSTICE STEVENS attempts a defense, contending that the Nondiscrimination Policy is viewpoint

neutral. But his arguments are squarely contrary to established precedent.

JUSTICE STEVENS first argues that the Nondiscrimination Policy is viewpoint neutral because it "does not regulate expression or belief at all" but instead regulates conduct. See *ante*, at 699 (concurring opinion). This Court has held, however, that the particular conduct at issue here constitutes a form of expression that is protected by the First Amendment. It is now well established that the First Amendment shields the right of a group to engage in expressive association by limiting membership to persons whose admission does not significantly interfere with the group's ability to convey its views. See *Dale*, *supra*, at 648; *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984); see also *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13 (1988) (acknowledging that an "association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion"); *Widmar*, 454 U. S., at 268–269 ("[T]he First Amendment rights of speech and association extend to the campuses of state universities"). Indeed, the opinion of the Court, which JUSTICE STEVENS joins, acknowledges this rule. See *ante*, at 680.

JUSTICE STEVENS also maintains that the Nondiscrimination Policy is viewpoint neutral because it prohibits all groups, both religious and secular, from engaging in religious speech. See *ante*, at 699–700. This argument is also contrary to established law. In *Rosenberger*, the dissent, which JUSTICE STEVENS joined, made exactly this argument. See 515 U. S., at 895–896 (opinion of Souter, J.). The Court disagreed, holding that a policy that treated secular speech more favorably than religious speech discriminated on the

basis of viewpoint.[4] *Id.*, at 831. The Court reaffirmed this holding in *Good News Club*, 533 U. S., at 112, and n. 4.

Here, the Nondiscrimination Policy permitted membership requirements that expressed a secular viewpoint. See App. 93. (For example, the Hastings Democratic Caucus and the Hastings Republicans were allowed to exclude members who disagreed with their parties' platforms.) But religious groups were not permitted to express a religious viewpoint by limiting membership to students who shared their religious viewpoints. Under established precedent, this was viewpoint discrimination.[5]

It bears emphasis that permitting religious groups to limit membership to those who share the groups' beliefs would not have the effect of allowing other groups to discriminate on the basis of religion. It would not mean, for example, that fraternities or sororities could exclude students on that basis. As our cases have recognized, the right of expressive association permits a group to exclude an applicant for member-

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[4] In *Rosenberger*, the university argued that the denial of student activity funding for all groups that sought to express a religious viewpoint was "facially neutral." See Brief for Respondents in *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, O. T. 1994, No. 94–329, p. 2; 515 U. S., at 824–825. The *Rosenberger* dissenters agreed that the university's policy did not constitute viewpoint discrimination because "it applie[d] to Muslim and Jewish and Buddhist advocacy as well as to Christian," and it "applie[d] to agnostics and atheists as well as it does to deists and theists." *Id.*, at 895–896 (opinion of Souter, J.); cf. *ante*, at 699–700 (opinion of STEVENS, J.) (asserting that under Hastings' Nondiscrimination Policy "all acts of *religious* discrimination" are prohibited (emphasis added)). But the Court flatly rejected this argument. See 515 U. S., at 831 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered").

[5] It is not at all clear what JUSTICE STEVENS means when he refers to religious "status" as opposed to religious belief. See *ante*, at 699, n. 1. But if by religious status he means such things as the religion into which a person was born or the religion of a person's ancestors, then prohibiting discrimination on such grounds would not involve viewpoint discrimination. Such immutable characteristics are quite different from viewpoint.

ship only if the admission of that person would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U. S., at 648. Groups that do not engage in expressive association have no such right. Similarly, groups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group's ability to express its views. But for religious groups, the situation is very different. This point was put well by a coalition of Muslim, Christian, Jewish, and Sikh groups: "Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association." Brief for American Islamic Congress et al. as *Amici Curiae* 3.

Sexual orientation. The Hastings Nondiscrimination Policy, as interpreted by the law school, also discriminated on the basis of viewpoint regarding sexual morality. CLS has a particular viewpoint on this subject, namely, that sexual conduct outside marriage between a man and a woman is wrongful. Hastings would not allow CLS to express this viewpoint by limiting membership to persons willing to express a sincere agreement with CLS's views. By contrast, nothing in the Nondiscrimination Policy prohibited a group from expressing a contrary viewpoint by limiting membership to persons willing to endorse that group's beliefs. A Free Love Club could require members to affirm that they reject the traditional view of sexual morality to which CLS adheres. It is hard to see how this can be viewed as anything other than viewpoint discrimination.

V

Hastings' current policy, as announced for the first time in the brief filed in this Court, fares no better than the policy that the law school invoked when CLS's application was de-

nied. According to Hastings' brief, its new policy, contrary to the position taken by Hastings officials at an earlier point in this litigation, really does not require a student group to accept all comers. Now, Hastings explains, its policy allows "neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Brief for Respondent Hastings College of the Law 5. As examples of permissible membership requirements, Hastings mentions academic standing, writing ability, "dues, attendance, and *even conduct requirements.*" *Ibid.* (emphasis added).

It seems doubtful that Hastings' new policy permits registered groups to condition membership eligibility on whatever "conduct requirements" they may wish to impose. If that is the school's current policy, it is hard to see why CLS may not be registered, for what CLS demands is that members foreswear "unrepentant participation in or advocacy of a sexually immoral lifestyle." App. 146. That should qualify as a conduct requirement.

If it does not, then what Hastings' new policy must mean is that registered groups may impose some, but not all, conduct requirements. And if that is the case, it is incumbent on Hastings to explain which conduct requirements are acceptable, which are not, and why CLS's requirement is not allowed. Hastings has made no effort to provide such an explanation.[6]

VI

I come now to the version of Hastings' policy that the Court has chosen to address. This is not the policy that Hastings invoked when CLS was denied registration. Nor is it the policy that Hastings now proclaims—and presumably implements. It is a policy that, as far as the record

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[6] Nor does the Court clarify this point. Suggesting that any conduct requirement must relate to "gross misconduct," *ante*, at 671, n. 2, is not helpful.

establishes, was in force only from the time when it was first disclosed by the former dean in July 2005 until Hastings filed its brief in this Court in March 2010. Why we should train our attention on this particular policy and not the other two is a puzzle. But in any event, it is clear that the accept-all-comers policy is not reasonable in light of the purpose of the RSO forum, and it is impossible to say on the present record that it is viewpoint neutral.

A

Once a state university opens a limited forum, it "must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U. S., at 829. Hastings' regulations on the registration of student groups impose only two substantive limitations: A group seeking registration must have student members and must be noncommercial. App. to Pet. for Cert. 82a–83a, Hastings Board of Directors, Policies and Regulations Applying to College Activities, Organizations and Students § 34.10 (June 22, 1990) (hereinafter Hastings Regulations). Access to the forum is not limited to groups devoted to particular purposes. The regulations provide that a group applying for registration must submit an official document including "a statement of *its purpose*," *id.*, at 83a (Hastings Regulations § 34.10.A.1 (emphasis added)), but the regulations make no attempt to define the limits of acceptable purposes. The regulations do not require a group seeking registration to show that it has a certain number of members or that its program is of interest to any particular number of Hastings students. Nor do the regulations require that a group serve a need not met by existing groups.

The regulations also make it clear that the registration program is not meant to stifle unpopular speech. They proclaim that "[i]t is the responsibility of the Dean to ensure an ongoing opportunity for the expression of a variety of viewpoints." *Id.*, at 82a (Hastings Regulations § 33.11).

They also emphatically disclaim any endorsement of or responsibility for views that student groups may express. *Id.*, at 85a (Hastings Regulations § 34.10.D).

Taken as a whole, the regulations plainly contemplate the creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus. That is precisely what the parties in this case stipulated: The RSO forum "seeks to promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality." App. 216 (emphasis added).

The way in which the RSO forum actually developed corroborates this design. As noted, Hastings had more than 60 RSOs in 2004–2005, each with its own independently devised purpose. Some addressed serious social issues; others—for example, the wine appreciation and ultimate Frisbee clubs—were simply recreational. Some organizations focused on a subject but did not claim to promote a particular viewpoint on that subject (for example, the Association of Communications, Sports & Entertainment Law); others were defined, not by subject, but by viewpoint. The forum did not have a single Party Politics Club; rather, it featured both the Hastings Democratic Caucus and the Hastings Republicans. There was no Reproductive Issues Club; the forum included separate pro-choice and pro-life organizations. Students did not see fit to create a Monotheistic Religions Club, but they have formed the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students. In short, the RSO forum, true to its design, has allowed Hastings students to replicate on campus a broad array of private, independent, noncommercial organizations that is very similar to those that nonstudents have formed in the outside world.

The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus. As explained above, a group's First Amendment right of expressive association is burdened by the "forced inclusion" of members whose presence would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U. S., at 648. The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, "'unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Ibid.* (quoting *Roberts*, 468 U. S., at 623).

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints. The Court lists four justifications offered by Hastings in defense of the accept-

all-comers policy and, deferring to the school's judgment, *ante*, at 687, the Court finds all those justifications satisfactory, *ante*, at 687–690. If we carry out our responsibility to exercise our own independent judgment, however, we must conclude that the justifications offered by Hastings and accepted by the Court are insufficient.

The Court first says that the accept-all-comers policy is reasonable because it helps Hastings to ensure that "'leadership, educational, and social opportunities'" are afforded to all students. *Ante*, at 688 (quoting Brief for Respondent Hastings College of the Law 32). The RSO forum, however, is designed to achieve these laudable ends in a very different way—by permitting groups of students, no matter how small, to form the groups they want. In this way, the forum multiplies the opportunity for students to serve in leadership positions; it allows students to decide which educational opportunities they wish to pursue through participation in extracurricular activities; and it permits them to create the "social opportunities" they desire by forming whatever groups they wish to create.

Second, the Court approves the accept-all-comers policy because it is easier to enforce than the Nondiscrimination Policy that it replaced. It would be "a daunting labor," the Court warns, for Hastings to try to determine whether a group excluded a member based on belief as opposed to status. *Ante*, at 688; see also *ante*, at 699, n. 1 (opinion of STEVENS, J.) (referring to the "impossible task of separating out belief-based from status-based religious discrimination").

This is a strange argument, since the Nondiscrimination Policy prohibits discrimination on substantially the same grounds as the antidiscrimination provisions of many States,[7] including California, and except for the inclusion of the prohibition of discrimination based on sexual orientation, the

[7] See, *e. g.*, Cal. Govt. Code Ann. §12940(a) (West 2005); N. J. Stat. Ann. §10:5–12(a) (West 2002); N. Y. Exec. Law Ann. §296(1)(a) (West 2010).

Nondiscrimination Policy also largely tracks federal antidiscrimination laws.[8] Moreover, Hastings now willingly accepts greater burdens under its latest policy, which apparently requires the school to distinguish between certain "conduct requirements" that are allowed and others that are not. Nor is Hastings daunted by the labor of determining whether a club admissions exam legitimately tests knowledge or is a pretext for screening out students with disfavored beliefs. Asked at oral argument whether CLS could require applicants to pass a test on the Bible, Hastings' attorney responded: "If it were truly an objective knowledge test, it would be okay." Tr. of Oral Arg. 52. The long history of disputes about the meaning of Bible passages belies any suggestion that it would be an easy task to determine whether the grading of such a test was "objective."

Third, the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. *Ante*, at 689. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. See, *e. g.*, Brief for Agudath Israel of America as *Amicus Curiae* 3 ("[B]ased upon millennia-old Jewish laws and traditions, Orthodox Jewish institutions . . . regularly differentiate between Jews and non-Jews"). Such

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[8] See, *e. g.*, Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (Title VII); *id.*, at 252, as amended, 42 U. S. C. § 2000d *et seq.* (Title VI); Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.;* Americans with Disabilities Act of 1990, 104 Stat. 337, 42 U. S. C. § 12101 *et seq.* However, Title VII, which prohibits employment discrimination on the basis of religion, provides that religious associations and schools can hire on the basis of religion and that any employer can hire on the basis of religion if it is a bona fide occupational qualification. 42 U. S. C. §§ 2000e–1(a), 2000e–2(e).

practices are not manifestations of "contempt" for members of other faiths. Cf. *ante*, at 703 (opinion of STEVENS, J.) (invoking groups that have "contempt for Jews, blacks, and women"). Nor do they thwart the objectives that Hastings endorses. Our country as a whole, no less than the Hastings College of the Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building," not by abridging First Amendment rights. Brief for Gays and Lesbians for Individual Liberty as *Amicus Curiae* 35.

Fourth, the Court observes that Hastings' policy "incorporates—in fact, subsumes—state-law proscriptions on discrimination." *Ante*, at 689. Because the First Amendment obviously takes precedence over any state law, this would not justify the Hastings policy even if it were true—but it is not. The only Hastings policy considered by the Court—the accept-all-comers policy—goes far beyond any California antidiscrimination law. Neither Hastings nor the Court claims that California law demands that state entities must accept all comers. Hastings itself certainly does not follow this policy in hiring or student admissions.

Nor is it at all clear that California law requires Hastings to deny registration to a religious group that limits membership to students who share the group's religious beliefs. Hastings cites no California court decision or administrative authority addressing this question. Instead, Hastings points to a statute prohibiting discrimination on specified grounds, including religion or sexual orientation, "in any program or activity *conducted by*" certain postsecondary educational institutions. Cal. Educ. Code Ann. § 66270 (West Supp. 2010) (emphasis added). Hastings, however, does not conduct the activities of the student groups it registers. Indeed, Hastings disclaims such responsibility, stating both in

its regulations and its Handbook for Student Organizations that it "*does not sponsor* student organizations and therefore does not accept liability for activities of student organizations." App. to Pet. for Cert. 85a (Hastings Regulations § 34.10.D (emphasis added)); App. 250. In addition, as CLS notes, another provision of California law specifically exempts "any funds that are used directly or indirectly for the benefit of student organizations" from a ban on state funding of private groups that discriminate on any of the grounds listed in § 66270. See § 92150 (West Supp. 2010).

The authority to decide whether § 66270 or any other provision of California law requires religious student groups at covered institutions to admit members who do not share the groups' religious views is of course a question of state law that we cannot resolve. The materials that have been brought to our attention, however, provide little support for the majority's suggested interpretation.

In sum, Hastings' accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints "*among*"—not within—"registered student organizations." App. 216 (emphasis added).[9]

B

The Court is also wrong in holding that the accept-all-comers policy is viewpoint neutral. The Court proclaims that it would be "hard to imagine a more viewpoint-neutral policy," *ante*, at 694, but I would not be so quick to jump to this conclusion. Even if it is assumed that the policy is

[9] Although we have held that the sponsor of a limited public forum "must respect the lawful boundaries it has itself set," *Rosenberger*, 515 U. S., at 829, the Court now says that, if the exclusion of a group is challenged, the sponsor can retroactively redraw the boundary lines in order to justify the exclusion. See *ante*, at 687–688, n. 17. This approach does not respect our prior holding.

viewpoint neutral on its face,[10] there is strong evidence in the record that the policy was announced as a pretext.

The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination. See *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527, 544 (1982) ("[A] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose"). A simple example illustrates this obvious point. Suppose that a hated student group at a state university has never been able to attract more than 10 members. Suppose that the university administration, for the purpose of preventing that group from using the school grounds for meetings, adopts a new rule under which the use of its facilities is restricted to groups with more than 25 members. Al-

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[10] In *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000), the Court considered a university rule permitting the "defund-[ing]" of a registered student group through a student referendum. See *id.*, at 224–225. "To the extent the referendum substitutes majority determinations for viewpoint neutrality," the Court observed, "it would undermine the constitutional protection the [university's registered student organization] program requires." *Id.*, at 235. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Ibid.*

Hastings' accept-all-comers policy bears a resemblance to the *Southworth* referendum process. Both permit the majority to silence a disfavored organization. There is force to CLS's argument that "[a]llowing all students to join and lead any group, even when they disagree with it, is tantamount to establishing a majoritarian heckler's veto" and "potentially turn[s] every group into an organ for the already-dominant opinion." Brief for Petitioner 51.

The Court attempts to distinguish *Southworth* as involving a funding mechanism for student groups that operated selectively, based on groups' viewpoints. *Ante*, at 695, n. 25. But that mechanism—a student referendum process—placed all students at risk of "being required to pay fees which are subsidies for speech they find objectionable, even offensive," solely upon a majority vote of the student body. See 529 U. S., at 230, 235. That is no different in principle than an accept-all-comers policy that places all student organizations at risk of takeover by a majority that is hostile to a group's viewpoint.

though this rule would be neutral on its face, its adoption for a discriminatory reason would be illegal.

Here, CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.

Shifting policies. When Hastings denied CLS's application in the fall of 2004, the only policy mentioned was the Nondiscrimination Policy. In July 2005, the former dean suggested in a deposition that the law school actually followed the very different accept-all-comers policy. In March of this year, Hastings' brief in this Court rolled out still a third policy. As is recognized in the employment discrimination context, where issues of pretext regularly arise, "[s]ubstantial changes over time in [an] employer's proffered reason for its employment decision support a finding of pretext." *Kobrin* v. *University of Minnesota*, 34 F. 3d 698, 703 (CA8 1994); see also, *e. g.*, *Aragon* v. *Republic Silver State Disposal Inc.*, 292 F. 3d 654, 661 (CA9 2002); *Cicero* v. *Borg-Warner Automotive, Inc.*, 280 F. 3d 579, 592 (CA6 2001).

Timing. The timing of Hastings' revelation of its new policies closely tracks the law school's litigation posture. When Hastings denied CLS registration, it cited only the Nondiscrimination Policy. Later, after CLS alleged that the Nondiscrimination Policy discriminated against religious groups, Hastings unveiled its accept-all-comers policy. Then, after we granted certiorari and CLS's opening brief challenged the constitutionality—and the plausibility—of the accept-all-comers policy, Hastings disclosed a new policy. As is true in the employment context, "[w]hen the justification for an adverse . . . action changes during litigation, that inconsistency raises an issue whether the proffered reason truly motivated the defendant's decision." *Ibid.*

Lack of documentation. When an employer has a written policy and then relies on a rule for which there is no written

documentation, that deviation may support an inference of pretext. See, *e. g.*, *Diaz* v. *Eagle Produce Ltd. Partnership*, 521 F. 3d 1201, 1214 (CA9 2008); *Rudin* v. *Lincoln Land Community College*, 420 F. 3d 712, 727 (CA7 2005); *Machinchick* v. *PB Power, Inc.*, 398 F. 3d 345, 354, n. 29 (CA5 2005); *Russell* v. *TG Missouri Corp.*, 340 F. 3d 735, 746 (CA8 2003); *Mohammed* v. *Callaway*, 698 F. 2d 395, 399–400, 401 (CA10 1983).

Here, Hastings claims that it has had an accept-all-comers policy since 1990, but it has not produced a single written document memorializing that policy. Nor has it cited a single occasion prior to the dean's deposition when this putative policy was orally disclosed to either student groups interested in applying for registration or to the Office of Student Services, which was charged with reviewing the bylaws of applicant groups to ensure that they were in compliance with the law school's policies.

Nonenforcement. Since it appears that no one was told about the accept-all-comers policy before July 2005, it is not surprising that the policy was not enforced. The record is replete with evidence that Hastings made no effort to enforce the all-comers policy until after it was proclaimed by the former dean. See, *e. g.*, App. to Pet. for Cert. 118a (Hastings Democratic Caucus); *id.*, at 110a (Association of Trial Lawyers of America at Hastings); *id.*, at 146a–147a (Vietnamese American Law Society); *id.*, at 142a–143a (Silenced Right); App. 192 (La Raza). See generally *supra*, at 712–713. If the record here is not sufficient to permit a finding of pretext, then the law of pretext is dead.

The Court—understandably—sidesteps this issue. The Court states that the lower courts did not address the "argument that Hastings selectively enforces its all-comer policy,"[11] that "this Court is not the proper forum to air the

[11] As previously noted, CLS consistently argued in the courts below that Hastings had applied its registration policy in a discriminatory manner. See *supra*, at 714–715, n. 1. The Court would ignore these arguments be-

issue in the first instance," and that "[o]n remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved." *Ante*, at 697–698.

Because the Court affirms the entry of summary judgment in favor of respondents, it is not clear how CLS will be able to ask the Ninth Circuit on remand to review its claim of pretext. And the argument that we should not address this issue of pretext because the Ninth Circuit did not do so is hard to take, given that the Ninth Circuit barely addressed anything, disposing of this case in precisely two sentences.

Neither of those two sentences addressed the "novel question," *ante*, at 668, to which the bulk of this Court's opinion is devoted, *i. e.*, whether the accept-all-comers policy is reasonable in light of the purposes of the RSO forum and is viewpoint neutral, see *ante*, at 683–697. If it is appropriate for us to consider that issue, then the Ninth Circuit's failure to address the issue of pretext should not stand in the way of review by this Court.

C

One final aspect of the Court's decision warrants comment. In response to the argument that the accept-all-comers policy would permit a small and unpopular group to be taken over by students who wish to silence its message, the Court states that the policy would permit a registered group to impose membership requirements "designed to ensure that students join because of their commitment to a group's vitality, not its demise." *Ante*, at 693. With this concession, the Court tacitly recognizes that Hastings does not really have an accept-all-comers policy—it has an accept-some-

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cause counsel for CLS acknowledged below that Hastings *has* an all-comers policy. See *ante*, at 675–676, n. 5 (quoting examples). But as the Court itself acknowledges, counsel for CLS stated at oral argument in this Court that "the Court needs to reach the constitutionality of the all-comers policy *as applied to CLS in this case*." Tr. of Oral Arg. 59 (emphasis added); *ante*, at 676, n. 5. And as the record shows, CLS has *never* ceded its argument that Hastings applies its accept-all-comers policy unequally.

dissident-comers policy—and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's "demise" (who may be kept out) is hopelessly vague.

Here is an example. Not all Christian denominations agree with CLS's views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was "vital" but rectified, while CLS, I assume, would take the view that the old group had suffered its "demise." Whether a change represents reform or transformation may depend very much on the eye of the beholder.

JUSTICE KENNEDY takes a similarly mistaken tack. He contends that CLS "would have a substantial case on the merits if it were shown that the all-comers policy was . . . used to infiltrate the group or challenge its leadership in order to stifle its views," *ante*, at 706 (concurring opinion), but he does not explain on what ground such a claim could succeed. The Court holds that the accept-all-comers policy is viewpoint neutral and reasonable in light of the purposes of the RSO forum. How could those characteristics be altered by a change in the membership of one of the forum's registered groups? No explanation is apparent.

In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely, see *ante*, at 693, would not eliminate this threat.

The possibility of such takeovers, however, is by no means the most important effect of the Court's holding. There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. See Brief for Evangelical Scholars (Officers and 24 Former Presidents of the Evangelical Theological Society) et al. as *Amici Curiae* 19 (affirmance in this case "will allow every public college and university in the United States to exclude all evangelical Christian organizations"); Brief for Agudath Israel of America as *Amicus Curiae* 3, 8 (affirmance would "point a judicial dagger at the heart of the Orthodox Jewish community in the United States" and permit that community to be relegated to the status of "a second-class group"); Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 3 (affirmance "could significantly affect the ability of [affiliated] student clubs and youth movements . . . to prescribe requirements for their membership and leaders based on religious beliefs and commitments"). This is where the Court's decision leads.

* * *

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Our First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction. Even those who find CLS's views objectionable should be concerned about the way the group has been treated—by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.

Syllabus

McDONALD ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL.

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

No. 08–1521. Argued March 2, 2010—Decided June 28, 2010

Two years ago, in *District of Columbia* v. *Heller*, 554 U. S. 570, this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by almost all private citizens. After *Heller*, petitioners filed this federal suit against the City, which was consolidated with two related actions, alleging that the City's handgun ban has left them vulnerable to criminals. They sought a declaration that the ban and several related City ordinances violate the Second and Fourteenth Amendments. Rejecting petitioners' argument that the ordinances are unconstitutional, the court noted that the Seventh Circuit previously had upheld the constitutionality of a handgun ban, that *Heller* had explicitly refrained from opining on whether the Second Amendment applied to the States, and that the court had a duty to follow established Circuit precedent. The Seventh Circuit affirmed, relying on three 19th-century cases—*United States* v. *Cruikshank*, 92 U. S. 542, *Presser* v. *Illinois*, 116 U. S. 252, and *Miller* v. *Texas*, 153 U. S. 535—which were decided in the wake of this Court's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughter-House Cases*, 16 Wall. 36.

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

567 F. 3d 856, reversed and remanded.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, and III, concluding that the Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense. Pp. 753–758, 759–780.

(a) Petitioners base their case on two submissions. Primarily, they argue that the right to keep and bear arms is protected by the Privileges or Immunities Clause of the Fourteenth Amendment and that the *Slaughter-House Cases*' narrow interpretation of the Clause should now be rejected. As a secondary argument, they contend that the Fourteenth Amendment's Due Process Clause incorporates the Second

Amendment right. Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only when it is an indispensable attribute of *any* "'civilized'" legal system. If it is possible to imagine a civilized country that does not recognize the right, municipal respondents assert, that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, they maintain that due process does not preclude such measures. P. 753.

(b) The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government, not to the States, see, *e. g.*, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247, but the constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system. Four years after the adoption of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases* that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," 16 Wall., at 79, and that the fundamental rights predating the creation of the Federal Government were not protected by the Clause, *id.*, at 76. Under this narrow reading, the Court held that the Privileges or Immunities Clause protects only very limited rights. *Id.*, at 79–80. Subsequently, the Court held that the Second Amendment applies only to the Federal Government in *Cruikshank*, *supra*, *Presser*, *supra*, and *Miller*, *supra*, the decisions on which the Seventh Circuit relied in this case. Pp. 754–758.

(c) Whether the Second Amendment right to keep and bear arms applies to the States is considered in light of the Court's precedents applying the Bill of Rights' protections to the States. Pp. 759–766.

(1) In the late 19th century, the Court began to hold that the Due Process Clause prohibits the States from infringing Bill of Rights protections. See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516. Five features of the approach taken during the ensuing era are noted. First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining* v. *New Jersey*, 211 U. S. 78, 99. Second, the Court explained that the only rights due process protected against state infringement were those "of such a nature that they are included in the conception of due process of law." *Ibid.* Third, some cases during this era "can be seen as having asked . . . if a civilized system could be imagined that would not accord the particular protection" asserted therein. *Duncan* v. *Louisiana*, 391 U. S. 145, 149, n. 14. Fourth, the Court did not hesitate to hold that a Bill of Rights guarantee failed to meet the test for Due Process Clause protection, finding, *e. g.*, that freedom of speech and press qualified, *Gitlow* v. *New York*, 268 U. S. 652,

666; *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, but the grand jury indictment requirement did not, *Hurtado*, *supra*. Finally, even when such a right was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from those provided against abridgment by the Federal Government. Pp. 759–761.

(2) Justice Black championed the alternative theory that § 1 of the Fourteenth Amendment totally incorporated all of the Bill of Rights' provisions, see, *e. g.*, *Adamson* v. *California*, 332 U. S. 46, 71–72 (Black, J., dissenting), but the Court never has embraced that theory. Pp. 761–763.

(3) The Court eventually moved in the direction advocated by Justice Black, by adopting a theory of selective incorporation by which the Due Process Clause incorporates particular rights contained in the first eight Amendments. See, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335, 341. These decisions abandoned three of the characteristics of the earlier period. The Court clarified that the governing standard is whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. *Duncan*, *supra*, at 149, n. 14. The Court eventually held that almost all of the Bill of Rights' guarantees met the requirements for protection under the Due Process Clause. The Court also held that Bill of Rights protections must "all . . . be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, 378 U. S. 1, 10. Under this approach, the Court overruled earlier decisions holding that particular Bill of Rights guarantees or remedies did not apply to the States. See, *e. g.*, *Gideon*, *supra*, which overruled *Betts* v. *Brady*, 316 U. S. 455. Pp. 763–766.

(d) The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. Pp. 767–780.

(1) The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, *Duncan*, *supra*, at 149, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721. *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the Second Amendment right. 554 U. S., at 599. Explaining that "the need for defense of self, family, and property is most acute" in the home, *id.*, at 628, the Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id.*, at

628–629. It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id.*, at 630. *Heller* also clarifies that this right is "deeply rooted in this Nation's history and tradition," *Glucksberg*, *supra*, at 721. *Heller* explored the right's origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the Bill of Rights. This is powerful evidence that the right was regarded as fundamental in the sense relevant here. That understanding persisted in the years immediately following the Bill of Rights' ratification and is confirmed by the state constitutions of that era, which protected the right to keep and bear arms. Pp. 767–770.

(2) A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty. Pp. 770–780.

(i) By the 1850's, the fear that the National Government would disarm the universal militia had largely faded, but the right to keep and bear arms was highly valued for self-defense. Abolitionist authors wrote in support of the right, and attempts to disarm "Free-Soilers" in "Bloody Kansas" met with outrage that the constitutional right to keep and bear arms had been taken from the people. After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African-Americans, see *Heller*, *supra*, at 614–615. These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389. In congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental. Pp. 770–778.

(ii) Despite all this evidence, municipal respondents argue that Members of Congress overwhelmingly viewed § 1 of the Fourteenth Amendment as purely an antidiscrimination rule. But while § 1 does contain an antidiscrimination rule, *i. e.*, the Equal Protection Clause, it can hardly be said that the section does no more than prohibit discrimination. If what municipal respondents mean is that the Second Amendment should be singled out for special—and specially unfavorable—

treatment, the Court rejects the suggestion. The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an even-handed manner. Pp. 778–780.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded, in Parts II–C, IV, and V, that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right recognized in *Heller*. Pp. 758–759, 780–791.

(a) Petitioners argue that the Second Amendment right is one of the "privileges or immunities of citizens of the United States." There is no need to reconsider the Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* because, for many decades, the Court has analyzed the question whether particular rights are protected against state infringement under the Fourteenth Amendment's Due Process Clause. Pp. 758–759.

(b) Municipal respondents' remaining arguments are rejected because they are at war with *Heller*'s central holding. In effect, they ask the Court to hold the right to keep and bear arms as subject to a different body of rules for incorporation than the other Bill of Rights guarantees. Pp. 780–787.

(c) The dissents' objections are addressed and rejected. Pp. 787–791.

JUSTICE THOMAS agreed that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms that was recognized in *District of Columbia* v. *Heller*, 554 U. S. 570, fully applicable to the States. However, he asserted, there is a path to this conclusion that is more straightforward and more faithful to the Second Amendment's text and history. The Court is correct in describing the Second Amendment right as "fundamental" to the American scheme of ordered liberty, *Duncan* v. *Louisiana*, 391 U. S. 145, 149, and "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721. But the Fourteenth Amendment's Due Process Clause, which speaks only to "process," cannot impose the type of substantive restraint on state legislation that the Court asserts. Rather, the right to keep and bear arms is enforceable against the States because it is a privilege of American citizenship recognized by §1 of the Fourteenth Amendment, which provides, *inter alia:* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller*, 554 U. S., at 576. The objective of this inquiry is to discern what "ordinary citizens" at the time of the Fourteenth Amendment's ratification would have understood that Amendment's Privileges or Immunities Clause to mean. *Id.*, at 577. A survey of contemporary legal

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authorities plainly shows that, at that time, the ratifying public understood the Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. Pp. 805–838.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, and III, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and an opinion with respect to Parts II–C, IV, and V, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 791. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 805. STEVENS, J., filed a dissenting opinion, *post*, p. 858. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 912.

Alan Gura argued the cause for petitioners. With him on the briefs was *David G. Sigale*. *Paul D. Clement* argued the cause for the National Rifle Association of America, Inc., et al., respondents in support of petitioners. On the briefs were *Stephen D. Poss*, *Kevin P. Martin*, *Scott B. Nardi*, *Joshua S. Lipshutz*, and *Stephen P. Halbrook*.

James A. Feldman argued the cause for respondent City of Chicago et al. With him on the brief were *Benna Ruth Solomon*, *Myriam Zreczny Kasper*, *Suzanne M. Loose*, and *Andrew W. Worseck*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *James C. Ho*, Solicitor General, *C. Andrew Weber*, First Assistant Attorney General, *David S. Morales*, Deputy Attorney General, *Sean D. Jordan*, Deputy Solicitor General, and *Candice N. Hance*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew*

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, and III, in which THE CHIEF JUSTICE, JUS-

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Edmondson of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for Academics for the Second Amendment by *Joseph Edward Olson* and *David T. Hardy;* for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May, James M. Henderson, Sr.*, and *John P. Tuskey;* for the American Civil Rights Union et al. by *Peter J. Ferrara;* for the American Legislative Exchange Council by *Rick A. Haberman* and *K. Scott Hamilton;* for Appellants from the Ninth Circuit Incorporation Case of *Nordyke v. King* et al. by *Donald E. J. Kilmer, Jr.*, and *Jason A. Davis;* for Arms Keepers by *Andrew T. Hyman;* for the Buckeye Firearms Foundation, Inc., et al. by *L. Kenneth Hanson III;* for the Calguns Foundation, Inc., by *Erik S. Jaffe;* for the Cato Institute et al. by *M. Reed Hopper, Timothy Sandefur, Robert A. Levy*, and *Ilya Shapiro;* for Constitutional Law Professors by *Douglas T. Kendall, Elizabeth B. Wydra*, and *David H. Gans;* for the Foundation for Moral Law by *John A. Eidsmoe* and *Benjamin D. DuPré;* for Gun Owners of America, Inc., et al. by *William J. Olson, Herbert W. Titus*, and *John S. Miles;* for the Heartland Institute by *Nancy Lee Carlson;* for the International Law Enforcement Educators and Trainers Association et al. by *David B. Kopel;* for Jews for the Preservation of Firearms Ownership by *Daniel L. Schmutter;* for the Maryland Arms Collectors' Association, Inc., by *Don B. Kates;* for the National Shooting Sports Foundation, Inc., by *Lawrence G. Keane, Christopher P. Johnson*, and *Laurin B. Grollman;* for the Paragon Foundation, Inc., by *Paul M. Kienzle III;* for Professors of Philosophy et al. by *Marc James Ayers* and *Mr. Kates;* for Rocky Mountain Gun Owners et al. by *Steven J. Lechner;* for Safari Club International by *Douglas S. Burdin* and *Anna M. Seidman;* for State Firearm Associations by *James W. Hryekewicz;* for State Legislators by *John Parker Sweeney* and *T. Sky Woodward;* for Thirty-Four California District Attorneys et al. by *C. D. Michel, Glenn S. McRoberts*, and *Hillary J. Green;* for Women State Legislators et al. by *Sarah Anne Gervase* and *M. Carol Bambery;* and for Senator Kay Bailey Hutchison et al. by *Mr. Clement, Jeffrey S. Bucholtz*, and *Adam Conrad.*

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A.*

TICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, and an opinion with respect to Parts II–C, IV, and V, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

Two years ago, in *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), we held that the Second Amendment protects the

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Scodro, Solicitor General, *Jane Elinor Notz*, Deputy Solicitor General, and *David A. Simpson*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Douglas F. Gansler* of Maryland and *Anne Milgram* of New Jersey; for American Cities et al. by *Henry C. Su*, *Jerrold J. Ganzfried*, *Anita Alvarez*, *Paul A. Castiglione*, *Dennis J. Herrera*, *Jean Boler*, *Linda Meng*, *George A. Nilson*, *William R. Phelan, Jr.*, *Randy Riddle*, and *Matthew D. Ruyak;* for the Anti-Defamation League by *Leonard M. Niehoff*, *Martin E. Karlinsky*, *Mark S. Finkelstein*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for the Association of Prosecuting Attorneys et al. by *Clifford M. Sloan* and *Geoffrey M. Wyatt;* for Historians on Early American Legal, Constitutional, and Pennsylvania History by *Roderick M. Thompson;* for the Oak Park Citizens Committee for Handgun Control by *Robert N. Hochman*, *Carter G. Phillips*, *Jeffrey T. Green*, and *Christopher G. Walsh, Jr.;* for Professors of Criminal Justice by *Elizabeth A. Ritvo*, *Amanda Buck Varella*, and *Albert W. Wallis;* for Thirty-Four Professional Historians and Legal Historians by *Matthew M. Shors;* for the United States Conference of Mayors by *Lawrence Rosenthal* and *John Daniel Reaves;* for the Villages of Winnetka and Skokie, Illinois, et al. by *David T. Goldberg*, *Sean H. Donahue*, *Charles W. Thompson, Jr.*, and *Katherine S. Janega;* and for Representative Carolyn McCarthy et al. by *Jennifer Milici* and *Christopher L. Hayes*.

Briefs of *amici curiae* were filed for the American Public Health Association et al. by *Julie D. Cantor* and *H. Philip Grossman;* for the Board of Education of the City of Chicago et al. by *Charles M. Dyke;* for the Brady Center to Prevent Gun Violence et al. by *A. Stephen Hut, Jr.*, *Paul R. Q. Wolfson*, *D. Hien Tran*, *Jonathan E. Lowy*, and *Daniel R. Vice;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso*, *John C. Eastman*, and *Edwin Meese III;* for the Eagle Forum Education and Legal Defense Fund by *Andrew L. Schlafly;* for the Educational Fund to Stop Gun Violence by *John E. Schreiber;* for English/Early American Historians by *Robert A. Goodin* and *Francine T. Radford;* for the Goldwater Institute et al. by *Clint Bolick*, *Nicholas C. Dranias*, and *Benjamin Barr;* for Historians and Legal Scholars by *Linda T. Coberly;* for the Institute for Jus-

right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (Chicago or City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

I

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago's firearms laws. A City ordinance provides that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." Chicago, Ill., Municipal Code § 8–20–040(a) (2009). The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. § 8–20–050(c). Like Chicago, Oak Park makes it "unlawful for any person to possess . . . any firearm," a term that includes "pistols, revolvers, guns and small arms . . . commonly known as handguns." Oak Park, Ill., Village Code §§ 27–2–1 (2007), 27–1–1 (2009).

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from fire-

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tice by *William H. Mellor, Clark M. Neily III,* and *Robert J. McNamara;* for Law Professor and Students by *Douglas A. Berman, pro se,* and *William B. Saxbe;* for the NAACP Legal Defense & Educational Fund, Inc., by *John Payton, Debo P. Adegbile, Dale E. Ho,* and *Joshua Civin;* and for the Rutherford Institute by *John W. Whitehead.*

arms." See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici*, however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted[1] and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.[2]

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers. App. 16–17; Brief for State Firearm Associations as *Amici Curiae* 20–21; Brief for State of Texas et al. as *Amici Curiae* 7–8. Colleen Lawson is a Chicago resident whose home has been targeted by burglars. "In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home."[3] McDonald, Lawson, and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection. See App. 16–19, 43–44 (McDonald), 20–24 (C. Lawson), 19, 36 (Orlov), 20–21, 40 (D. Lawson).

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[1] See Brief for Heartland Institute as *Amicus Curiae* 6–7 (noting that handgun murder rate per 100,000 persons was 9.65 in 1983 and 13.88 in 2008).

[2] Brief for Buckeye Firearms Foundation, Inc., et al. as *Amici Curiae* 8–9 ("In 2002 and again in 2008, Chicago had more murders than any other city in the U. S., including the much larger Los Angeles and New York" (internal quotation marks omitted)); see also Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17–21, and App. A (providing comparisons of Chicago's rates of assault, murder, and robbery to average crime rates in 24 other large cities).

[3] Brief for Women State Legislators et al. as *Amici Curiae* 2.

After our decision in *Heller*, the Chicago petitioners and two groups[4] filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge.

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. See App. 83–84; *NRA, Inc.* v. *Oak Park*, 617 F. Supp. 2d 752, 754 (ND Ill. 2008). The court noted that the Seventh Circuit had "squarely upheld the constitutionality of a ban on handguns a quarter century ago," *id.*, at 753 (citing *Quilici* v. *Morton Grove*, 695 F. 2d 261 (CA7 1982)), and that *Heller* had explicitly refrained from "opin[ing] on the subject of incorporation vel non of the Second Amendment," *NRA*, 617 F. Supp. 2d, at 754. The court observed that a district judge has a "duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction." *Id.*, at 753.

The Seventh Circuit affirmed, relying on three 19th-century cases—*United States* v. *Cruikshank*, 92 U. S. 542 (1876), *Presser* v. *Illinois*, 116 U. S. 252 (1886), and *Miller* v. *Texas*, 153 U. S. 535 (1894)—that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, 16 Wall. 36 (1873). The Seventh Circuit described the rationale of those cases as "defunct" and recognized that they did not consider the question whether the

[4] The Illinois State Rifle Association and the Second Amendment Foundation, Inc.

Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms. *NRA, Inc.* v. *Chicago*, 567 F. 3d 856, 857, 858 (2009). Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have "direct application," and it declined to predict how the Second Amendment would fare under this Court's modern "selective incorporation" approach. *Id.*, at 857–858 (internal quotation marks omitted).

We granted certiorari. 557 U. S. 965 (2009).

II

A

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases*, *supra*, should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of *any* "'civilized'" legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. *Ibid.* And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. *Id.*, at 21–23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

B

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." *Id.*, at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also *Lessee of Livingston* v. *Moore*, 7 Pet. 469, 551–552 (1833) ("[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states").

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." The *Slaughter-House Cases*, *supra*, involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"—were not protected by the Clause. *Id.*, at 76.

In drawing a sharp distinction between the rights of federal and state citizenship, the Court relied on two principal arguments. First, the Court emphasized that the Fourteenth Amendment's Privileges or Immunities Clause spoke of "the privileges or immunities of *citizens of the United States*," and the Court contrasted this phrasing with the wording in the first sentence of the Fourteenth Amendment and in the Privileges and Immunities Clause of Article IV, both of which refer to *state* citizenship.[5] (Emphasis added.) Second, the Court stated that a contrary reading would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," and the Court refused to conclude that such a change had been made "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Id.*, at 78. Finding the phrase "privileges or immunities of citizens of the United States" lacking by this high standard, the Court reasoned that the phrase must mean something more limited.

Under the Court's narrow reading, the Privileges or Immunities Clause protects such things as the right

> "to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Id.*, at 79–80 (internal quotation marks omitted).

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[5] The first sentence of the Fourteenth Amendment makes "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof . . . citizens of the United States *and of the State wherein they reside*." (Emphasis added.) The Privileges and Immunities Clause of Article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of *Citizens in the several States*." (Emphasis added.)

Finding no constitutional protection against state intrusion of the kind envisioned by the Louisiana statute, the Court upheld the statute. Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.*, at 96; see also *id.*, at 104. Justice Field opined that the Privileges or Immunities Clause protects rights that are "in their nature . . . fundamental," including the right of every man to pursue his profession without the imposition of unequal or discriminatory restrictions. *Id.*, at 96–97 (internal quotation marks omitted). Justice Bradley's dissent observed that "we are not bound to resort to implication . . . to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id.*, at 118. Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. *Id.*, at 119. Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] . . . what was meant for bread into a stone." *Id.*, at 129 (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. See, *e. g.*, *Saenz* v. *Roe*, 526 U. S. 489, 522, n. 1, 527 (1999) (THOMAS, J., dissenting) (scholars of the Fourteenth Amendment agree "that the Clause does not mean what the Court said it meant in 1873"); Amar, Substance and Method in the Year 2000, 28 Pepperdine L. Rev. 601, 631, n. 178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment"); Brief for Constitutional Law Professors as *Amici Curiae* 33 (claiming an "overwhelming consensus among leading consti-

tutional scholars" that the opinion is "egregiously wrong"); C. Black, A New Birth of Freedom 74–75 (1997).

Three years after the decision in the *Slaughter-House Cases*, the Court decided *Cruikshank*, the first of the three 19th-century cases on which the Seventh Circuit relied. 92 U. S. 542. In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men.[6] Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed.[7] Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.[8]

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. *Cruikshank*, 92 U. S., at 553, 559. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id.*, at 553. "The second amendment," the Court continued, "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." *Ibid.* "Our later decisions in *Presser* v. *Illinois*, 116 U. S. 252, 265

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[6] See C. Lane, The Day Freedom Died 265–266 (2008); see also Brief for NAACP Legal Defense & Education Fund, Inc., as *Amicus Curiae* 3, and n. 2.

[7] See Lane, *supra*, at 106.

[8] *United States* v. *Cruikshank*, 92 U. S. 542, 544–545 (statement of the case), 548, 553 (opinion of the Court) (1876); Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 Tulane L. Rev. 2113, 2153 (1993).

(1886), and *Miller* v. *Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government." *Heller*, 554 U. S., at 620, n. 23.

C

As previously noted, the Seventh Circuit concluded that *Cruikshank*, *Presser*, and *Miller* doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others, see Brief for Petitioners 10, 14, 15–21, but petitioners are unable to identify the Clause's full scope, Tr. of Oral Arg. 5–6, 8–11. Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases'* interpretation is flawed. See *Saenz*, *supra*, at 522, n. 1 (THOMAS, J., dissenting).

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, this Court's decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States. See *Heller*, 554 U. S., at 620, n. 23. None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." *Ibid.* As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the Due Process Clause, and we have never previously addressed the question whether the

right to keep and bear arms applies to the States under that theory.

Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In *Cruikshank*, the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the States. See 92 U. S., at 551–552. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment." *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

D

1

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See *Hurtado* v. *California*, 110 U. S. 516 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining* v. *New Jersey*, 211 U. S. 78, 99 (1908).

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." *Ibid.* See also, *e. g.*, *Ad-*

amson v. *California*, 332 U. S. 46 (1947); *Betts* v. *Brady*, 316 U. S. 455 (1942); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Powell* v. *Alabama*, 287 U. S. 45 (1932). While it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." *Twining*, 211 U. S., at 99.

The Court used different formulations in describing the boundaries of due process. For example, in *Twining*, the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Id.*, at 102 (internal quotation marks omitted). In *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko*, the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U. S., at 325.

Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." *Duncan* v. *Louisiana*, 391 U. S. 145, 149, n. 14 (1968). Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R. Co.*, *supra*, at 238. Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free

countries outside the domain of the common law." *Twining*, *supra*, at 113.

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. See, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925) (freedom of speech and press); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931) (same); *Powell*, *supra* (assistance of counsel in capital cases); *De Jonge*, *supra* (freedom of assembly); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (free exercise of religion). But others did not. See, *e. g.*, *Hurtado*, *supra* (grand jury indictment requirement); *Twining*, *supra* (privilege against self-incrimination).

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where "want of counsel in [the] particular case . . . result[ed] in a conviction lacking in . . . fundamental fairness." 316 U. S., at 473. Similarly, in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), the Court held that the "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id.*, at 27–28, 33.

2

An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was

championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, *e. g.*, *Adamson*, *supra*, at 71–72 (Black, J., dissenting); *Duncan*, *supra*, at 166 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in *Barron*.[9] *Adamson*, *supra*, at 72 (dissenting opinion).[10] None-

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[9] Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of "the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866) (hereinafter 39th Cong. Globe). Representative John Bingham, the principal author of the text of § 1, said that the Amendment would "arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today." *Id.*, at 1088; see also *id.*, at 1089–1090; A. Amar, The Bill of Rights: Creation and Reconstruction 183 (1998) (hereinafter Amar, Bill of Rights). After ratification of the Amendment, Bingham maintained the view that the rights guaranteed by § 1 of the Fourteenth Amendment "are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871). Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction, stated during the debates on the Amendment that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States." 39th Cong. Globe 2459; see also M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 112 (1986) (counting at least 30 statements during the debates in Congress interpreting § 1 to incorporate the Bill of Rights); Brief for Constitutional Law Professors as *Amici Curiae* 20 (collecting authorities and stating that "[n]ot a single senator or representative disputed [the incorporationist] understanding" of the Fourteenth Amendment).

[10] The municipal respondents and some of their *amici* dispute the significance of these statements. They contend that the phrase "privileges or immunities" is not naturally read to mean the rights set out in the first eight Amendments, see Brief for Historians et al. as *Amici Curiae* 13–16, and that "there is 'support in the legislative history for no fewer than four

theless, the Court never has embraced Justice Black's "total incorporation" theory.

3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i. e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335, 341 (1963); *Malloy* v. *Hogan*, 378 U. S. 1, 5–6 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 403–404 (1965); *Washington* v. *Texas*, 388 U. S. 14, 18 (1967); *Duncan*, 391 U. S., at 147–148; *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969).

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interpretations of the . . . Privileges or Immunities Clause,'" Brief for Municipal Respondents 69 (quoting Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008); brackets omitted). They question whether there is sound evidence of "'any strong public awareness of nationalizing the *entire* Bill of Rights.'" Brief for Municipal Respondents 69 (quoting Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L. J. 1509, 1600 (2007)). Scholars have also disputed the total incorporation theory. See, *e. g.*, Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5 (1949); Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 Ohio St. L. J. 435 (1981).

Proponents of the view that §1 of the Fourteenth Amendment makes all of the provisions of the Bill of Rights applicable to the States respond that the terms privileges, immunities, and rights were used interchangeably at the time, see, *e. g.*, Curtis, *supra*, at 64–65, and that the position taken by the leading congressional proponents of the Amendment was widely publicized and understood, see, *e. g.*, Wildenthal, *supra*, at 1564–1565, 1590; Hardy, Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868, 30 Whittier L. Rev. 695 (2009). A number of scholars have found support for the total incorporation of the Bill of Rights. See Curtis, *supra*, at 57–130; Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L. J. 57, 61 (1993); see also Amar, Bill of Rights 181–230. We take no position with respect to this academic debate.

The decisions during this time abandoned three of the previously noted characteristics of the earlier period.[11] The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan*, 391 U. S., at 149, n. 14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id.*, at 149, and n. 14; see also *id.*, at 148 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions" (emphasis added; internal quotation marks omitted)).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights.[12]

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[11] By contrast, the Court has never retreated from the proposition that the Privileges or Immunities Clause and the Due Process Clause present different questions. And in recent cases addressing unenumerated rights, we have required that a right also be "implicit in the concept of ordered liberty." See, *e. g.*, *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

[12] With respect to the First Amendment, see *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947) (Establishment Clause); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (Free Exercise Clause); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937) (freedom of assembly); *Gitlow* v. *New York*, 268 U. S. 652 (1925) (free speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931) (freedom of the press).

With respect to the Fourth Amendment, see *Aguilar* v. *Texas*, 378 U. S. 108 (1964) (warrant requirement); *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (exclusionary rule); *Wolf* v. *Colorado*, 338 U. S. 25 (1949) (freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, see *Benton* v. *Maryland*, 395 U. S. 784 (1969) (Double Jeopardy Clause); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (privilege against self-incrimination); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897) (Just Compensation Clause).

With respect to the Sixth Amendment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (trial by jury in criminal cases); *Washington* v. *Texas*, 388 U. S. 14 (1967) (compulsory process); *Klopfer* v. *North Carolina*, 386

Only a handful of the Bill of Rights protections remain unincorporated.[13]

Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy*, 378 U. S., at 10–11 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.*, at 10; see also *Mapp* v. *Ohio*, 367 U. S. 643, 655–656 (1961); *Ker* v. *California*, 374 U. S. 23, 33–34 (1963);

U. S. 213 (1967) (speedy trial); *Pointer* v. *Texas*, 380 U. S. 400 (1965) (right to confront adverse witness); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (assistance of counsel); *In re Oliver*, 333 U. S. 257 (1948) (right to a public trial).

With respect to the Eighth Amendment, see *Robinson* v. *California*, 370 U. S. 660 (1962) (cruel and unusual punishment); *Schilb* v. *Kuebel*, 404 U. S. 357 (1971) (prohibition against excessive bail (assumed)).

[13] In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.

We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 276, n. 22 (1989) (declining to decide whether the excessive-fines protection applies to the States); see also *Engblom* v. *Carey*, 677 F. 2d 957, 961 (CA2 1982) (holding as a matter of first impression that the "Third Amendment is incorporated into the Fourteenth Amendment for application to the states").

Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.

Aguilar v. *Texas*, 378 U. S. 108, 110 (1964); *Pointer*, 380 U. S., at 406; *Duncan*, *supra*, at 149, 157–158; *Benton*, 395 U. S., at 794–795; *Wallace* v. *Jaffree*, 472 U. S. 38, 48–49 (1985).[14]

Employing this approach, the Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States. See, *e. g.*, *Mapp*, *supra* (overruling in part *Wolf*, 338 U. S. 25); *Gideon*, 372 U. S. 335 (overruling *Betts*, 316 U. S. 455); *Malloy*, *supra* (overruling *Adamson*, 332 U. S. 46, and *Twining*, 211 U. S. 78); *Benton*, 395 U. S., at 794 (overruling *Palko*, 302 U. S. 319).

[14] There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. See *Apodaca* v. *Oregon*, 406 U. S. 404 (1972); see also *Johnson* v. *Louisiana*, 406 U. S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. See *Johnson*, *supra*, at 395 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U. S., at 406 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id.*, at 414–415 (Stewart, J., dissenting); *Johnson*, *supra*, at 381–382 (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. See *Johnson*, *supra*, at 395–396 (Brennan, J., dissenting) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments" (footnote omitted)).

III

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan*, 391 U. S., at 149, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

A

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day,[15] and in *Heller*, we held that individual self-defense is "the *central component*" of the Second Amendment right. 554 U. S., at 599; see also *id.*, at 628 (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid.*, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id.*, at 628–629 (some internal quotation marks omitted); see also *id.*, at 628 (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); *id.*, at 629 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded,

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[15] Citing Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, "the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame." 4 W. Blackstone, Commentaries on the Laws of England 182 (1769).

citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id.*, at 630.

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, *supra*, at 721 (internal quotation marks omitted). *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 554 U. S., at 592–593, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen," *id.*, at 594.

Blackstone's assessment was shared by the American colonists. As we noted in *Heller*, King George III's attempt to disarm the colonists in the 1760's and 1770's "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."[16] *Ibid.;* see also L. Levy, Origins of the Bill of Rights 137–143 (1999) (hereinafter Levy).

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Heller*, *supra*, at 598 (citing Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981)); see also Federal Farmer: An Additional Number of Letters to the Republican, Letter XVIII (Jan. 25, 1788), in 17 Documentary History of the Ratification of the Constitution 360, 362–363 (J. Kaminski & G. Saladino eds. 1995); S. Halbrook, The Founders' Second Amendment 171–278

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[16] For example, an article in the Boston Evening Post stated: "For it is certainly beyond human art and sophistry, to prove the British subjects, to whom the priviledge of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with arms, &c. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." Boston Evening Post, Feb. 6, 1769, in Boston Under Military Rule 1768–1769, p. 61 (1936) (emphasis deleted).

(2008). Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution's assignment of only limited powers to the Federal Government. *Heller*, *supra*, at 599; cf. The Federalist No. 46, p. 296 (C. Rossiter ed. 1961) (J. Madison). Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. See Levy 143–149; J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 155–164 (1994). But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution. See 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution 327–331 (J. Elliot 2d ed. 1854); 3 *id.*, at 657–661; 4 *id.*, at 242–246, 248–249; see also Levy 26–34; 1 A. Kelly, W. Harbison, & H. Belz, The American Constitution: Its Origins and Development 110, 118 (7th ed. 1991). This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.

This understanding persisted in the years immediately following the ratification of the Bill of Rights. In addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820. *Heller*, *supra*, at 600–603. Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as "the true palladium of liberty" and explained that prohibitions on the right would place liberty "on the brink of destruction." 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803); see also W. Rawle, A View of the Constitution of the United States of America 125–126 (2d ed. 1829); 3 J. Story, Commentaries on the Constitution of

the United States § 1890, p. 746 (1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them").

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By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense. See M. Doubler, Civilian in Peace, Soldier in War 87–90 (2003); Amar, Bill of Rights 258–259. Abolitionist authors wrote in support of the right. See L. Spooner, The Unconstitutionality of Slavery 66 (1860); J. Tiffany, A Treatise on the Unconstitutionality of American Slavery 117–118 (1849). And when attempts were made to disarm "Free-Soilers" in "Bloody Kansas," Senator Charles Sumner, who later played a leading role in the adoption of the Fourteenth Amendment, proclaimed that "[n]ever was [the rifle] more needed in just self-defense than now in Kansas." The Crime Against Kansas: The Apologies for the Crime: The True Remedy, Speech of Hon. Charles Sumner in the Senate of the United States 64–65 (1856). Indeed, the 1856 Republican Party Platform protested that in Kansas the constitutional rights of the people had been "fraudulently and violently taken from them" and the "right of the people to keep and bear arms" had been "infringed." National Party Platforms 1840–1972, p. 27 (D. Johnson & K. Porter comp. 5th ed. 1973).[17]

[17] Abolitionists and Republicans were not alone in believing that the right to keep and bear arms was a fundamental right. The 1864 Democratic Party Platform complained that the confiscation of firearms by

After the Civil War, many of the over 180,000 African-Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. See *Heller*, 554 U. S., at 614; E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 8 (1988) (hereinafter Foner). The laws of some States formally prohibited African-Americans from possessing firearms. For example, a Mississippi law provided that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, §1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed. 1950); see also Regulations for Freedmen in Louisiana, in *id.*, at 279–280; H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E. McPherson, The Political History of the United States of America During the Period of Reconstruction 40 (1871) (describing a Florida law); *id.*, at 33 (describing an Alabama law).[18]

Union troops occupying parts of the South constituted "the interference with and denial of the right of the people to bear arms in their defense." National Party Platforms 1840–1972, at 34.

[18] In South Carolina, prominent black citizens held a convention to address the State's Black Code. They drafted a memorial to Congress, in which they included a plea for protection of their constitutional right to keep and bear arms: "'We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution.'" S. Halbrook, Freedmen, The Fourteenth Amendment, and The Right to Bear Arms, 1866–1876, p. 9 (1998) (hereinafter Halbrook, Freedmen) (quoting 2 Proceedings of the Black State Conventions, 1840–1865, p. 302 (P. Foner & G. Walker eds. 1980)). Senator Charles Sumner relayed the memorial to the Senate and described the memorial as a request that black citizens "have the constitutional protection in keeping arms." 39th Cong. Globe 337.

Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Henry Wilson told his colleagues: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country." 39th Cong. Globe 40 (1865). The Report of the Joint Committee on Reconstruction—which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment [19]—contained numerous examples of such abuses. See, *e. g.*, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49–50 (1866); see also S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 23–24, 26, 36 (1865). In one town, the "marshal [took] all arms from returned colored soldiers, and [was] very prompt in shooting the blacks whenever an opportunity occur[red]." H. R. Exec. Doc. No. 70, at 238 (internal quotation marks omitted). As Senator Wilson put it during the debate on a failed proposal to disband Southern militias: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." 39th Cong. Globe 915 (1866).[20]

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[19] See B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 265–266 (1914); *Adamson* v. *California*, 332 U. S. 46, 108–109 (1947) (appendix to dissenting opinion of Black, J.).

[20] Disarmament by bands of former Confederate soldiers eventually gave way to attacks by the Ku Klux Klan. In debates over the later enacted Enforcement Act of 1870, Senator John Pool observed that the Klan would "order the colored men to give up their arms; saying that everybody would be Kukluxed in whose house fire-arms were found." Cong. Globe, 41st Cong., 2d Sess., 2719 (1870); see also H. R. Exec. Doc. No. 268, 42d Cong., 2d Sess., 2 (1872).

Union Army commanders took steps to secure the right of all citizens to keep and bear arms,[21] but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.

The most explicit evidence of Congress' aim appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery." 14 Stat. 176–177 (emphasis added).[22] Section 14 thus explicitly guaranteed that "all the citizens," black and white, would have "the constitutional right to bear arms."

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[21] For example, the occupying Union commander in South Carolina issued an order stating that "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed." General Order No. 1, Department of South Carolina, January 1, 1866, in 1 Documentary History of Reconstruction 208 (W. Fleming ed. 1950). Union officials in Georgia issued a similar order, declaring that "'[a]ll men, without the distinction of color, have the right to keep arms to defend their homes, families or themselves.'" Cramer, Johnson, & Mocsary, "This Right is Not Allowed by Governments That Are Afraid of The People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified, 17 Geo. Mason L. Rev. 823, 854 (2010) (hereinafter Cramer) (quoting Right To Bear Arms, Phila., Pa., Christian Recorder, Feb. 24, 1866, pp. 1–2). In addition, when made aware of attempts by armed parties to disarm blacks, the head of the Freedmen's Bureau in Alabama "made public [his] determination to maintain the right of the negro to keep and to bear arms, and [his] disposition to send an armed force into any neighborhood in which that right should be systematically interfered with." Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, p. 140 (1866).

[22] The Freedmen's Bureau bill was amended to include an express reference to the right to keep and bear arms, see 39th Cong. Globe 654 (Rep. Thomas Eliot), even though at least some Members believed that the unamended version alone would have protected the right, see *id.*, at 743 (Sen. Lyman Trumbull).

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms.[23] Section 1 of the Civil Rights Act guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Ibid.* This language was virtually identical to language in § 14 of the Freedmen's Bureau Act, 14 Stat. 176 ("the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal"). And as noted, the latter provision went on to explain that one of the "laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal" was "the constitutional right to bear arms." *Ibid.* Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep

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[23] There can be no doubt that the principal proponents of the Civil Rights Act of 1866 meant to end the disarmament of African-Americans in the South. In introducing the bill, Senator Trumbull described its purpose as securing to blacks the "privileges which are essential to freemen." *Id.*, at 474. He then pointed to the previously described Mississippi law that "prohibit[ed] any negro or mulatto from having fire-arms" and explained that the bill would "destroy" such laws. *Ibid.* Similarly, Representative Sidney Clarke cited disarmament of freedmen in Alabama and Mississippi as a reason to support the Civil Rights Act and to continue to deny Alabama and Mississippi representation in Congress: "I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the 'reconstructed' State authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless to-day, and oppressed by the pardoned and encouraged rebels of those States. They appeal to the American Congress for protection. In response to this appeal I shall vote for every just measure of protection, for I do not intend to be among the treacherous violators of the solemn pledge of the nation." *Id.*, at 1838–1839.

and bear arms. 39th Cong. Globe 1292. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms" and not simply to prohibit discrimination. See also Amar, Bill of Rights 264–265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks.[24] Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389 (1982); see also Amar, Bill of Rights 187; Calabresi & Fine, Two Cheers for Professor Balkin's Originalism, 103 Nw. U. L. Rev. 663, 669–670 (2009).

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safeguards of liberty under our form of Government." 39th Cong. Globe 1182. One of these, he said, was the right to keep and bear arms:

> "Every man . . . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open

[24] For example, at least one Southern court had held the Civil Rights Act to be unconstitutional. That court did so, moreover, in the course of upholding the conviction of an African-American man for violating Mississippi's law against firearm possession by freedmen. See Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional, N. Y. Times, Oct. 26, 1866, p. 2, col. 3.

> and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete." *Ibid.*

Even those who thought the Fourteenth Amendment unnecessary believed that blacks, as citizens, "have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073 (Sen. James Nye); see also Foner 258–259.[25]

Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." "The fourteenth amendment, now so happily adopted, settles the whole question." Cong. Globe, 40th Cong., 2d Sess., 1967. And in debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South. See Halbrook, Freedmen 120–131. Finally, legal commentators from the period emphasized the fundamental nature of the right. See, *e. g.*, T. Farrar, Manual of the Constitution of the United States of America § 118, p. 145 (1867);

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[25] Other Members of the 39th Congress stressed the importance of the right to keep and bear arms in discussing other measures. In speaking generally on Reconstruction, Representative Roswell Hart listed the "'right of the people to keep and bear arms'" as among those rights necessary to a "republican form of government." 39th Cong. Globe 1629. Similarly, in objecting to a bill designed to disarm Southern militias, Senator Willard Saulsbury argued that such a measure would violate the Second Amendment. *Id.*, at 914–915. Indeed, the bill "ultimately passed in a form that disbanded militias but maintained the right of individuals to their private firearms." Cramer 858.

J. Pomeroy, An Introduction to the Constitutional Law of the United States § 239, pp. 152–153 (3d ed. 1875).

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. See Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition? 87 Texas L. Rev. 7, 50 (2008).[26] Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. See Ala. Const., Art. I, § 28 (1868); Conn. Const., Art. I, § 17 (1818); Ky. Const., Art. XIII, § 25 (1850); Mich. Const., Art. XVIII, § 7 (1850); Miss. Const., Art. I, § 15 (1868); Mo. Const., Art. I, § 8 (1865); Tex. Const., Art. I, § 13 (1869); see also Mont. Const., Art. III, § 13 (1889); Wash. Const., Art. I, § 24 (1889); Wyo. Const., Art. I, § 24 (1889); see also *State* v. *McAdams*, 714 P. 2d 1236, 1238 (Wyo. 1986). What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. See, *e. g.*, Ark. Const., Art. I, § 5 (1868); Miss. Const., Art. I, § 15 (1868); Tex. Const., Art. I, § 13 (1869). A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of government.[27]

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[26] More generally worded provisions in the constitutions of seven other States may also have encompassed a right to bear arms. See Calabresi & Agudo, 87 Texas L. Rev., at 52.

[27] These state constitutional protections often reflected a lack of law enforcement in many sections of the country. In the frontier towns that did not have an effective police force, law enforcement often could not pursue criminals beyond the town borders. See Brief for Rocky Mountain Gun Owners et al. as *Amici Curiae* 15. Settlers in the West and elsewhere, therefore, were left to "repe[l] force by force when the intervention of

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

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Despite all this evidence, municipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw "discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle" and that even an outright ban on the possession of firearms was regarded as acceptable, "so long as it was not done in a discriminatory manner." Brief for Municipal Respondents 7. They argue that Members of Congress overwhelmingly viewed § 1 of the Fourteenth Amendment "as an antidiscrimination rule," and they cite statements to the effect that the section would outlaw discriminatory measures. *Id.*, at 64. This argument is implausible.

First, while § 1 of the Fourteenth Amendment contains "an antidiscrimination rule," namely, the Equal Protection Clause, municipal respondents can hardly mean that § 1 does no more than prohibit discrimination. If that were so, then the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the Fourth Amendment, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures—and so on. We assume that this is not municipal respondents' view, so what they must mean is that the Second Amendment should be singled out for

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society . . . [was] too late to prevent an injury." *District of Columbia* v. *Heller*, 554 U. S. 570, 595 (2008) (internal quotation marks omitted). The settlers' dependence on game for food and economic livelihood, moreover, undoubtedly undergirded these state constitutional guarantees. See *id.*, at 599, 609, 615.

special—and specially unfavorable—treatment. We reject that suggestion.

Second, municipal respondents' argument ignores the clear terms of the Freedmen's Bureau Act of 1866, which acknowledged the existence of the right to bear arms. If that law had used language such as "the equal benefit of laws concerning the bearing of arms," it would be possible to interpret it as simply a prohibition of racial discrimination. But § 14 speaks of and protects "the constitutional right to bear arms," an unmistakable reference to the right protected by the Second Amendment. And it protects the "full and equal benefit" of this right in the States. 14 Stat. 176–177. It would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist.

Third, if the 39th Congress had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers. In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law—like the Chicago and Oak Park ordinances challenged here—presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers. And as the Report of the Joint Committee on Reconstruction revealed, see *supra*, at 772, those groups were widely involved in harassing blacks in the South.

Fourth, municipal respondents' purely antidiscrimination theory of the Fourteenth Amendment disregards the plight of whites in the South who opposed the Black Codes. If the 39th Congress and the ratifying public had simply prohibited racial discrimination with respect to the bearing of arms, opponents of the Black Codes would have been left without

the means of self-defense—as had abolitionists in Kansas in the 1850's.

Fifth, the 39th Congress' response to proposals to disband and disarm the Southern militias is instructive. Despite recognizing and deploring the abuses of these militias, the 39th Congress balked at a proposal to disarm them. See 39th Cong. Globe 914; Halbrook, Freedmen 20–21. Disarmament, it was argued, would violate the members' right to bear arms, and it was ultimately decided to disband the militias but not to disarm their members. See Act of Mar. 2, 1867, § 6, 14 Stat. 487; Halbrook, Freedmen 68–69; Cramer 858–861. It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.

IV

Municipal respondents' remaining arguments are at war with our central holding in *Heller:* that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the Due Process Clause protects only those rights "'recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.'" Brief for Municipal Respondents 9 (quoting *Chicago, B. & Q. R. Co.*, 166 U. S., at 238). According to municipal respondents, if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right bind-

ing on the States. Brief for Municipal Respondents 9. Therefore, municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment. *Id.*, at 21–23.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See *Duncan*, 391 U. S., at 149, and n. 14. And the present-day implications of municipal respondents' argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country.[28] If *our* understanding of the right to a jury trial, the right against self-incrimination,

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[28] For example, the United States affords criminal jury trials far more broadly than other countries. See, *e. g.*, Van Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L. Rev. 403 (1992); Leib, A Comparison of Criminal Jury Decision Rules in Democratic Countries, 5 Ohio St. J. Crim. L. 629, 630 (2008); Henderson, The Wrongs of Victim's Rights, 37 Stan. L. Rev. 937, 1003, n. 296 (1985); see also *Roper* v. *Simmons*, 543 U. S. 551, 624 (2005) (SCALIA, J., dissenting) ("In many significant respects the laws of most other countries differ from our law—including . . . such explicit provisions of our Constitution as the right to jury trial"). Similarly, our rules governing pretrial interrogation differ from those in countries sharing a similar legal heritage. See Dept. of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation: Truth in Criminal Justice Report No. 1 (Feb. 12, 1986), reprinted in 22 U. Mich. J. L. Ref. 437, 534–542 (1989) (comparing the system envisioned by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), with rights afforded by England, Scotland, Canada, India, France, and Germany). And the "Court-pronounced exclusionary rule . . . is distinctively American." *Roper*, *supra*, at 624 (SCALIA, J., dissenting) (citing *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting) (noting that exclusionary rule was "unique to American jurisprudence" (internal quotation marks omitted))); see also Sklansky, Anti-Inquisitorialism, 122 Harv. L. Rev. 1634, 1648–1656, 1689–1693 (2009) (discussing the differences between American and European confrontation rules).

and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world.

Municipal respondents attempt to salvage their position by suggesting that their argument applies only to substantive as opposed to procedural rights. Brief for Municipal Respondents 10, n. 3. But even in this trimmed form, municipal respondents' argument flies in the face of more than a half century of precedent. For example, in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 8 (1947), the Court held that the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment. Yet several of the countries that municipal respondents recognize as civilized have established state churches.[29] If we were to adopt municipal respondents' theory, all of this Court's Establishment Clause precedents involving actions taken by state and local governments would go by the boards.

Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private

[29] England and Denmark have state churches. See Torke, The English Religious Establishment, 12 J. Law & Religion 399, 417–427 (1995–1996) (describing legal status of Church of England); Constitutional Act of Denmark, pt. I, §4 (1953) ("The Evangelical Lutheran Church shall be the Established Church of Denmark"). The Evangelical Lutheran Church of Finland has attributes of a state church. See Christensen, Is the Lutheran Church Still the State Church? An Analysis of Church-State Relations in Finland, 1995 B. Y. U. L. Rev. 585, 596–600 (describing status of church under Finnish law). The Web site of the Evangelical Lutheran Church of Finland states that the church may be usefully described as both a "state church" and a "folk church." See J. Seppo, The Current Condition of Church-State Relations in Finland (2004), online at http://evl.fi/EVLen.nsf/Documents/838DDBEF4A28712AC225730F001F7C67?OpenDocument&lang=EN (all Internet materials as visited June 23, 2010, and available in Clerk of Court's case file).

possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13–17.

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, *e. g.*, *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States* v. *Leon*, 468 U. S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker* v. *Wingo*, 407 U. S. 514, 522 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda* v. *Arizona*, 384 U. S. 436, 517 (1966) (Harlan, J., dissenting); *id.*, at 542 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime"); *Mapp*, 367 U. S., at 659. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

We likewise reject municipal respondents' argument that we should depart from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions is inconsistent with principles of federalism and will stifle experimentation. Municipal respondents point out—quite correctly—that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control. Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense. Brief for Municipal Respondents 18–20, 23.

There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. This argument was made repeatedly and eloquently by Members of this Court who rejected the concept of incorporation and urged retention of the two-track approach to incorporation. Throughout the era of "selective incorporation," Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 500–503 (1957) (Harlan, J., concurring in result in part and dissenting in part); *Mapp*, *supra*, at 678–680 (Harlan, J., dissenting); *Gideon*, 372 U. S., at 352 (Harlan, J., concurring); *Malloy*, 378 U. S., at 14–33 (Harlan, J., dissenting); *Pointer*, 380 U. S., at 408–409 (Harlan, J., concurring in result); *Washington*, 388 U. S., at 23–24 (Harlan, J., concurring in result); *Duncan*, 391 U. S., at 171–193 (Harlan, J., dissenting); *Benton*, 395 U. S., at 808–809 (Harlan, J., dissenting); *Williams* v. *Florida*, 399 U. S. 78, 117 (1970) (Harlan, J., dissenting in part and concurring in result in part).

Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise,[30]

[30] As noted above, see n. 13, *supra*, cases that predate the era of selective incorporation held that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement do not apply to the States. See *Hurtado* v. *California*, 110 U. S. 516 (1884) (indictment); *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 (1916) (civil jury).

As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries. See Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, D. Rottman & S. Strickland, State Court Organization 2004, pp. 213, 215–217

that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." Brief for State of Texas et al. 23.

Municipal respondents and their *amici* complain that incorporation of the Second Amendment right will lead to extensive and costly litigation, but this argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States. Consider the exclusionary rule. Although the exclusionary rule "is not an individual right," *Herring* v. *United States*, 555 U. S. 135, 141 (2009), but a "judicially created rule," *id.*, at 139, this Court made the rule applicable to the States. See *Mapp*, *supra*, at 660. The exclusionary rule is said to result in "tens of thousands of contested suppression motions each year." Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. L. & Pub. Pol'y 443, 444 (1997).

Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23–31. In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, 554 U. S., at 633–635, and this Court decades ago

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(2006) (Table 38), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf.

As a result of *Bombolis*, cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims courts. See, *e. g.*, *Cheung* v. *Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P. 3d 550 (2005) (no right to jury trial in small claims court under Nevada Constitution).

abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," *Malloy*, *supra*, at 10–11 (internal quotation marks omitted).

As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26–27 (citing *Kalodimos* v. *Morton Grove*, 103 Ill. 2d 483, 470 N. E. 2d 266 (1984)); see also Reply Brief for Respondent NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U. S., at 626. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*, at 626–627. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

Municipal respondents argue, finally, that the right to keep and bear arms is unique among the rights set out in the first eight Amendments "because the reason for codifying the Second Amendment (to protect the militia) differs from the

purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty." Brief for Municipal Respondents 36–37. Municipal respondents suggest that the Second Amendment right differs from the rights heretofore incorporated because the latter were "valued for [their] own sake." *Id.*, at 33. But we have never previously suggested that incorporation of a right turns on whether it has intrinsic as opposed to instrumental value, and quite a few of the rights previously held to be incorporated—for example the right to counsel and the right to confront and subpoena witnesses—are clearly instrumental by any measure. Moreover, this contention repackages one of the chief arguments that we rejected in *Heller*, *i. e.*, that the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights. In *Heller*, we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. 554 U. S., at 598–599. On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was "the *central component* of the right itself." *Id.*, at 599.

V

A

We turn, finally, to the two dissenting opinions. JUSTICE STEVENS' eloquent opinion covers ground already addressed, and therefore little need be added in response. JUSTICE STEVENS would "'ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.'" *Post*, at 865 (quoting *Malloy*, 378 U. S., at 24 (Harlan, J., dissenting)). The question presented in this case, in his view, "is whether the par-

ticular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom." *Post*, at 883. He would hold that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." *Post*, at 866.

As we have explained, the Court, for the past half century, has moved away from the two-track approach. If we were now to accept JUSTICE STEVENS' theory across the board, decades of decisions would be undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely for the individual right that *Heller* recognized, over vigorous dissents.

The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle. It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy*, *supra*, at 10–11 (internal quotation marks omitted).

B

JUSTICE BREYER's dissent makes several points to which we briefly respond. To begin, while there is certainly room for disagreement about *Heller*'s analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.

JUSTICE BREYER's conclusion that the Fourteenth Amendment does not incorporate the right to keep and bear arms appears to rest primarily on four factors: First, "there is no popular consensus" that the right is fundamental, *post*, at

920; second, the right does not protect minorities or persons neglected by those holding political power, *post,* at 921–922; third, incorporation of the Second Amendment right would "amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government" and preventing local variations, *ibid.;* and fourth, determining the scope of the Second Amendment right in cases involving state and local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, *post,* at 922–927. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the case for incorporation of the right to keep and bear arms for self-defense.

First, we have never held that a provision of the Bill of Rights applies to the States only if there is a "popular consensus" that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An *amicus* brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. See Brief for Senator Kay Bailey Hutchison et al. 4. Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. 6.

Second, petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets.[31] The legislators noted that the number of Chicago homicide victims during the current year equaled the number of

[31] See Mack & Burnette, 2 Lawmakers to Quinn: Send the Guard to Chicago, Chicago Tribune, Apr. 26, 2010, p. 6.

American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black.[32] *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime.[33] If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Third, JUSTICE BREYER is correct that incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U. S., at 636. This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

Finally, JUSTICE BREYER is incorrect that incorporation will require judges to assess the costs and benefits of fire-

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[32] Janssen & Knowles, Send in Troops? Chicago Sun-Times, Apr. 26, 2010, p. 2; see also Brief for NAACP Legal Defense & Educational Fund, Inc., as *Amicus Curiae* 5, n. 4 (stating that in 2008, almost three out of every four homicide victims in Chicago were African-Americans); *id.*, at 5–6 (noting that "each year [in Chicago], many times more African Americans are murdered by assailants wielding guns than were killed during the Colfax massacre" (footnote omitted)).

[33] See Brief for Women State Legislators et al. 9–10, 14–15; Brief for Jews for the Preservation of Firearms Ownership 3–4; see also Brief for Pink Pistols et al. in *District of Columbia* v. *Heller*, O. T. 2007, No. 07–290, pp. 5–11.

arms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See *supra*, at 785–786. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, *supra*, at 634.

* * *

In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan*, 391 U. S., at 149, and n. 14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion. Despite my misgivings about substantive due process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited." *Albright* v. *Oliver*, 510 U. S. 266, 275 (1994) (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

I write separately only to respond to some aspects of JUSTICE STEVENS' dissent. Not that aspect which disagrees with the majority's application of our precedents to this case,

which is fully covered by the Court's opinion. But much of what JUSTICE STEVENS writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount. He proposes a different theory, which he claims is more "cautiou[s]" and respectful of proper limits on the judicial role. *Post*, at 912. It is that claim I wish to address.

I

A

After stressing the substantive dimension of what he has renamed the "liberty clause," *post*, at 861–864,[1] JUSTICE STEVENS proceeds to urge readoption of the theory of incorporation articulated in *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), see *post*, at 871–877. But in fact he does not favor application of that theory at all. For whether *Palko* requires only that "a fair and enlightened system of justice would be impossible without" the right sought to be incorporated, 302 U. S., at 325, or requires in addition that the right be rooted in the "traditions and conscience of our people," *ibid.* (internal quotation marks omitted), many of the rights JUSTICE STEVENS thinks are incorporated could not pass muster under either test: abortion, *post*, at 864 (citing *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 847 (1992)); homosexual sodomy, *post*, at 873 (citing *Lawrence* v. *Texas*, 539 U. S. 558, 572 (2003)); the right to have excluded from criminal trials evidence obtained in violation of the Fourth Amendment, *post*, at 875 (citing *Mapp* v. *Ohio*, 367 U. S. 643, 650, 655–657 (1961)); and the right to teach one's

[1] I do not entirely understand JUSTICE STEVENS' renaming of the Due Process Clause. What we call it, of course, does not change what the Clause says, but shorthand should not obscure what it says. Accepting for argument's sake the shift in emphasis—from avoiding certain deprivations without that "process" which is "due," to avoiding the deprivations themselves—the Clause applies not just to deprivations of "liberty," but also to deprivations of "life" and even "property."

children foreign languages, *post,* at 864 (citing *Meyer* v. *Nebraska*, 262 U. S. 390, 399–403 (1923)), among others.

That JUSTICE STEVENS is not applying any version of *Palko* is clear from comparing, on the one hand, the rights he believes *are* covered, with, on the other hand, his conclusion that the right to keep and bear arms is *not* covered. Rights that pass his test include not just those "relating to marriage, procreation, contraception, family relationships, and child rearing and education," but also rights against "[g]overnment action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, [or] perpetrates gross injustice." *Post,* at 879 (internal quotation marks omitted). Not *all* such rights are in, however, since only "*some* fundamental aspects of personhood, dignity, and the like" are protected, *post,* at 880 (emphasis added). Exactly what is covered is not clear. But whatever else is in, he *knows* that the right to keep and bear arms is out, despite its being as "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted), as a right can be, see *District of Columbia* v. *Heller*, 554 U. S. 570, 593–595, 599, 603, 614–616 (2008). I can find no other explanation for such certitude except that JUSTICE STEVENS, despite his forswearing of "personal and private notions," *post,* at 878 (internal quotation marks omitted), deeply believes it should be out.

The subjective nature of JUSTICE STEVENS' standard is also apparent from his claim that it is the courts' prerogative—indeed their *duty*—to update the Due Process Clause so that it encompasses new freedoms the Framers were too narrowminded to imagine, *post,* at 875–877, and n. 21. Courts, he proclaims, must "do justice to [the Clause's] urgent call and its open texture" by exercising the "interpretive discretion the latter embodies." *Post,* at 877. (Why the *people* are not up to the task of deciding what new rights to

protect, even though it is *they* who are authorized to make changes, see U. S. Const., Art. V, is never explained.[2]) And it would be "judicial abdication" for a judge to "tur[n] his back" on *his* task of determining what the Fourteenth Amendment covers by "outsourc[ing]" the job to "historical sentiment," *post*, at 876, 877—that is, by being guided by what the American people throughout our history have thought. It is only we judges, exercising our "own reasoned judgment," *post*, at 872, who can be entrusted with deciding the Due Process Clause's scope—which rights serve the Amendment's "central values," *post*, at 880—which basically means picking the rights we want to protect and discarding those we do not.

B

JUSTICE STEVENS resists this description, insisting that his approach provides plenty of "guideposts" and "constraints" to keep courts from "injecting excessive subjectivity" into the process.[3] *Post*, at 877, 878. Plenty indeed—and

[2] JUSTICE STEVENS insists that he would not make courts the *sole* interpreters of the "liberty clause"; he graciously invites "[a]ll Americans" to ponder what the Clause means to them today. *Post*, at 877, n. 22. The problem is that in his approach the people's ponderings do not matter, since whatever the people decide, courts have the last word.

[3] JUSTICE BREYER is not worried by that prospect. His interpretive approach applied to incorporation of the Second Amendment includes consideration of such factors as "the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims"; whether recognizing a particular right will "further the Constitution's effort to ensure that the government treats each individual with equal respect" or will "help maintain the democratic form of government"; whether it is "inconsistent . . . with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises"; whether it fits with "the Framers' basic reason for believing the Court ought to have the power of judicial review"; courts' comparative advantage in answering empirical questions that may be involved in applying the right; and whether there is a "strong offsetting justification" for removing a decision from the democratic process. *Post*, at 918, 922–927 (dissenting opinion).

that alone is a problem. The ability of omnidirectional guideposts to constrain is inversely proportional to their number. But even individually, each lodestar or limitation he lists either is incapable of restraining judicial whimsy or cannot be squared with the precedents he seeks to preserve.

He begins with a brief nod to history, *post*, at 877–878, but as he has just made clear, he thinks historical inquiry unavailing, *post*, at 874–877. Moreover, trusting the meaning of the Due Process Clause to what has historically been protected is circular, see *post*, at 875–876, since that would mean no *new* rights could get in.

JUSTICE STEVENS moves on to the "most basic" constraint on subjectivity his theory offers: that he would "esche[w] attempts to provide any all-purpose, top-down, totalizing theory of 'liberty.' " *Post*, at 878. The notion that the absence of a coherent theory of the Due Process Clause will somehow *curtail* judicial caprice is at war with reason. Indeterminacy means opportunity for courts to impose whatever rule they like; it is the problem, not the solution. The idea that interpretive pluralism would *reduce* courts' ability to impose their will on the ignorant masses is not merely naive, but absurd. If there are no right answers, there are no wrong answers either.

JUSTICE STEVENS also argues that requiring courts to show "respect for the democratic process" should serve as a constraint. *Post*, at 880. That is true, but JUSTICE STEVENS would have them show respect in an extraordinary manner. In his view, if a right "is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate." *Ibid.* In other words, a right, such as the right to keep and bear arms, that has long been recognized but on which the States are considering restrictions, apparently deserves *less* protection, while a privilege the political branches (instruments of the democratic process) have withheld entirely and continue to withhold, deserves *more*. That topsy-turvy ap-

proach conveniently accomplishes the objective of ensuring that the rights this Court held protected in *Casey*, *Lawrence*, and other such cases fit the theory—but at the cost of insulting rather than respecting the democratic process.

The next constraint JUSTICE STEVENS suggests is harder to evaluate. He describes as "an important tool for guiding judicial discretion" "sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society." *Post*, at 880. I cannot say whether that sensitivity will really guide judges because I have no idea what it is. Is it some sixth sense instilled in judges when they ascend to the bench? Or does it mean judges are more constrained when they agonize about the cosmic conflict between liberty and its potentially harmful consequences? Attempting to give the concept more precision, JUSTICE STEVENS explains that "sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution." *Post*, at 881. Both traits are undeniably admirable, though what relation they bear to sensitivity is a mystery. But it makes no difference, for the first case JUSTICE STEVENS cites in support, see *ibid.*, *Casey*, 505 U. S., at 849, dispels any illusion that he has a meaningful form of judicial modesty in mind.

JUSTICE STEVENS offers no examples to illustrate the next constraint: *stare decisis*, *post*, at 881. But his view of it is surely not very confining, since he holds out as a "canonical" exemplar of the proper approach, see *post*, at 873, 909, *Lawrence*, which overruled a case decided a mere 17 years earlier, *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), see 539 U. S., at 578 (it "was not correct when it was decided, and it is not correct today"). Moreover, JUSTICE STEVENS would apply that constraint unevenly: He apparently approves those Warren Court cases that adopted jot-for-jot incorporation of procedural protections for criminal defendants, *post*, at 868, but would abandon those Warren Court rulings that undercut his

approach to substantive rights, on the basis that we have "cut back" on cases from that era before, *post*, at 869.

JUSTICE STEVENS also relies on the requirement of a "careful description of the asserted fundamental liberty interest" to limit judicial discretion. *Post*, at 882 (internal quotation marks omitted). I certainly agree with that requirement, see *Reno* v. *Flores*, 507 U. S. 292, 302 (1993), though some cases JUSTICE STEVENS approves have not applied it seriously, see, *e. g.*, *Lawrence*, *supra*, at 562 ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions"). But if the "careful description" requirement is used in the manner we have hitherto employed, then the enterprise of determining the Due Process Clause's "conceptual core," *post*, at 879, is a waste of time. In the cases he cites we sought a careful, specific description of the right at issue in order to determine *whether that right, thus narrowly defined, was fundamental*. See, *e. g.*, *Glucksberg*, 521 U. S., at 722–728; *Reno*, *supra*, at 302–306; *Collins* v. *Harker Heights*, 503 U. S. 115, 125–129 (1992); *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 269–279 (1990); see also *Vacco* v. *Quill*, 521 U. S. 793, 801–808 (1997). The threshold step of defining the asserted right with precision is entirely unnecessary, however, if (as JUSTICE STEVENS maintains) the "conceptual core" of the "liberty clause," *post*, at 879, includes a number of capacious, hazily defined categories. There is no need to define the right with much precision in order to conclude that it pertains to the plaintiff's "ability independently to define [his] identity," his "right to make certain unusually important decisions that will affect his own, or his family's, destiny," or some aspect of his "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity [or] respect." *Post*, at 879, 880 (internal quotation marks omitted). JUSTICE STEVENS must therefore have in mind some other use for the careful-

description requirement—perhaps just as a means of ensuring that courts "procee[d] slowly and incrementally," *post*, at 881. But that could be achieved just as well by having them draft their opinions in longhand.[4]

II

If JUSTICE STEVENS' account of the constraints of his approach did not demonstrate that they do not exist, his application of that approach to the case before us leaves no doubt. He offers several reasons for concluding that the Second Amendment right to keep and bear arms is not fundamental enough to be applied against the States.[5] None is persuasive, but more pertinent to my purpose, each is either intrinsically indeterminate, would preclude incorporation of rights we have already held incorporated, or both. His approach

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[4] After defending the careful-description criterion, JUSTICE STEVENS quickly retreats and cautions courts not to apply it too stringently. *Post*, at 882. Describing a right *too* specifically risks robbing it of its "universal valence and a moral force it might otherwise have," *ibid.*, and "loads the dice against its recognition," *post*, at 882, n. 25 (internal quotation marks omitted). *That* must be avoided, since it endangers rights JUSTICE STEVENS *does* like. See *ibid.* (discussing *Lawrence* v. *Texas*, 539 U. S. 558 (2003)). To make sure *those* rights get in, we must leave leeway in our description, so that a right that has not itself been recognized as fundamental can ride the coattails of one that has been.

[5] JUSTICE STEVENS claims that I mischaracterize his argument by referring to the Second Amendment right to keep and bear arms, instead of "the interest in keeping a firearm of one's choosing in the home," the right he says petitioners assert. *Post*, at 894, n. 36. But it is precisely the "Second Amendment right to keep and bear arms" that petitioners argue is incorporated by the Due Process Clause. See, *e. g.*, Pet. for Cert. i. Under JUSTICE STEVENS' own approach, that should end the matter. See *post*, at 882 ("[W]e must pay close attention to the precise liberty interest the litigants have asked us to vindicate"). In any event, the demise of watered-down incorporation, see *ante*, at 765–766, means that we no longer subdivide Bill of Rights guarantees into their theoretical components, only some of which apply to the States. The First Amendment freedom of speech is incorporated—not the freedom to speak on Fridays, or to speak about philosophy.

therefore does nothing to stop a judge from arriving at any conclusion he sets out to reach.

JUSTICE STEVENS begins with the odd assertion that "firearms have a fundamentally ambivalent relationship to liberty," since sometimes they are used to cause (or sometimes accidentally produce) injury to others. *Post*, at 891. The source of the rule that only nonambivalent liberties deserve due process protection is never explained—proof that judges applying JUSTICE STEVENS' approach can add new elements to the test as they see fit. The criterion, moreover, is inherently manipulable. Surely JUSTICE STEVENS does not mean that the Clause covers only rights that have *zero* harmful effect on *anyone*. Otherwise even the First Amendment is out. Maybe what he means is that the right to keep and bear arms imposes *too great* a risk to others' physical well-being. But as the plurality explains, *ante*, at 782–783, other rights we have already held incorporated pose similarly substantial risks to public safety. In all events, JUSTICE STEVENS supplies neither a standard for how severe the impairment on others' liberty must be for a right to be disqualified, nor (of course) any method of measuring the severity.

JUSTICE STEVENS next suggests that the Second Amendment right is not fundamental because it is "different in kind" from other rights we have recognized. *Post*, at 893. In one respect, of course, the right to keep and bear arms *is* different from some other rights we have held the Clause protects and he would recognize: It is deeply grounded in our Nation's history and tradition. But JUSTICE STEVENS has a different distinction in mind: Even though he does "not doubt for a moment that many Americans . . . see [firearms] as critical to their way of life as well as to their security," he pronounces that owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality."[6] *Ibid.*

[6] JUSTICE STEVENS goes a step further still, suggesting that the right to keep and bear arms is not protected by the "liberty clause" because it

Who says? Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.[7]

No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what *other* countries do. *Post,* at 895–896. When it comes to guns, JUSTICE STEVENS explains, our Nation is *already* an outlier among "advanced democracies"; not even our "oldest allies" protect as robust a right as we do, and we should not widen the gap. *Ibid.* Never mind that he explains neither which countries qualify as "advanced democracies" nor why others are irrelevant. For there is an even clearer indication that this criterion lets judges pick which rights States must respect and those they can ignore: As the plurality shows, *ante,* at 781–782, and nn. 28–29, this follow-the-foreign-crowd requirement would foreclose rights

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is not really a liberty at all, but a "property right." *Post,* at 894. Never mind that the right to bear arms sounds mighty like a liberty; and never mind that the "liberty clause" is really a Due Process Clause which explicitly protects "property," see *United States* v. *Carlton,* 512 U. S. 26, 41–42 (1994) (SCALIA, J., concurring in judgment). JUSTICE STEVENS' theory cannot explain why the Takings Clause, which unquestionably protects property, has been incorporated, see *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241 (1897), in a decision he appears to accept, *post,* at 871, n. 14.

[7] As JUSTICE STEVENS notes, see *post,* at 906–907, I accept as a matter of *stare decisis* the requirement that to be fundamental for purposes of the Due Process Clause, a right must be "implicit in the concept of ordered liberty," *Lawrence, supra,* at 593, n. 3 (SCALIA, J., dissenting) (internal quotation marks omitted). But that inquiry provides infinitely less scope for judicial invention when conducted under the Court's approach, since the field of candidates is *immensely* narrowed by the prior requirement that a right be rooted in this country's traditions. JUSTICE STEVENS, on the other hand, is free to scan the universe for rights that he thinks "implicit in the concept," etc. The point JUSTICE STEVENS makes here is merely one example of his demand that a historical approach to the Constitution prove itself, not merely much better than his in restraining judicial invention, but utterly perfect in doing so. See Part III, *infra.*

that we have held (and JUSTICE STEVENS accepts) are incorporated, but that other "advanced" nations do not recognize—from the exclusionary rule to the Establishment Clause. A judge applying JUSTICE STEVENS' approach must either throw all of those rights overboard or, as cases JUSTICE STEVENS approves have done in considering unenumerated rights, simply ignore foreign law when it undermines the desired conclusion, see, *e. g.*, *Casey*, 505 U. S. 833 (making no mention of foreign law).

JUSTICE STEVENS also argues that since the right to keep and bear arms was *codified* for the purpose of "prevent[ing] elimination of the militia," it should be viewed as " 'a federalism provision' " logically incapable of incorporation. *Post*, at 897 (quoting *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 45 (2004) (THOMAS, J., concurring in judgment); some internal quotation marks omitted). This criterion, too, evidently applies only when judges want it to. The opinion JUSTICE STEVENS quotes for the "federalism provision" principle, JUSTICE THOMAS's concurrence in *Newdow*, argued that incorporation of the Establishment Clause "makes little sense" because that Clause was originally understood as a limit on congressional interference with state establishments of religion. *Id.*, at 49–51. JUSTICE STEVENS, of course, has no problem with applying the Establishment Clause to the States. See, *e. g.*, *id.*, at 8, n. 4 (opinion for the Court by STEVENS, J.) (acknowledging that the Establishment Clause "appl[ies] to the States by incorporation into the Fourteenth Amendment"). While he insists *that* Clause is not a "federalism provision," *post*, at 897, n. 40, he does not explain why *it* is not, but the right to keep and bear arms *is* (even though only the latter refers to a "right of the people"). The "federalism" argument prevents the incorporation of only *certain* rights.

JUSTICE STEVENS next argues that even if the right to keep and bear arms is "deeply rooted in some important senses," the roots of States' efforts to regulate guns run just as deep. *Post*, at 899 (internal quotation marks omitted).

But this too is true of other rights we have held incorporated. No fundamental right—not even the First Amendment—is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character. At least that is what they show (JUSTICE STEVENS would agree) for *other* rights. Once again, principles are applied selectively.

JUSTICE STEVENS' final reason for rejecting incorporation of the Second Amendment reveals, more clearly than any of the others, the game that is afoot. Assuming that there is a "plausible constitutional basis" for holding that the right to keep and bear arms is incorporated, he asserts that we ought not to do so *for prudential reasons*. *Post*, at 902. Even if we had the authority to withhold rights that are within the Constitution's command (and we assuredly do not), two of the reasons JUSTICE STEVENS gives for abstention show just how much power he would hand to judges. The States' "right to experiment" with solutions to the problem of gun violence, he says, is at its apex here because "the best solution is far from clear." *Post*, at 902–903 (internal quotation marks omitted). That is true of most serious social problems—whether, for example, "the best solution" for rampant crime is to admit confessions unless they are affirmatively shown to have been coerced, but see *Miranda* v. *Arizona*, 384 U. S. 436, 444–445 (1966), or to permit jurors to impose the death penalty without a requirement that they be free to consider "any relevant mitigating factor," see *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982), which in turn leads to the conclusion that defense counsel has provided inadequate defense if he has not conducted a "reasonable investigation" into potentially mitigating factors, see, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003), inquiry into which question tends to destroy any prospect of prompt justice, see, *e. g.*, *Wong* v. *Belmontes*, 558 U. S. 15 (2009) *(per curiam)* (reversing grant of habeas relief for sentencing on a crime committed in 1981). The obviousness of the optimal answer is

in the eye of the beholder. The implication of JUSTICE STEVENS' call for abstention is that if We The Court conclude that They The People's answers to a problem are silly, we are free to "interven[e]," *post*, at 902, but if we too are uncertain of the right answer, or merely think the States may be on to something, we can loosen the leash.

A second reason JUSTICE STEVENS says we should abstain is that the States have shown they are "capable" of protecting the right at issue, and if anything have protected it too much. *Post*, at 904. That reflects an assumption that judges can distinguish between a *proper* democratic decision to leave things alone (which we should honor), and a case of democratic market failure (which we should step in to correct). I would not—and no judge should—presume to have that sort of omniscience, which seems to me far more "arrogant," *post*, at 896, than confining courts' focus to our own national heritage.

III

JUSTICE STEVENS' response to this concurrence, *post*, at 906–911, makes the usual rejoinder of "living Constitution" advocates to the criticism that it empowers judges to eliminate or expand what the people have prescribed: The traditional, historically focused method, he says, reposes discretion in judges as well.[8] Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nu-

[8] JUSTICE STEVENS also asserts that his approach is "more faithful to this Nation's constitutional history" and to "the values and commitments of the American people, as they stand today," *post*, at 909. But what he asserts to be the proof of this is that his approach aligns (no surprise) with those cases he approves (and dubs "canonical," *ibid.*). Cases he disfavors are discarded as "hardly bind[ing]" "excesses," *post*, at 869, or less "enduring," *post*, at 873, n. 16. Not proven. Moreover, whatever relevance JUSTICE STEVENS ascribes to current "values and commitments of the American people" (and that is unclear, see *post*, at 903–904, n. 47), it is hard to see how it shows fidelity to them that he disapproves a different subset of old cases than the Court does.

anced judgments about which evidence to consult and how to interpret it.

I will stipulate to that.[9] But the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what JUSTICE STEVENS proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—*any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion.[10] Moreover, the methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, *post*, at 907–908, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments JUSTICE STEVENS would have courts pronounce. And whether or not special expertise is needed

[9] That is not to say that every historical question on which there is room for debate is indeterminate, or that every question on which historians disagree is equally balanced. Cf. *post*, at 907–908. For example, the historical analysis of the principal dissent in *Heller* is as valid as the Court's only in a two-dimensional world that conflates length and depth.

[10] By the way, JUSTICE STEVENS greatly magnifies the difficulty of a historical approach by suggesting that it was *my* burden in *Lawrence* to show the "ancient roots of proscriptions against sodomy," *post*, at 908 (internal quotation marks omitted). *Au contraire*, it was *his* burden (in the opinion he joined) to show the ancient roots of the right of sodomy.

to answer historical questions, judges most certainly have no "comparative . . . advantage," *post*, at 880 (internal quotation marks omitted), in resolving moral disputes. What is more, his approach would not eliminate, but multiply, the hard questions courts must confront, since he would not *replace* history with moral philosophy, but would have courts consider *both*.

And the Court's approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision. JUSTICE STEVENS' approach, on the other hand, deprives the people of that power, since whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be. After all, he notes, the people have been wrong before, *post*, at 910, and courts may conclude they are wrong in the future. JUSTICE STEVENS abhors a system in which "majorities or powerful interest groups always get their way," *post*, at 911, but replaces it with a system in which unelected and life-tenured judges always get their way. That such usurpation is effected unabashedly, see *post*, at 908—with "the judge's cards . . . laid on the table," *ibid.*—makes it even worse. In a vibrant democracy, usurpation should have to be accomplished in the dark. It is JUSTICE STEVENS' approach, not the Court's, that puts democracy in peril.

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

I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment "fully applicable to the States." *Ante*, at 750. I write separately because I believe there is a more straightforward path to this conclusion, one that is more

faithful to the Fourteenth Amendment's text and history. I therefore do not join Parts II–C, IV, and V of the principal opinion.

Applying what is now a well-settled test, the Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," *ante*, at 767 (citing *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968)), and " 'deeply rooted in this Nation's history and tradition,' " *ante*, at 767 (quoting *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997)). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

I

In *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), this Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense, striking down a District of Columbia ordinance that banned the possession of handguns in the home. *Id.*, at 635. The question in this case is whether the Constitution protects that right against abridgment by the States.

As the Court explains, if this case were litigated before the Fourteenth Amendment's adoption in 1868, the answer to that question would be simple. In *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), this Court held that the Bill of Rights applied only to the Federal Government. Writing for the Court, Chief Justice Marshall recalled that the founding generation added the first eight Amendments to the Constitution in response to Antifederalist concerns regarding the extent of federal—not state—power, and held that if "the framers of these amendments [had] intended them to be limitations on the powers of the state govern-

ments," "they would have declared this purpose in plain and intelligible language." *Id.*, at 250. Finding no such language in the Bill of Rights, Chief Justice Marshall held that it did not in any way restrict state authority. *Id.*, at 248–250; see *Lessee of Livingston* v. *Moore*, 7 Pet. 469, 551–552 (1833) (reaffirming *Barron*'s holding); *Permoli* v. *Municipality No. 1 of New Orleans*, 3 How. 589, 609–610 (1845) (same).

Nearly three decades after *Barron*, the Nation was splintered by a civil war fought principally over the question of slavery. As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure. See, *e. g.*, 3 Records of the Federal Convention of 1787, p. 212 (M. Farrand ed. 1911) (remarks of Luther Martin) ("[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind" (emphasis deleted)); A. Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 The Collected Works of Abraham Lincoln 266 (R. Basler ed. 1953) ("[N]o man is good enough to govern another man, *without that other's consent.* I say this is the leading principle—the sheet anchor of American republicanism. . . . Now the relation of masters and slaves is, *pro tanto*, a total violation of this principle").

After the war, a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused. The provision at issue here, § 1 of the Fourteenth Amendment, significantly altered our system of government. The first sentence of that section provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This unambiguously overruled this Court's contrary holding in *Dred Scott* v. *Sand-*

ford, 19 How. 393 (1857), that the Constitution did not recognize black Americans as citizens of the United States or their own State. *Id.*, at 405–406.

The meaning of § 1's next sentence has divided this Court for many years. That sentence begins with the command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." On its face, this appears to grant the persons just made United States citizens a certain collection of rights—*i. e.*, privileges or immunities—attributable to that status.

This Court's precedents accept that point, but define the relevant collection of rights quite narrowly. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), decided just five years after the Fourteenth Amendment's adoption, the Court interpreted this text, now known as the Privileges or Immunities Clause, for the first time. In a closely divided decision, the Court drew a sharp distinction between the privileges and immunities of state citizenship and those of federal citizenship, and held that the Privileges or Immunities Clause protected only the latter category of rights from state abridgment. *Id.*, at 78. The Court defined that category to include only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. This arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship. See *ibid.* (listing "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*" as rights potentially protected by the Privileges or Immunities Clause). But the Court soon rejected that proposition, interpreting the Privileges or Immunities Clause even more narrowly in its later cases.

Chief among those cases is *United States* v. *Cruikshank*, 92 U. S. 542 (1876). There, the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had

not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Ibid.;* see L. Keith, The Colfax Massacre 109 (2008). According to the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because "[t]he right . . . existed long *before* the adoption of the Constitution." 92 U. S., at 551 (emphasis added). Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." *Id.*, at 553. In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth.

That circular reasoning effectively has been the Court's last word on the Privileges or Immunities Clause.[1] In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel, see *Saenz* v. *Roe,* 526 U. S. 489, 503 (1999), that are not readily described as essential to liberty.

As a consequence of this Court's marginalization of the Clause, litigants seeking federal protection of fundamental rights turned to the remainder of § 1 in search of an alternative fount of such rights. They found one in a most curious place—that section's command that every State guarantee "due process" to any person before depriving him of "life, liberty, or property." At first, litigants argued that this Due Process Clause "incorporated" certain procedural rights codified in the Bill of Rights against the States. The Court

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[1] In the two decades after *United States* v. *Cruikshank,* 92 U. S. 542 (1876), was decided, this Court twice reaffirmed its holding that the Privileges or Immunities Clause does not apply the Second Amendment to the States. *Presser* v. *Illinois,* 116 U. S. 252, 266–267 (1886); *Miller* v. *Texas,* 153 U. S. 535 (1894).

generally rejected those claims, however, on the theory that the rights in question were not sufficiently "fundamental" to warrant such treatment. See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516 (1884) (grand jury indictment requirement); *Maxwell* v. *Dow*, 176 U. S. 581 (1900) (12-person jury requirement); *Twining* v. *New Jersey*, 211 U. S. 78 (1908) (privilege against self-incrimination).

That changed with time. The Court came to conclude that certain Bill of Rights guarantees *were* sufficiently fundamental to fall within § 1's guarantee of "due process." These included not only procedural protections listed in the first eight Amendments, see, *e. g.*, *Benton* v. *Maryland*, 395 U. S. 784 (1969) (protection against double jeopardy), but substantive rights as well, see, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925) (right to free speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (same). In the process of incorporating these rights against the States, the Court often applied them differently against the States than against the Federal Government on the theory that only those "fundamental" aspects of the right required Due Process Clause protection. See, *e. g.*, *Betts* v. *Brady*, 316 U. S. 455, 473 (1942) (holding that the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, but that the Due Process Clause required appointment of counsel in state criminal cases only where "want of counsel . . . result[ed] in a conviction lacking in . . . fundamental fairness"). In more recent years, this Court has "abandoned the notion" that the guarantees in the Bill of Rights apply differently when incorporated against the States than they do when applied to the Federal Government. *Ante*, at 765 (opinion of the Court) (internal quotation marks omitted). But our cases continue to adhere to the view that a right is incorporated through the Due Process Clause only if it is sufficiently "fundamental," *ante*, at 784–785, 789–791 (plurality opinion)—a term the Court has long struggled to define.

While this Court has at times concluded that a right gains "fundamental" status only if it is essential to the American "scheme of ordered liberty" or "'deeply rooted in this Nation's history and tradition,'" *ante*, at 767 (opinion of the Court) (quoting *Glucksberg*, 521 U. S., at 721), the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria, see *Lawrence* v. *Texas*, 539 U. S. 558, 562 (2003) (concluding that the Due Process Clause protects "liberty of the person both in its spatial and in its more transcendent dimensions"). Using the latter approach, the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. See, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45 (1905); *Roe* v. *Wade*, 410 U. S. 113 (1973); *Lawrence*, *supra*.

All of this is a legal fiction. The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point. Replaying a debate that has endured from the inception of the Court's substantive due process jurisprudence, the dissents laud the "flexibility" in this Court's substantive due process doctrine, *post*, at 871 (opinion of STEVENS, J.); see *post*, at 918–919 (opinion of BREYER, J.), while the plurality makes yet another effort to impose principled restraints on its exercise, see *ante*, at 780–787. But neither side argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.

To be sure, the plurality's effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives. See *post*, at 918 (BREYER, J., dissenting) (arguing that rights should be incorporated against the States through the Due Process Clause if they are "well suited to the carrying out of . . . constitutional promises"); *post*, at 878 (STEVENS, J., dissenting) (warning that there is no "all-purpose, top-down, totalizing theory of 'liberty'" protected by the Due Process Clause). But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

I cannot accept a theory of constitutional interpretation that rests on such tenuous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 963 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not "an inexorable command." *Lawrence*, *supra*, at 577. Moreover, as judges, we interpret the Con-

stitution one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular Clause in the Constitution protects the particular right at issue here. With the inquiry appropriately narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.

II

"It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803) (opinion for the Court by Marshall, C. J.). Because the Court's Privileges or Immunities Clause precedents have presumed just that, I set them aside for the moment and begin with the text.

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller*, 554 U. S., at 576 (quoting *United States* v. *Sprague*, 282 U. S. 716, 731 (1931)). Thus, the objective of this inquiry is to discern what "ordinary citizens" at the time of ratification would have understood the Privileges or Immunities Clause to mean. 554 U. S., at 577.

A

1

At the time of Reconstruction, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. See 1 W. Blackstone, Commentaries *129 (describing

the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. See, *e. g.*, *Magill* v. *Brown*, 16 F. Cas. 408, 428 (No. 8,952) (CC ED Pa. 1833) (Baldwin, J.) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places"). In addition, dictionary definitions confirm that the public shared this understanding. See, *e. g.*, 2 N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" as "a right or immunity not enjoyed by others or by all" and listing among its synonyms the words "immunity," "franchise," "right," and "liberty"); 1 *id.*, at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); 2 *id.*, at 1140 (defining "right" as "[p]rivilege or immunity granted by authority").[2]

The fact that a particular interest was designated as a "privilege" or "immunity," rather than a "right," "liberty," or "freedom," revealed little about its substance. Blackstone, for example, used the terms "privileges" and "immunities" to describe both the inalienable rights of individuals and the positive-law rights of corporations. See 1 Commentaries, at *129 (describing "private immunities" as a "*residuum* of natural liberty," and "civil privileges" as those "which society hath engaged to provide, in lieu of the natural liberties so given up by individuals"); *id.*, at *468 (stating that a corporate charter enables a corporation to "establish

[2] See also 2 C. Richardson, A New Dictionary of the English Language 1512 (1839) (defining "privilege" as "an appropriate or peculiar law or rule or right; a peculiar immunity, liberty, or franchise"); 1 *id.*, at 1056 (defining "immunity" as "[f]reedom or exemption, (from duties,) liberty, privilege"); The Philadelphia School Dictionary; or Expositor of the English Language 152 (3d ed. 1812) (defining "privilege" as a "peculiar advantage"); *id.*, at 105 (defining "immunity" as "privilege, exemption"); Royal Standard English Dictionary 411 (1788) (defining "privilege" as "public right, peculiar advantage").

rules and orders" that serve as "the privileges and immunities . . . of the corporation"). Writers in this country at the time of Reconstruction followed a similar practice. See, *e. g.*, *Racine & Mississippi R. Co.* v. *Farmers' Loan & Trust Co.*, 49 Ill. 331, 334 (1868) (describing agreement between two railroad companies in which they agreed "'to fully merge and consolidate the[ir] capital stock, powers, privileges, immunities and franchises'"); *Hathorn* v. *Calef*, 53 Me. 471, 483–484 (1866) (concluding that a statute did not "modify any power, privileges, or immunity, pertaining to the franchise of any corporation"). The nature of a privilege or immunity thus varied depending on the person, group, or entity to whom those rights were assigned. See Lash, The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art, 98 Geo. L. J. 1241, 1256–1257 (2010) (surveying antebellum usages of these terms).

2

The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, "citizens." By the time of Reconstruction, it had long been established that both the States and the Federal Government existed to preserve their citizens' inalienable rights, and that these rights were considered "privileges" or "immunities" of citizenship.

This tradition begins with our country's English roots. Parliament declared the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the Petition of Right and the English Bill of Rights. See 1 B. Schwartz, The Bill of Rights: A Documentary History 8–16, 19–21, 41–46 (1971) (hereinafter Schwartz). These fundamental rights, according to the English tradition, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. See B. Bailyn, The Ideological Origins of the American Revolution 77–79 (1967). These rights included many that later would be set forth in our

Federal Bill of Rights, such as the right to petition for redress of grievances, the right to a jury trial, and the right of "Protestants" to "have arms for their defence." English Bill of Rights (1689), reprinted in 1 Schwartz 41, 43.

As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as "privileges" and "immunities." For example, a Maryland law provided:

> "[A]ll the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such *rights liberties immunities priviledges and free customs* within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England . . . ." Md. Act for the Liberties of the People (1639), in *id.*, at 68 (emphasis added).[3]

[3] See also, *e. g.*, First Charter of Va. (1606), reprinted in 7 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3783, 3788 (F. Thorpe ed. 1909) (hereinafter Thorpe) ("DECLAR[ING]" that "all and every the Persons being our Subjects, . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of *England*" (emphasis in original)); Charter of New England (1620), in 3 *id.*, at 1827, 1839 ("[A]ll and every the Persons, beinge our Subjects, . . . shall have and enjoy all Liberties, and ffranchizes, and Immunities of free Denizens and naturall Subjects . . . as if they had been abidinge and born within this our Kingdome of England"); Charter of Mass. Bay (1629), in *id.*, at 1846, 1856–1857 (guaranteeing that "all and every the Subjects of Us, . . . shall have and enjoy all liberties and Immunities of free and naturall Subjects . . . as yf they and everie of them were borne within the Realme of England"); Grant of the Province of Me. (1639), in *id.*, at 1625, 1635 (guaranteeing "Liberties Francheses and Immunityes of or belonging to any the naturall borne subjects of this our Kingdome of England"); Charter of Carolina (1663), in 5 *id.*, at 2743, 2747 (guaranteeing to all subjects "all liberties franchises and priviledges of this our kingdom of England"); Charter of R. I. and Providence Plantations (1663), in 6 *id.*, at 3211, 3220 ("[A]ll and every the subjects of us . . . shall have and enjoye all libertyes and immunityes of ffree and naturall subjects within any the dominions of us, our heires, or successours, . . . as if they, and every of them, were borne within the realme of England"); Charter of Ga. (1732),

As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms "privileges" and "immunities" to describe these rights. As the Massachusetts Resolves declared:

> "*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind—Therefore
>
> . . . . .
>
> "*Resolved*, That no Man can justly take the Property of another without his Consent: And that upon this *original* Principle the Right of Representation . . . is evidently founded.
>
> "*Resolved*, That this *inherent* Right, together with all other, essential *Rights*, *Liberties*, *Privileges and Immunities* of the People of *Great Britain*, have been fully confirmed to them by *Magna Charta*." The Massachusetts Resolves (Oct. 29, 1765), reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766, p. 56 (E. Morgan ed. 1959) (some emphasis added).[4]

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in 2 *id.*, at 765, 773 ("[A]ll and every the persons which shall happen to be born within the said province . . . shall have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes, as if abiding and born within this our kingdom of Great-Britain").

[4] See also, *e. g.*, A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 174 (1968) (quoting 1774 Georgia resolution declaring that the Colony's inhabitants were entitled to "'the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*'" (emphasis in original)); The Virginia Resolves, Resolutions as Printed in the Journal of the House of Burgesses, reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766, at 46, 48 ("[T]he Colonists aforesaid are declared entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*" (emphasis in original)).

In keeping with this practice, the First Continental Congress declared in 1774 that the King had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." 1 Journals of the Continental Congress 1774–1789, p. 68 (W. Ford ed. 1904). In an address delivered to the inhabitants of Quebec that same year, the Congress described those rights as including the "great" "right[s]" of "trial by jury," "Habeas Corpus," and "freedom of the press." Address of the Continental Congress to the Inhabitants of Quebec (1774), reprinted in 1 Schwartz 221–223.

After declaring their independence, the newly formed States replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage. See, *e. g.*, Pa. Declaration of Rights (1776), reprinted in 5 Thorpe 3081–3084 (declaring that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights," including the "right to worship Almighty God according to the dictates of their own consciences" and the "right to bear arms for the defence of themselves and the state").[5]

Several years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. See, *e. g.*, 1 Annals of Cong. 431–432, 436–437, 440–442 (1789) (statement of Rep. Madison)

[5] See also Va. Declaration of Rights (1776), reprinted in 1 Schwartz 234–236; Pa. Declaration of Rights (1776), in *id.*, at 263–275; Del. Declaration of Rights (1776), in *id.*, at 276–278; Md. Declaration of Rights (1776), in *id.*, at 280–285; N. C. Declaration of Rights (1776), in *id.*, at 286–288.

(proposing Bill of Rights in the First Congress); The Federalist No. 84, pp. 531–533 (B. Wright ed. 1961) (A. Hamilton); see also *Heller*, 554 U. S., at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right"). The Court's subsequent decision in *Barron*, however, made plain that the codification of these rights in the Bill of Rights made them legally enforceable only against the Federal Government, not the States. See 7 Pet., at 247.

3

Even though the Bill of Rights did not apply to the States, other provisions of the Constitution did limit state interference with individual rights. Article IV, § 2, cl. 1, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The text of this provision resembles the Privileges or Immunities Clause, and it can be assumed that the public's understanding of the latter was informed by its understanding of the former.

Article IV, § 2, was derived from a similar clause in the Articles of Confederation, and reflects the dual citizenship the Constitution provided to all Americans after replacing that "league" of separate sovereign States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 187 (1824); see 3 J. Story, Commentaries on the Constitution of the United States § 1800, p. 675 (1833). By virtue of a person's citizenship in a particular State, he was guaranteed whatever rights and liberties that State's constitution and laws made available. Article IV, § 2, vested citizens of each State with an additional right: the assurance that they would be afforded the "privileges and immunities" of citizenship in any of the several States in the Union to which they might travel.

What were the "Privileges and Immunities of Citizens in the several States"? That question was answered perhaps most famously by Justice Bushrod Washington sitting as Cir-

cuit Justice in *Corfield* v. *Coryell,* 6 F. Cas. 546, 551–552 (No. 3,230) (CC ED Pa. 1825). In that case, a Pennsylvania citizen claimed that a New Jersey law prohibiting nonresidents from harvesting oysters from the State's waters violated Article IV, § 2, because it deprived him, as an out-of-state citizen, of a right New Jersey availed to its own citizens. *Id.*, at 550. Justice Washington rejected that argument, refusing to "accede to the proposition" that Article IV, § 2, entitled "citizens of the several states . . . to participate in *all* the rights which belong exclusively to the citizens of any other particular state." *Id.*, at 552 (emphasis added). In his view, Article IV, § 2, did not guarantee equal access to all public benefits a State might choose to make available to its citizens. See *id.*, at 552. Instead, it applied only to those rights "which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments." *Id.*, at 551 (emphasis added). Other courts generally agreed with this principle. See, *e. g.*, *Abbot* v. *Bayley*, 23 Mass. 89, 92–93 (1827) (noting that the "privileges and immunities" of citizens in the several States protected by Article IV, § 2, are "qualified and not absolute" because they do not grant a traveling citizen the right of "suffrage or of eligibility to office" in the State to which he travels).

When describing those "fundamental" rights, Justice Washington thought it "would perhaps be more tedious than difficult to enumerate" them all, but suggested that they could "be all comprehended under" a broad list of "general heads," such as "[p]rotection by the government," "the enjoyment of life and liberty, with the right to acquire and possess property of every kind," "the benefit of the writ of habeas corpus," and the right of access to "the courts of the state," among others.[6] *Corfield*, *supra*, at 551–552.

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[6] Justice Washington's complete list was as follows:

"Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the

Notably, Justice Washington did not indicate whether Article IV, § 2, *required* States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize. On this question, the weight of legal authorities at the time of Reconstruction indicated that Article IV, § 2, prohibited States from discriminating against sojourning citizens when recognizing fundamental rights, but did not require States to recognize those rights and did not prescribe their content. The highest courts of several States adopted this view, see, *e. g.*, *Livingston* v. *Van Ingen*, 9 Johns. *507, *561 (N. Y. Sup. Ct. 1812) (Yates, J.); *id.*, at *577 (Kent, C. J.); *Campbell* v. *Morris*, 3 H. & McH. 535, 553–554 (Md. Gen. Ct. 1797) (Chase, J.), as did several influential treatise writers, see T. Cooley, Constitutional Limitations 15–16, and n. 3 (1868) (describing Article IV, § 2, as designed "to prevent discrimination by the several States against the citizens and public proceedings of other States"); 2 J. Kent, Commentaries on American Law 35 (11th ed. 1867) (stating that Article IV, § 2, entitles sojourning citizens "to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other"). This Court adopted the same conclusion in a unanimous opinion

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government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." 6 F. Cas., at 551–552.

just one year after the Fourteenth Amendment was ratified. See *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869).

* * *

The text examined so far demonstrates three points about the meaning of the Privileges or Immunities Clause in § 1. First, "privileges" and "immunities" were synonyms for "rights." Second, both the States and the Federal Government had long recognized the inalienable rights of their citizens. Third, Article IV, § 2, of the Constitution protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship.

Two questions still remain, both provoked by the textual similarity between § 1's Privileges or Immunities Clause and Article IV, § 2. The first involves the nature of the rights at stake: Are the privileges or immunities of "citizens of the United States" recognized by § 1 the same as the privileges and immunities of "Citizens in the several States" to which Article IV, § 2, refers? The second involves the restriction imposed on the States: Does § 1, like Article IV, § 2, prohibit only discrimination with respect to certain rights *if* the State chooses to recognize them, or does it require States to recognize those rights? I address each question in turn.

B

I start with the nature of the rights that § 1's Privileges or Immunities Clause protects. Section 1 overruled *Dred Scott*'s holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. 19 How., at 417. The Court in *Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and citizens in the several States, instead referring to the rights of citizens generally. It did, however, give examples of what the rights of citizens were—

the constitutionally enumerated rights of "the full liberty of speech" and the right "to keep and carry arms." *Ibid.*

Section 1 protects the rights of citizens "of the United States" specifically. The evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

1

Nineteenth-century treaties through which the United States acquired territory from other sovereigns routinely promised inhabitants of the newly acquired Territories that they would enjoy all of the "rights," "privileges," and "immunities" of United States citizens. See, *e. g.*, Treaty of Amity, Settlement, and Limits, Art. 6, Feb. 22, 1819, 8 Stat. 256–258, T. S. No. 327 (entered into force Feb. 19, 1821) (cession of Florida) ("The inhabitants of the territories which his Catholic Majesty cedes to the United States, by this Treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of *all the privileges, rights, and immunities, of the citizens of the United States*" (emphasis added)).[7]

[7] See also Treaty Between the United States of America and the Ottawa Indians of Blanchard's Fork and Roche De Boeuf, June 24, 1862, 12 Stat. 1237 ("The Ottawa Indians of the United Bands of Blanchard's Fork and of Roche de Boeuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States . . . [after five years from the ratification of this treaty] shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the *rights, privileges, and immunities of such citizens*" (emphasis added)); Treaty Between the United States of America and Different Tribes of Sioux Indians, Art. VI, April 29, 1868, 15 Stat. 637 ("[A]ny Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the *privileges and immunities of such citizens*" (emphasis added)).

Commentators of the time explained that the rights and immunities of "citizens of the United States" recognized in these treaties "undoubtedly mean[t] those privileges that are common to all the citizens of this republic." Marcus, An Examination of the Expediency and Constitutionality of Prohibiting Slavery in the State of Missouri 17 (1819). It is therefore altogether unsurprising that several of these treaties identify liberties enumerated in the Constitution as privileges and immunities common to all United States citizens.

For example, the Louisiana Cession Act of 1803, which codified a treaty between the United States and France culminating in the Louisiana Purchase, provided:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of *all the rights, advantages and immunities of citizens of the United States;* and in the mean time they shall be maintained and protected in *the free enjoyment of their liberty, property, and the religion which they profess.*" Treaty Between the United States of America and the French Republic, Art. III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86 (emphasis added).[8]

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[8] Subsequent treaties contained similar guarantees that the inhabitants of the newly acquired Territories would enjoy the freedom to exercise certain constitutional rights. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Art. IX, Feb. 2, 1848, 9 Stat. 930, T. S. No. 207 (cession of Texas) (declaring that inhabitants of the Territory were entitled "to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction"); Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Art. III, Mar. 30, 1867, 15 Stat. 542, T. S. No. 301 (June 20, 1867) (cession of Alaska) ("The inhabitants of the ceded territory, . . . if they should prefer to remain in the ceded territory, they,

The Louisiana Cession Act reveals even more about the privileges and immunities of United States citizenship because it provoked an extensive public debate on the meaning of that term. In 1820, when the Missouri Territory (which the United States acquired through the Cession Act) sought to enter the Union as a new State, a debate ensued over whether to prohibit slavery within Missouri as a condition of its admission. Some Congressmen argued that prohibiting slavery in Missouri would deprive its inhabitants of the "privileges and immunities" they had been promised by the Cession Act. See, *e. g.*, 35 Annals of Cong. 1083 (1820) (remarks of Kentucky Rep. Hardin). But those who opposed slavery in Missouri argued that the right to hold slaves was merely a matter of state property law, not one of the privileges and immunities of United States citizenship guaranteed by the Act.[9]

Daniel Webster was among the leading proponents of the antislavery position. In his "Memorial to Congress," Webster argued that "[t]he rights, advantages and immunities here spoken of [in the Cession Act] must . . . be such as are recognized or communicated by the Constitution of the United States," not the "rights, advantages and immunities, derived exclusively from the *State* governments . . . ."

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with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion").

[9] See, *e. g.*, Speech of Mr. Joseph Hemphill (Pa.) on the Missouri Question in the House of Representatives 16 (1820), as published in pamphlet form and reprinted in 22 Moore Pamphlets, p. 16 ("If the right to hold slaves is a federal right and attached merely to citizenship of the United States, [then slavery] could maintain itself against state authority, and on this principle the owner might take his slaves into any state he pleased, in defiance of the state laws, but this would be contrary to the constitution"); see also Lash, The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art, 98 Geo. L. J. 1241, 1288–1290 (2010) (collecting other examples).

D. Webster, A Memorial to the Congress of the United States, on the Subject of Restraining the Increase of Slavery in New States To Be Admitted Into the Union 15 (Dec. 15, 1819) (emphasis added). "The obvious meaning" of the Act, in Webster's view, was that "*the rights derived under the federal Constitution* shall be enjoyed by the inhabitants of [the Territory]." *Id.*, at 15–16 (emphasis added). In other words, Webster articulated a distinction between the rights of United States citizenship and the rights of state citizenship, and argued that the former included those rights "recognized or communicated by the Constitution." Since the right to hold slaves was not mentioned in the Constitution, it was not a right of federal citizenship.

Webster and his allies ultimately lost the debate over slavery in Missouri, and the Territory was admitted as a slave State as part of the now-famous Missouri Compromise. Missouri Enabling Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 548. But their arguments continued to inform public understanding of the privileges and immunities of United States citizenship. In 1854, Webster's Memorial was republished in a pamphlet discussing the Nation's next major debate on slavery—the proposed repeal of the Missouri Compromise through the Kansas-Nebraska Act, see The Nebraska Question: Comprising Speeches in the United States Senate: Together With the History of the Missouri Compromise 9–12 (1854). It was published again in 1857 in a collection of famous American speeches. See Political Text-Book, or Encyclopedia: Containing Everything Necessary for the Reference of the Politicians and Statesmen of the United States 601–604 (M. Cluskey ed. 1857); see also Lash, 98 Geo. L. J., at 1294–1296 (describing Webster's arguments and their influence).

2

Evidence from the political branches in the years leading to the Fourteenth Amendment's adoption demonstrates broad public understanding that the privileges and immuni-

ties of United States citizenship included rights set forth in the Constitution, just as Webster and his allies had argued. In 1868, President Andrew Johnson issued a proclamation granting amnesty to former Confederates, guaranteeing "to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason . . . with restoration of *all rights, privileges, and immunities under the Constitution* and the laws which have been made in pursuance thereof." 15 Stat. 712 (emphasis added).

Records from the 39th Congress further support this understanding.

a

After the Civil War, Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union. See Cong. Globe, 39th Cong., 1st Sess., 6, 30 (1865) (hereinafter 39th Cong. Globe); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 57 (1986) (hereinafter Curtis). That Committee would ultimately recommend the adoption of the Fourteenth Amendment, justifying its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States and argued that "adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." See Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

As the Court notes, the Committee's Report "was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents." *Ante*, at 772; B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 264–265 (1914) (noting that 150,000 copies of the

Report were printed and that it was widely distributed as a campaign document in the election of 1866). In addition, newspaper coverage suggests that the wider public was aware of the Committee's work even before the Report was issued. For example, the Fort Wayne Daily Democrat (which appears to have been unsupportive of the Committee's work) paraphrased a motion instructing the Committee to

> "enquire into [the] expediency of amending the Constitution of the United States so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in *that instrument*." The Nigger Congress! Fort Wayne Daily Democrat, Feb. 1, 1866, p. 4 (emphasis added).

b

Statements made by Members of Congress leading up to, and during, the debates on the Fourteenth Amendment point in the same direction. The record of these debates has been combed before. See *Adamson* v. *California*, 332 U. S. 46, 92–110 (1947) (appendix to dissenting opinion of Black, J.) (concluding that the debates support the conclusion that § 1 was understood to incorporate the Bill of Rights against the States); *ante*, at 762, n. 9, 774, n. 23, (opinion of the Court) (counting the debates among other evidence that § 1 applies the Second Amendment against the States). Before considering that record here, it is important to clarify its relevance. When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase. They can further assist to the extent there is evidence that these statements were disseminated to the public. In other words, this evidence is useful not because

it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.

(1)

Three speeches stand out as particularly significant. Representative John Bingham, the principal draftsman of § 1, delivered a speech on the floor of the House in February 1866 introducing his first draft of the provision. Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person." 39th Cong. Globe 1089–1090 (1866). Bingham emphasized that § 1 was designed "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent—no more.'" *Id.*, at 1088.

Bingham's speech was printed in pamphlet form and broadly distributed in 1866 under the title, "One Country, One Constitution, and One People," and the subtitle, "In Support of the Proposed Amendment to Enforce the Bill of Rights."[10] Newspapers also reported his proposal, with the New York Times providing particularly extensive coverage,

[10] One Country, One Constitution, and One People: Speech of Hon. John A. Bingham, of Ohio, In the House of Representatives, February 28, 1866, In Support of the Proposed Amendment To Enforce the Bill of Rights (Cong. Globe). The pamphlet was published by the official reporter of congressional debates, and was distributed presumably pursuant to the congressional franking privilege. See Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L. J. 1509, 1558, n. 167 (2007) (hereinafter Wildenthal).

including a full reproduction of Bingham's first draft of § 1 and his remarks that a constitutional amendment to "enforc[e]" the "immortal bill of rights" was "absolutely essential to American nationality." N. Y. Times, Feb. 27, 1866, p. 8.

Bingham's first draft of § 1 was different from the version ultimately adopted. Of particular importance, the first draft granted Congress the "power to make all laws . . . necessary and proper to secure" the "citizens of each State all privileges and immunities of citizens in the several States," rather than restricting state power to "abridge" the privileges or immunities of citizens of the United States.[11] 39th Cong. Globe 1088.

That draft was met with objections, which the Times covered extensively. A front-page article hailed the "Clear and Forcible Speech" by Representative Robert Hale against the draft, explaining—and endorsing—Hale's view that Bingham's proposal would "confer upon Congress all the rights and power of legislation now reserved to the States" and would "in effect utterly obliterate State rights and State authority over their own internal affairs."[12] N. Y. Times, Feb. 28, 1866, p. 1.

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[11] The full text of Bingham's first draft of § 1 provided as follows:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." 39th Cong. Globe 1088.

[12] In a separate front-page article on the same day, the paper expounded upon Hale's arguments in even further detail, while omitting Bingham's chief rebuttals. N. Y. Times, Feb. 28, 1866, p. 1. The unbalanced nature of The New York Times' coverage is unsurprising. As scholars have noted, "[m]ost papers" during the time of Reconstruction "had a frank partisan slant . . . and the *Times* was no exception." Wildenthal 1559. In 1866, the paper "was still defending" President Johnson's resistance to Republican reform measures, as exemplified by the fact that it "supported Johnson's veto of the Civil Rights Act of 1866." *Ibid.*

Critically, Hale did *not* object to the draft insofar as it purported to protect constitutional liberties against state interference. Indeed, Hale stated that he believed (incorrectly in light of *Barron*) that individual rights enumerated in the Constitution were already enforceable against the States. See 39th Cong. Globe 1064 ("I have, somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected"); see N. Y. Times, Feb. 28, 1866, at 1. Hale's misperception was not uncommon among members of the Reconstruction generation. See *infra*, at 842–843. But that is secondary to the point that the Times' coverage of this debate over § 1's meaning suggests public awareness of its main contours—*i. e.*, that § 1 would, at a minimum, enforce constitutionally enumerated rights of United States citizens against the States.

Bingham's draft was tabled for several months. In the interim, he delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States. That speech was printed in pamphlet form, see Speech of Hon. John A. Bingham, of Ohio, on the Civil Rights Bill, Mar. 9, 1866 (Cong. Globe); see 39th Cong. Globe 1837 (remarks of Rep. Lawrence) (noting that the speech was "extensively published"), and the New York Times covered the speech on its front page. Thirty-Ninth Congress, N. Y. Times, Mar. 10, 1866, p. 1.

By the time the debates on the Fourteenth Amendment resumed, Bingham had amended his draft of § 1 to include the text of the Privileges or Immunities Clause that was ultimately adopted. Senator Jacob Howard introduced the new draft on the floor of the Senate in the third speech relevant here. Howard explained that the Constitution recognized "a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the

Constitution, . . . some by the first eight amendments of the Constitution," and that "there is no power given in the Constitution to enforce and to carry out any of these guarantees" against the States. 39th Cong. Globe 2765. Howard then stated that "[t]he great object" of § 1 was to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*, at 2766. Section 1, he indicated, imposed "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States." *Id.*, at 2765.

In describing these rights, Howard explained that they included "the privileges and immunities spoken of" in Article IV, § 2. *Id.*, at 2765. Although he did not catalogue the precise "nature" or "extent" of those rights, he thought "Corfield *vs.* Coryell" provided a useful description. Howard then submitted that

> "[t]o these privileges and immunities, whatever they may be— . . . should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution;* such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, [and] . . . *the right to keep and to bear arms.*" *Ibid.* (emphasis added).

News of Howard's speech was carried in major newspapers across the country, including the New York Herald, see N. Y. Herald, May 24, 1866, p. 1, which was the best selling paper in the Nation at that time, see A. Amar, The Bill of Rights: Creation and Reconstruction 187 (1998) (hereinafter Amar).[13] The New York Times carried the speech as well,

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[13] Other papers that covered Howard's speech include the following: Baltimore Gazette, May 24, 1866, p. 4; Boston Daily Journal, May 24, 1866, p. 4; Boston Daily Advertiser, May 24, 1866, p. 1; Daily National Intelligencer, May 24, 1866, p. 3. Springfield Daily Republican, May 24, 1866, p. 3; Charleston Daily Courier, May 28, 1866, p. 4; Charleston Daily Cou-

reprinting a lengthy excerpt of Howard's remarks, including the statements quoted above. N. Y. Times, May 24, 1866, p. 1. The following day's Times editorialized on Howard's speech, predicting that "[t]o this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance," suggesting that Bingham's narrower second draft had not been met with the same objections that Hale had raised against the first. N. Y. Times, May 25, 1866, p. 4.

As a whole, these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task.

(2)

When read against this backdrop, the civil rights legislation adopted by the 39th Congress in 1866 further supports this view. Between passing the Thirteenth Amendment—which outlawed slavery alone—and the Fourteenth Amendment, Congress passed two significant pieces of legislation. The first was the Civil Rights Act of 1866, which provided that "all persons born in the United States" were "citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" to, among other things, "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." § 1, 14 Stat. 27.

Both proponents and opponents of this Act described it as providing the "privileges" of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms. See 39th Cong. Globe 474 (remarks of Sen. Trumbull) (stating that "the late slave-

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rier, May 29, 1866, p. 1; Chicago Tribune, May 29, 1866, p. 2; Philadelphia Inquirer, May 24, 1866, p. 8.

holding States" had enacted laws "depriving persons of African descent of privileges which are essential to freemen," including "prohibit[ing] any negro or mulatto from having fire-arms" and stating that "[t]he purpose of the bill under consideration is to destroy all these discriminations"); *id.*, at 1266–1267 (remarks of Rep. Raymond) (opposing the Act, but recognizing that to "[m]ake the colored man a citizen of the United States" would guarantee to him, *inter alia*, "a defined *status* . . . a right to defend himself and his wife and children; a right to bear arms").

Three months later, Congress passed the Freedmen's Bureau Act, which also entitled all citizens to the "full and equal benefit of all laws and proceedings concerning personal liberty" and "personal security." Act of July 16, 1866, § 14, 14 Stat. 176. The Act stated expressly that the rights of personal liberty and security protected by the Act "includ[ed] the constitutional right to bear arms." *Ibid.*

(3)

There is much else in the legislative record. Many statements by Members of Congress corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States. See Curtis 112 (collecting examples). I am not aware of any statement that directly refutes that proposition. That said, the record of the debates—like most legislative history—is less than crystal clear. In particular, much ambiguity derives from the fact that at least several Members described § 1 as protecting the privileges and immunities of citizens "in the several States," harkening back to Article IV, § 2. See *supra*, at 832–833 (describing Sen. Howard's speech). These statements can be read to support the view that the Privileges or Immunities Clause protects some or all the fundamental rights of "citizens" described in *Corfield*. They can also be read to support the view that the Privileges or Immunities Clause, like Article IV, § 2, prohibits only state discrimination with

respect to those rights it covers, but does not deprive States of the power to deny those rights to all citizens equally.

I examine the rest of the historical record with this understanding. But for purposes of discerning what the public most likely thought the Privileges or Immunities Clause to mean, it is significant that the most widely publicized statements by the legislators who voted on § 1—Bingham, Howard, and even Hale—point unambiguously toward the conclusion that the Privileges or Immunities Clause enforces at least those fundamental rights enumerated in the Constitution against the States, including the Second Amendment right to keep and bear arms.

3

Interpretations of the Fourteenth Amendment in the period immediately following its ratification help to establish the public understanding of the text at the time of its adoption.

Some of these interpretations come from Members of Congress. During an 1871 debate on a bill to enforce the Fourteenth Amendment, Representative Henry Dawes listed the Constitution's first eight Amendments, including "the right to keep and bear arms," before explaining that after the Civil War, the country "gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens" who formerly were slaves. Cong. Globe, 42d Cong., 1st Sess., 475–476 (1871). "It is all these," Dawes explained, "which are comprehended in the words 'American citizen.'" *Id.*, at 476; see also *id.*, at 334 (remarks of Rep. Hoar) (stating that the Privileges or Immunities Clause referred to those rights "declared to belong to the citizen by the Constitution itself"). Even opponents of Fourteenth Amendment enforcement legislation acknowledged that the Privileges or Immunities Clause protected constitutionally enumerated individual rights. See 2 Cong. Rec. 384–385 (1874) (remarks

of Rep. Mills) (opposing enforcement law, but acknowledging, in referring to the Bill of Rights, that "[t]hese first amendments and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in article 4, section 2, of the Constitution *and in the fourteenth amendment*" (emphasis added)); see Curtis 166–170 (collecting examples).

Legislation passed in furtherance of the Fourteenth Amendment demonstrates even more clearly this understanding. For example, Congress enacted the Civil Rights Act of 1871, 17 Stat. 13, which was titled in pertinent part "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States," and which is codified in the still-existing 42 U. S. C. § 1983. That statute prohibits state officials from depriving citizens of "any rights, privileges, or immunities *secured by the Constitution.*" Rev. Stat. 1979, 42 U. S. C. § 1983 (emphasis added). Although the Judiciary ignored this provision for decades after its enactment, this Court has come to interpret the statute, unremarkably in light of its text, as protecting constitutionally enumerated rights. *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961).

A Federal Court of Appeals decision written by a future Justice of this Court adopted the same understanding of the Privileges or Immunities Clause. See, *e. g.*, *United States* v. *Hall*, 26 F. Cas. 79, 82 (No. 15,282) (CC SD Ala. 1871) (Woods, J.) ("We think, therefore, that the . . . rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States"). In addition, two of the era's major constitutional treatises reflected the understanding that § 1 would protect constitutionally enumerated rights from state abridgment.[14] A third such treatise unambigu-

[14] See J. Pomeroy, An Introduction to the Constitutional Law of the United States 155–156 (E. Bennett ed. 1886) (describing § 1, which the country was then still considering, as a "needed" "remedy" for *Barron ex*

ously indicates that the Privileges or Immunities Clause accomplished this task. G. Paschal, The Constitution of the United States 290 (1868) (explaining that the rights listed in § 1 had "already been guarantied" by Article IV and the Bill of Rights, but that "[t]he new feature declared" by § 1 was that these rights, "which had been construed to apply only to the national government, are thus imposed upon the States").

Another example of public understanding comes from United States Attorney Daniel Corbin's statement in an 1871 Ku Klux Klan prosecution. Corbin cited *Barron* and declared:

> "[T]he fourteenth amendment changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States—that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the fourteenth amendment, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep and bear arms is included in the fourteenth amendment, under 'privileges and immunities.'" Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872).

* * *

This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep

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rel. Tiernan v. *Mayor of Baltimore*, 7 Pet. 243 (1833), which held that the Bill of Rights was not enforceable against the States); T. Farrar, Manual of the Constitution of the United States of America 58–59, 145–146, 395–397 (1867); *id.*, at 546 (3d ed. 1872) (describing the Fourteenth Amendment as having "swept away" the "decisions of many courts" that "the popular rights guaranteed by the Constitution are secured only against [the federal] government").

and bear arms. As the Court demonstrates, there can be no doubt that § 1 was understood to enforce the Second Amendment against the States. See *ante,* at 770–780. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.

C

The next question is whether the Privileges or Immunities Clause merely prohibits States from discriminating among citizens if they recognize the Second Amendment's right to keep and bear arms, or whether the Clause requires States to recognize the right. The municipal respondents, Chicago and Oak Park, argue for the former interpretation. They contend that the Second Amendment, as applied to the States through the Fourteenth, authorizes a State to impose an outright ban on handgun possession such as the ones at issue here so long as a State applies it to all citizens equally.[15] The Court explains why this antidiscrimination-only reading of § 1 as a whole is "implausible." *Ante,* at 778 (citing Brief for Municipal Respondents 64). I agree, but because I think it is the Privileges or Immunities Clause that applies this right to the States, I must explain why this Clause in particular protects against more than just state discrimination, and in fact establishes a minimum baseline of rights for all American citizens.

[15] The municipal respondents and JUSTICE BREYER's dissent raise a most unusual argument that § 1 prohibits discriminatory laws affecting only the right to keep and bear arms, but offers substantive protection to other rights enumerated in the Constitution, such as the freedom of speech. See *post,* at 935. Others, however, have made the more comprehensive—and internally consistent—argument that § 1 bars discrimination alone and does not afford protection to any substantive rights. See, *e. g.,* R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (2d ed. 1997). I address the coverage of the Privileges or Immunities Clause only as it applies to the Second Amendment right presented here, but I do so with the understanding that my conclusion may have implications for the broader argument.

1

I begin, again, with the text. The Privileges or Immunities Clause opens with the command that "*No State shall*" abridge the privileges or immunities of citizens of the United States. Amdt. 14, § 1 (emphasis added). The very same phrase opens Article I, § 10, of the Constitution, which prohibits the States from "pass[ing] any Bill of Attainder" or "ex post facto Law," among other things. Article I, § 10, is one of the few constitutional provisions that limits state authority. In *Barron*, when Chief Justice Marshall interpreted the Bill of Rights as lacking "plain and intelligible language" restricting state power to infringe upon individual liberties, he pointed to Article I, § 10, as an example of text that would have accomplished that task. 7 Pet., at 250. Indeed, Chief Justice Marshall would later describe Article I, § 10, as "a bill of rights for the people of each state." *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810). Thus, the fact that the Privileges or Immunities Clause uses the command "[n]o State shall"—which Article IV, § 2, does not—strongly suggests that the former imposes a greater restriction on state power than the latter.

This interpretation is strengthened when one considers that the Privileges or Immunities Clause uses the verb "abridge," rather than "discriminate," to describe the limit it imposes on state authority. The Webster's dictionary in use at the time of Reconstruction defines the word "abridge" to mean "[t]o deprive; to cut off; . . . as, to *abridge* one of his rights." 1 Webster, An American Dictionary of the English Language, at 6. The Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights. It raises no indication that the Framers of the Clause used the word "abridge" to prohibit only discrimination.

This most natural textual reading is underscored by a well-publicized revision to the Fourteenth Amendment that the Reconstruction Congress rejected. After several

Southern States refused to ratify the Amendment, President Johnson met with their Governors to draft a compromise. N. Y. Times, Feb. 5, 1867, p. 5. Their proposal eliminated Congress' power to enforce the Amendment (granted in § 5), and replaced the Privileges or Immunities Clause in § 1 with the following:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States in which they reside, and the Citizens of each State shall be entitled to all *the privileges and immunities of citizens in the several States.*" Draft reprinted in 1 Documentary History of Reconstruction 240 (W. Fleming ed. 1950) (hereinafter Fleming) (emphasis added).

Significantly, this proposal removed the "[n]o State shall" directive and the verb "abridge" from § 1, and also changed the class of rights to be protected from those belonging to "citizens of the United States" to those of the "citizens in the several States." This phrasing is materially indistinguishable from Article IV, § 2, which generally was understood as an antidiscrimination provision alone. See *supra*, at 819–822. The proposal thus strongly indicates that at least the President of the United States and several Southern Governors thought that the Privileges or Immunities Clause, which they unsuccessfully tried to revise, prohibited more than just state-sponsored discrimination.

2

The argument that the Privileges or Immunities Clause prohibits no more than discrimination often is followed by a claim that public discussion of the Clause, and of § 1 generally, was not extensive. Because of this, the argument goes, § 1 must not have been understood to accomplish such a significant task as subjecting States to federal enforcement of a minimum baseline of rights. That argument overlooks

critical aspects of the Nation's history that underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States, including the right to keep and bear arms.

a

I turn first to public debate at the time of ratification. It is true that the congressional debates over § 1 were relatively brief. It is also true that there is little evidence of extensive debate in the States. Many state legislatures did not keep records of their debates, and the few records that do exist reveal only modest discussion. See Curtis 145. These facts are not surprising.

First, however consequential we consider the question today, the nationalization of constitutional rights was not the most controversial aspect of the Fourteenth Amendment at the time of its ratification. The Nation had just endured a tumultuous civil war, and §§ 2, 3, and 4—which reduced the representation of States that denied voting rights to blacks, deprived most former Confederate officers of the power to hold elective office, and required States to disavow Confederate war debts—were far more polarizing and consumed far more political attention. See Wildenthal 1600; Hardy, Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868, 30 Whittier L. Rev. 695, 699 (2009).

Second, the congressional debates on the Fourteenth Amendment reveal that many Representatives, and probably many citizens, believed that the Thirteenth Amendment, the 1866 Civil Rights legislation, or some combination of the two, had already enforced constitutional rights against the States. Justice Black's dissent in *Adamson* chronicles this point in detail. 332 U. S., at 107–108 (appendix to dissenting opinion). Regardless of whether that understanding was accurate as a matter of constitutional law, it helps to explain why

Congressmen had little to say during the debates about § 1. See *ibid.*

Third, while *Barron* made plain that the Bill of Rights was not legally enforceable against the States, see *supra*, at 806–807, the significance of that holding should not be overstated. Like the Framers, see *supra*, at 818–819, many 19th-century Americans understood the Bill of Rights to declare inalienable rights that pre-existed all government. Thus, even though the Bill of Rights technically applied only to the Federal Government, many believed that it declared rights that no legitimate government could abridge.

Chief Justice Henry Lumpkin's decision for the Georgia Supreme Court in *Nunn* v. *State*, 1 Ga. 243 (1846), illustrates this view. In assessing state power to regulate firearm possession, Lumpkin wrote that he was "aware that it has been decided, that [the Second Amendment], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States." *Id.*, at 250. But he still considered the right to keep and bear arms as "an unalienable right, which lies at the bottom of every free government," and thus found the States bound to honor it. *Ibid.* Other state courts adopted similar positions with respect to the right to keep and bear arms and other enumerated rights.[16] Some courts even suggested that the protections in the Bill of Rights were legally enforceable against the States, *Barron* notwithstanding.[17] A prominent treatise of the era took the same position. W. Rawle, A View of the Constitution of the

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[16] See, *e. g.*, *Raleigh & Gaston R. Co.* v. *Davis*, 19 N. C. 451, 458–462 (1837) (right to just compensation for government taking of property); *Rohan* v. *Sawin*, 59 Mass. 281, 285 (1850) (right to be secure from unreasonable government searches and seizures); *State* v. *Buzzard*, 4 Ark. 18, 28 (1842) (right to keep and bear arms); *State* v. *Jumel*, 13 La. Ann. 399, 400 (1858) (same); *Cockrum* v. *State*, 24 Tex. 394, 401–404 (1859) (same).

[17] See, *e. g.*, *People* v. *Goodwin*, 18 Johns. *187, *201 (N. Y. Sup. Ct. 1820); *Rhinehart* v. *Schuyler*, 7 Ill. 473, 522 (1845).

United States of America 124–125 (2d ed. 1829) (arguing that certain of the first eight Amendments "appl[y] to the state legislatures" because those Amendments "form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them"); *id.*, at 125–126 (describing the Second Amendment "right of the people to keep and bear Arms" as "a restraint on both" Congress and the States); see also *Heller*, 554 U. S., at 607 (describing Rawle's treatise as "influential"). Certain abolitionist leaders adhered to this view as well. Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles, citing as evidence the fact that it deprived black Americans of the "natural right of all men 'to keep and bear arms' for their personal defence," which he believed the Constitution "prohibit[ed] both Congress and the State governments from infringing." The Unconstitutionality of Slavery 98 (1860).

In sum, some appear to have believed that the Bill of Rights *did* apply to the States, even though this Court had squarely rejected that theory. See, *e. g.*, *supra*, at 830–831 (recounting Rep. Hale's argument to this effect). Many others believed that the liberties codified in the Bill of Rights were ones that no State *should* abridge, even though they understood that the Bill technically did not apply to States. These beliefs, combined with the fact that most state constitutions recognized many, if not all, of the individual rights enumerated in the Bill of Rights, made the need for federal enforcement of constitutional liberties against the States an afterthought. See *ante*, at 777 (opinion of the Court) (noting that, "[i]n 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms"). That changed with the national conflict over slavery.

b

In the contentious years leading up to the Civil War, those who sought to retain the institution of slavery found that to

do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. Congressman Tobias Plants explained that slaveholders "could not hold [slaves] safely where dissent was permitted," so they decided that "all dissent must be suppressed by the strong hand of power." 39th Cong. Globe 1013. The measures they used were ruthless, repressed virtually every right recognized in the Constitution, and demonstrated that preventing only discriminatory state firearms restrictions would have been a hollow assurance for liberty. Public reaction indicates that the American people understood this point.

The overarching goal of proslavery forces was to repress the spread of abolitionist thought and the concomitant risk of a slave rebellion. Indeed, it is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures. Slaves and free blacks represented a substantial percentage of the population and posed a severe threat to Southern order if they were not kept in their place. According to the 1860 Census, slaves represented one quarter or more of the population in 11 of the 15 slave States, nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than 50% of the population in Mississippi and South Carolina. Statistics of the United States (Including Mortality, Property, & c.,) in 1860, The Eighth Census 336–350 (1866).

The Southern fear of slave rebellion was not unfounded. Although there were others, two particularly notable slave uprisings heavily influenced slaveholders in the South. In 1822, a group of free blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. H. Aptheker, American Negro Slave Revolts 268–270 (1983). The plan was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. *Id.*, at 271. Still, slaveowners took notice—it was reportedly feared that as many as 6,600 to 9,000 slaves and

free blacks were involved in the plot. *Id.*, at 272. A few years later, the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed. *Id.*, at 298–302.

The fear generated by these and other rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense. Teaching slaves to read (even the Bible) was a criminal offense punished severely in some States. See K. Stampp, The Peculiar Institution: Slavery in the Ante-bellum South 208, 211 (1956). Virginia made it a crime for a member of an "abolition" society to enter the State and argue "that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery." 1835–1836 Va. Acts ch. 66, p. 44. Other States prohibited the circulation of literature denying a master's right to property in his slaves and passed laws requiring postmasters to inspect the mails in search of such material. C. Eaton, The Freedom-of-Thought Struggle in the Old South 118–143, 199–200 (1964).

Many legislatures amended their laws prohibiting slaves from carrying firearms[18] to apply the prohibition to free blacks as well. See, *e. g.*, Act of Dec. 23, 1833, § 7, 1833 Ga. Acts pp. 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever"); H. Aptheker, Nat Turner's Slave Rebellion 74–76, 83–94 (1966) (discussing similar Maryland and Virginia statutes); see also Act of Mar. 15,

[18] See, *e. g.*, Black Code, ch. 33, § 19, 1806 Acts of First Session of Territory of Orleans pp. 160, 162 (prohibiting slaves from using firearms unless they were authorized by their master to hunt within the boundaries of his plantation); An Act to Provide for the More Effectual Performance of Patrol Duty, 1819 S. C. Acts pp. 29, 31 (same); An Act to Amend the Sixth Section of an Act Entitled "An Act Concerning Slaves," approved 5th Feb., 1840, Tex. Laws, 3d Sess., pp. 42–43 (making it unlawful for "any slave to own firearms of any description").

1852, ch. 206, 1852 Miss. Laws p. 328 (repealing laws allowing free blacks to obtain firearms licenses); Act of Jan. 31, 1831, 1831 Fla. Acts p. 30 (same). Florida made it the "duty" of white citizen "patrol[s] to search negro houses or other suspected places, for fire arms." Act of Feb. 17, 1833, ch. 671, 1833 Fla. Acts pp. 26, 30. If they found any firearms, the patrols were to take the offending slave or free black "to the nearest justice of the peace," whereupon he would be "sever[ely] punished" by "whipping on the bare back, not exceeding thirty-nine lashes," unless he could give a "plain and satisfactory" explanation of how he came to possess the gun. *Ibid.*

Southern blacks were not alone in facing threats to their personal liberty and security during the antebellum era. Mob violence in many Northern cities presented dangers as well. Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309, 340 (1991) (hereinafter Cottrol) (recounting a July 1834 mob attack against "churches, homes, and businesses of white abolitionists and blacks" in New York that involved "upwards of twenty thousand people and required the intervention of the militia to suppress"); *ibid.* (noting an uprising in Boston nine years later in which a confrontation between a group of white sailors and four blacks led "a mob of several hundred whites" to "attac[k] and severely beat every black they could find").

c

After the Civil War, Southern anxiety about an uprising among the newly freed slaves peaked. As Representative Thaddeus Stevens is reported to have said, "'[w]hen it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, the snobs, and the male waiting-maids in Congress, were in hysterics.'" K. Stampp, The Era of Reconstruction, 1865–1877, p. 104 (1965) (hereinafter Era of Reconstruction).

As the Court explains, this fear led to "systematic efforts" in the "old Confederacy" to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. See *ante*, at 771. Some States formally prohibited blacks from possessing firearms. *Ibid.* (quoting 1865 Miss. Laws p. 165, § 1, reprinted in 1 Fleming 289). Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. See, *e. g.*, La. Statute of 1865, reprinted in *id.*, at 280. Additionally, "[t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Ante*, at 772.

As the Court makes crystal clear, if the Fourteenth Amendment "had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers." *Ante*, at 779. In the years following the Civil War, a law banning firearm possession outright "would have been nondiscriminatory only in the formal sense," for it would have "left firearms in the hands of the militia and local peace officers." *Ibid.*

Evidence suggests that the public understood this at the time the Fourteenth Amendment was ratified. The publicly circulated Report of the Joint Committee on Reconstruction extensively detailed these abuses, see *ante*, at 772 (collecting examples), and statements by citizens indicate that they looked to the Committee to provide a federal solution to this problem, see, *e. g.*, 39th Cong. Globe 337 (remarks of Rep. Sumner) (introducing "a memorial from the colored citizens of the State of South Carolina" asking for, *inter alia*, "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press").

One way in which the Federal Government responded was to issue military orders countermanding Southern arms leg-

islation. See, *e. g.*, Jan. 17, 1866, order from Major General D. E. Sickles, reprinted in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 37 (1871) ("The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed"). The significance of these steps was not lost on those they were designed to protect. After one such order was issued, The Christian Recorder, published by the African Methodist Episcopal Church, published the following editorial:

> "'We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms. . . . All men, without the distinction of color, have the right to keep arms to defend their homes, families, or themselves.'
>
> "We are glad to learn that [the] Commissioner for this State . . . has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present." Right To Bear Arms, Phila., Pa., Christian Recorder, Feb. 24, 1866, pp. 29–30.

The same month, The Loyal Georgian carried a letter to the editor asking, "Have colored persons a right to own and carry fire arms?—A Colored Citizen." The editors responded as follows:

> "Almost every day, we are asked questions similar to the above. We answer *certainly* you have the *same* right to own and carry fire arms that *other* citizens have. You are not only free but citizens of the United States and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.
>
> . . . . . .
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> "' . . . Article II, of the amendments to the Constitution of the United States, gives the people the right to bear

> arms and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." Letter to the Editor, Augusta, Ga., Loyal Georgian, Feb. 3, 1866, p. 3.

These statements are consistent with the arguments of abolitionists during the antebellum era that slavery, and the slave States' efforts to retain it, violated the constitutional rights of individuals—rights the abolitionists described as among the privileges and immunities of citizenship. See, *e. g.*, J. Tiffany, Treatise on the Unconstitutionality of American Slavery 56 (1849) ("pledg[ing] . . . to see that all the rights, privileges, and immunities, granted by the constitution of the United States, are extended to all"); *id.*, at 99 (describing the "right to keep and bear arms" as one of those rights secured by "the constitution of the United States"). The problem abolitionists sought to remedy was that, under *Dred Scott*, blacks were not entitled to the privileges and immunities of citizens under the Federal Constitution and that, in many States, whatever inalienable rights state law recognized did not apply to blacks. See, *e. g.*, *Cooper* v. *Savannah*, 4 Ga. 68, 72 (1848) (deciding, just two years after Chief Justice Lumpkin's opinion in *Nunn* recognizing the right to keep and bear arms, see *supra*, at 842, that "[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms").

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if § 1 left each State to decide which privileges or immunities of United States citizenship it would protect. As Frederick Douglass explained before § 1's adoption, "the Legislatures of the South can take from him the right to keep and bear arms, as they can—they would not allow a negro to walk with a cane where I came from, they would not allow five of them to assemble together." In

What New Skin Will the Old Snake Come Forth? An Address Delivered in New York, New York, on May 10, 1865, reprinted in 4 The Frederick Douglass Papers 79, 83–84 (J. Blassingame & J. McKivigan eds. 1991) (footnote omitted). "Notwithstanding the provision in the Constitution of the United States that the right to keep and bear arms shall not be abridged," Douglass explained that "the black man has never had the right either to keep or bear arms." *Id.*, at 84. Absent a constitutional amendment to enforce that right against the States, he insisted that "the work of the Abolitionists [wa]s not finished." *Ibid.*

This history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that "[n]o State shall . . . abridge" the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.[19]

III

My conclusion is contrary to this Court's precedents, which hold that the Second Amendment right to keep and bear arms is not a privilege of United States citizenship. See *Cruikshank*, 92 U. S., at 548–549, 551–553. I must, therefore, consider whether *stare decisis* requires retention of those precedents. As mentioned at the outset, my inquiry is limited to the right at issue here. Thus, I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumer-

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[19] I conclude that the right to keep and bear arms applies to the States through the Privileges or Immunities Clause, which recognizes the rights of United States "citizens." The plurality concludes that the right applies to the States through the Due Process Clause, which covers all "person[s]." Because this case does not involve a claim brought by a noncitizen, I express no view on the difference, if any, between my conclusion and the plurality's with respect to the extent to which the States may regulate firearm possession by noncitizens.

ated in the Constitution against the States.[20] Nor do I suggest that the *stare decisis* considerations surrounding the application of the right to keep and bear arms against the States would be the same as those surrounding another right protected by the Privileges or Immunities Clause. I consider *stare decisis* only as it applies to the question presented here.

A

This inquiry begins with the *Slaughter-House Cases*. There, this Court upheld a Louisiana statute granting a monopoly on livestock butchering in and around the city of New Orleans to a newly incorporated company. 16 Wall. 36. Butchers excluded by the monopoly sued, claiming that the statute violated the Privileges or Immunities Clause because it interfered with their right to pursue and "exercise their trade." *Id.*, at 60. This Court rejected the butchers' claim, holding that their asserted right was not a privilege or immunity of American citizenship, but one governed by the States alone. The Court held that the Privileges or Immunities Clause protected only rights of *federal* citizenship—those "which owe their existence to the Federal government, its National character, its Constitution, or its laws," *id.*, at 79—and did not protect *any* of the rights of state citizenship,

[20] I note, however, that I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect individual rights, see, *e. g.*, Art. I, § 9, cl. 2 (granting the "Privilege of the Writ of Habeas Corpus"), and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them. In addition, certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment's Establishment Clause, which "does not purport to protect individual rights." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 50 (2004) (THOMAS, J., concurring in judgment); see Amar 179–180.

id., at 74. In other words, the Court defined the two sets of rights as mutually exclusive.

After separating these two sets of rights, the Court defined the rights of state citizenship as "embrac[ing] nearly every civil right for the establishment and protection of which organized government is instituted"—that is, all those rights listed in *Corfield*. 16 Wall., at 76 (referring to "those rights" that "Judge Washington" described). That left very few rights of federal citizenship for the Privileges or Immunities Clause to protect. The Court suggested a handful of possibilities, such as the "right of free access to [federal] seaports," protection of the Federal Government while traveling "on the high seas," and even two rights listed in the Constitution. *Id.*, at 79 (noting "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*"); see *supra*, at 808. But its decision to interpret the rights of state and federal citizenship as mutually exclusive led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause's scope. See *Cruikshank*, *supra*.

I reject that understanding. There was no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the "privileges and immunities" of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all. 16 Wall., at 76. The record is scant that the public understood the Clause to make the Federal Government "a perpetual censor upon all legislation of the States" as the *Slaughter-House* majority feared. *Id.*, at 78. For one thing, *Corfield* listed the "elective franchise" as one of the privileges and immunities of "citizens of the several states," 6 F. Cas., at 552, yet Congress and the States still found it necessary to adopt the Fifteenth Amendment—which protects "[t]he right of citizens of the United States to vote"—two years after the Fourteenth Amendment's passage. If the Privileges or Immunities Clause were understood to protect every

conceivable civil right from state abridgment, the Fifteenth Amendment would have been redundant.

The better view, in light of the States and Federal Government's shared history of recognizing certain inalienable rights in their citizens, is that the privileges and immunities of state and federal citizenship overlap. This is not to say that the privileges and immunities of state and federal citizenship are the same. At the time of the Fourteenth Amendment's ratification, States performed many more functions than the Federal Government, and it is unlikely that, simply by referring to "privileges or immunities," the Framers of § 1 meant to transfer every right mentioned in *Corfield* to congressional oversight. As discussed, "privileges" and "immunities" were understood only as synonyms for "rights." See *supra*, at 813–815. It was their attachment to a particular group that gave them content, and the text and history recounted here indicate that the rights of United States citizens were not perfectly identical to the rights of citizens "in the several States." Justice Swayne, one of the dissenters in *Slaughter-House*, made the point clear:

> "The citizen of a State has the *same* fundamental rights as a citizen of the United States, *and also certain others*, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection." 16 Wall., at 126 (emphasis added).

Because the privileges and immunities of American citizenship include rights enumerated in the Constitution, they overlap to at least some extent with the privileges and immunities traditionally recognized in citizens in the several States.

A separate question is whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution. The four dissenting Justices in *Slaughter-House* would have held that the Privileges or Immunities Clause protected the unenumerated right that the butchers in that case asserted. See *id.*, at 83 (opinion of Field, J.); *id.*, at 111 (opinion of Bradley, J.); *id.*, at 124 (opinion of Swayne, J.). Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court's judgment in *Slaughter-House* was correct.

Still, it is argued that the mere possibility that the Privileges or Immunities Clause may enforce unenumerated rights against the States creates "'special hazards'" that should prevent this Court from returning to the original meaning of the Clause.[21] *Post*, at 860 (STEVENS, J., dissenting). Ironically, the same objection applies to the Court's substantive due process jurisprudence, which illustrates the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts. But I see no reason to assume that such hazards apply to the Privileges or Immunities Clause. The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited. See, *e. g.*, Art. I, § 8, cl. 18 (Necessary and Proper Clause); Amdt. 8 (Cruel and

[21] To the extent JUSTICE STEVENS is concerned that reliance on the Privileges or Immunities Clause may invite judges to "write their personal views of appropriate public policy into the Constitution," *post*, at 860 (internal quotation marks omitted), his celebration of the alternative—the "flexibility," "transcend[ence]," and "dynamism" of substantive due process—speaks for itself, *post*, at 871, 872, 876.

Unusual Punishments Clause). When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more "hazardous" than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention—and far more likely to yield discernible answers—than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.

Finding these impediments to returning to the original meaning overstated, I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship. I next proceed to the *stare decisis* considerations surrounding the precedent that expressly controls the question presented here.

B

Three years after *Slaughter-House*, the Court in *Cruikshank* squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre. See *supra*, at 808–809. *Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences of *Cruikshank* warrant mention as well.

Cruikshank's holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them

into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.

Take, for example, the Hamburg Massacre of 1876. There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman, later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, Ben Tillman & the Reconstruction of White Supremacy 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice.[22]

Organized terrorism like that perpetuated by Tillman and his cohorts proliferated in the absence of federal enforcement of constitutional rights. Militias such as the Ku Klux Klan, the Knights of the White Camellia, the White Brotherhood, the Pale Faces, and the '76 Association spread terror among blacks and white Republicans by breaking up Republican meetings, threatening political leaders, and whipping black militiamen. Era of Reconstruction 199–200; Curtis

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[22] Tillman went on to a long career as South Carolina's Governor and, later, United States Senator. Tillman's contributions to campaign finance law have been discussed in our recent cases on that subject. See *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 394–395, 433, 446, 476 (2010) (STEVENS, J., concurring in part and dissenting in part) (discussing at length the Tillman Act of 1907, ch. 420, 34 Stat. 864). His contributions to the culture of terrorism that grew in the wake of *Cruikshank* had an even more dramatic and tragic effect.

156. These groups raped, murdered, lynched, and robbed as a means of intimidating, and instilling pervasive fear in, those whom they despised. A. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 28–46 (1995).

Although Congress enacted legislation to suppress these activities,[23] Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3,446 reported lynchings of blacks in the South. Cottrol 351–352. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmit Till, for example, was killed in 1955 for allegedly whistling at a white woman. S. Whitfield, A Death in the Delta: The Story of Emmett Till 15–31 (1988). The fates of other targets of mob violence were equally depraved. See, *e. g.*, Lynched Negro and Wife Were First Mutilated, Vicksburg (Miss.) Evening Post, Feb. 8, 1904, reprinted in R. Ginzburg, 100 Years of Lynchings 63 (1988); Negro Shot Dead for Kissing His White Girlfriend, Chicago Defender, Feb. 31, 1915, in *id.*, at 95 (reporting incident in Florida); La. Negro Is Burned Alive Screaming "I Didn't Do It," Cleveland Gazette, Dec. 13, 1914, in *id.*, at 93 (reporting incident in Louisiana).

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, "[t]he 'Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.'" Church Burnings Follow Negro Agitator's Lynching, Chicago Defender, Sept. 6, 1919, in *id.*, at 124. Sometimes, as in Cooper's case, self-defense did not succeed. He was dragged from his home by a mob and

[23] In an effort to enforce the Fourteenth Amendment and halt this violence, Congress enacted a series of civil rights statutes, including the Force Acts, see Act of May 31, 1870, 16 Stat. 140; Act of Feb. 28, 1871, 16 Stat. 433, and the Ku Klux Klan Act, see Act of Apr. 20, 1871, 17 Stat. 13.

killed as his wife looked on. *Ibid.* But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. See Cottrol 354. The experience left him with a sense, "not 'of powerlessness, but of the "possibilities of salvation"'" that came from standing up to intimidation. *Ibid.*

In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the war over slavery. There is nothing about *Cruikshank*'s contrary holding that warrants its retention.

* * *

I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.

JUSTICE STEVENS, dissenting.

In *District of Columbia* v. *Heller*, 554 U. S. 570, 573 (2008), the Court answered the question whether a federal enclave's "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the home." Complaint ¶ 34, App. 23. That is a different—and more difficult—inquiry than asking if the Fourteenth Amendment "incorporates" the Second Amendment. The

so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century.[1]

Before the District Court, petitioners focused their pleadings on the special considerations raised by domestic possession, which they identified as the core of their asserted right. In support of their claim that the city of Chicago's handgun ban violates the Constitution, they now rely primarily on the Privileges or Immunities Clause of the Fourteenth Amendment. See Brief for Petitioners 9–65. They rely secondarily on the Due Process Clause of that Amendment. See *id.*, at 66–72. Neither submission requires the Court to express an opinion on whether the Fourteenth Amendment places any limit on the power of States to regulate possession, use, or carriage of firearms outside the home.

I agree with the plurality's refusal to accept petitioners' primary submission. *Ante,* at 758. Their briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases*, 16 Wall. 36 (1873). But the original meaning of the Clause is not as clear as they suggest[2]—and not nearly as clear as it would

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[1] See *United States* v. *Cruikshank*, 92 U. S. 542, 553 (1876); *Presser* v. *Illinois*, 116 U. S. 252, 265 (1886); *Miller* v. *Texas*, 153 U. S. 535, 538 (1894). This is not to say that I agree with all other aspects of these decisions.

[2] Cf., *e. g.*, Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (finding "some support in the legislative history for no fewer than four interpretations" of the Privileges or Immunities Clause, two of which contradict petitioners' submission); Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 Geo. Mason U. Civ. Rights L. J. 219, 255–277 (2009) (providing evidence that the Clause was originally conceived of as an antidiscrimination measure, guaranteeing equal rights for black citizens); Rosenthal, The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation, 18 J. Contemp. Legal Issues 361 (2009) (detailing reasons to doubt that the Clause was originally understood to apply the Bill of Rights to the States); Hamburger, Privileges or Immunities, 105 Nw. U. L. Rev. 61 (2011) (arguing that the Clause was meant to ensure freed slaves were afforded "the Privileges and Immunities" speci-

need to be to dislodge 137 years of precedent. The burden is severe for those who seek radical change in such an established body of constitutional doctrine.[3] Moreover, the suggestion that invigorating the Privileges or Immunities Clause will reduce judicial discretion, see Reply Brief for Petitioners 22, n. 8, 26; Tr. of Oral Arg. 64–65, strikes me as implausible, if not exactly backwards. "For the very reason that it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution."[4]

I further agree with the plurality that there are weighty arguments supporting petitioners' second submission, insofar as it concerns the possession of firearms for lawful self-defense in the home. But these arguments are less compelling than the plurality suggests; they are much less

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fied in Article IV, §2, cl. 1, of the Constitution). Although he urges its elevation in our doctrine, JUSTICE THOMAS has acknowledged that, in seeking to ascertain the original meaning of the Privileges or Immunities Clause, "[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U. S. 489, 522, n. 1 (1999) (dissenting opinion); accord, *ante*, at 758 (plurality opinion).

[3] It is no secret that the desire to "displace" major "portions of our equal protection and substantive due process jurisprudence" animates some of the passion that attends this interpretive issue. *Saenz*, 526 U. S., at 528 (THOMAS, J., dissenting).

[4] Wilkinson, The Fourteenth Amendment Privileges or Immunities Clause, 12 Harv. J. L. & Pub. Pol'y 43, 52 (1989). Judge Wilkinson's point is broader than the privileges or immunities debate. As he observes, "there may be more structure imposed by provisions subject to generations of elaboration and refinement than by a provision in its pristine state. The fortuities of uneven constitutional development must be respected, not cast aside in the illusion of reordering the landscape anew." *Id.*, at 51–52; see also *Washington* v. *Glucksberg*, 521 U. S. 702, 759, n. 6 (1997) (Souter, J., concurring in judgment) (acknowledging that, "[t]o a degree," the *Slaughter-House* "decision may have led the Court to look to the Due Process Clause as a source of substantive rights").

compelling when applied outside the home; and their validity does not depend on the Court's holding in *Heller*. For that holding sheds no light on the meaning of the Due Process Clause of the Fourteenth Amendment. Our decisions construing that Clause to render various procedural guarantees in the Bill of Rights enforceable against the States likewise tell us little about the meaning of the word "liberty" in the Clause or about the scope of its protection of nonprocedural rights.

This is a substantive due process case.

I

Section 1 of the Fourteenth Amendment decrees that no State shall "deprive any person of life, liberty, or property, without due process of law." The Court has filled thousands of pages expounding that spare text. As I read the vast corpus of substantive due process opinions, they confirm several important principles that ought to guide our resolution of this case. The principal opinion's lengthy summary of our "incorporation" doctrine, see *ante*, at 754–758, 759–766 (majority opinion), 758–759 (plurality opinion), and its implicit (and untenable) effort to wall off that doctrine from the rest of our substantive due process jurisprudence, invite a fresh survey of this old terrain.

Substantive Content

The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to "process." But substance and procedure are often deeply entwined. Upon closer inspection, the text can be read to "impos[e] nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law,'" *Washington* v. *Glucksberg*, 521 U. S. 702, 764 (1997) (Souter, J., concurring in judgment), lest superficially fair procedures be permitted to "destroy the enjoyment" of life, liberty, and

property, *Poe* v. *Ullman*, 367 U. S. 497, 541 (1961) (Harlan, J., dissenting), and the Clause's prepositional modifier be permitted to swallow its primary command. Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations.

I have yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise. To the contrary, the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase "due process of law" had acquired substantive content as a term of art within the legal community.[5] This understanding is

[5] See, *e. g.*, Ely, The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const. Commentary 315, 326–327 (1999) (concluding that founding-era "American statesmen accustomed to viewing due process through the lens of [Sir Edward] Coke and [William] Blackstone could [not] have failed to understand due process as encompassing substantive as well as procedural terms"); Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 Emory L. J. 585, 594 (2009) (arguing "that one widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights"); Maltz, Fourteenth Amendment Concepts in the Antebellum Era, 32 Am. J. Legal Hist. 305, 317–318 (1988) (explaining that in the antebellum era a "substantial number of states," as well as antislavery advocates, "imbued their [constitutions'] respective due process clauses with a substantive content"); Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1297, n. 247 (1995) ("[T]he *historical* evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of 'life, liberty, or property, without due process of law' would have understood that ban as having substantive as well as procedural content, given that era's premise that, to qualify as 'law,' an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness"); see also Stevens, The Third Branch of Liberty, 41 U. Miami L. Rev. 277, 290 (1986) ("In view of the number of cases that have given substantive content to the term liberty, the burden of demonstrating that this consistent course of decision was unfaithful to the intent of the Framers is surely a heavy one").

consonant with the venerable "notion that governmental authority has implied limits which preserve private autonomy,"[6] a notion which predates the founding and which finds reinforcement in the Constitution's Ninth Amendment, see *Griswold* v. *Connecticut*, 381 U. S. 479, 486–493 (1965) (Goldberg, J., concurring).[7] The Due Process Clause cannot claim to be the source of our basic freedoms—no legal document ever could, see *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting)—but it stands as one of their foundational guarantors in our law.

If text and history are inconclusive on this point, our precedent leaves no doubt: It has been "settled" for well over a century that the Due Process Clause "applies to matters of substantive law as well as to matters of procedure." *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (Brandeis, J., concurring). Time and again, we have recognized that in the Fourteenth Amendment as well as the Fifth, the "Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Glucksberg*, 521 U. S., at 719. "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel* v. *Granville*, 530 U. S. 57, 65 (2000) (plurality opinion of O'Connor, J., joined by Rehnquist, C. J., and GINSBURG and BREYER, JJ.) (quoting *Glucksberg*, 521 U. S., at 720). Some of our most enduring precedents, accepted today by virtually everyone, were substantive due process decisions. See, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967) (recognizing due-process- as well as equal-protection-based right to marry person of another race); *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500 (1954) (outlawing racial segregation in District of Colum-

[6] 1 L. Tribe, American Constitutional Law § 8–1, p. 1335 (3d ed. 2000).

[7] The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

bia public schools); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925) (vindicating right of parents to direct upbringing and education of their children); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–403 (1923) (striking down prohibition on teaching of foreign languages).

Liberty

The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field. It is the liberty clause that enacts the Constitution's "promise" that a measure of dignity and self-rule will be afforded to all persons. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 847 (1992). It is the liberty clause that reflects and renews "the origins of the American heritage of freedom [and] the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 720 (CA7 1975) (Stevens, J.). Our substantive due process cases have episodically invoked values such as privacy and equality as well, values that in certain contexts may intersect with or complement a subject's liberty interests in profound ways. But as I have observed on numerous occasions, "most of the significant [20th-century] cases raising Bill of Rights issues have, in the final analysis, actually interpreted the word 'liberty' in the Fourteenth Amendment."[8]

It follows that the term "incorporation," like the term "unenumerated rights," is something of a misnomer. Whether an asserted substantive due process interest is explicitly

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[8] Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 20 (1992); see *Fitzgerald*, 523 F. 2d, at 719–720; Stevens, 41 U. Miami L. Rev., at 286–289; see also Greene, The So-Called Right to Privacy, 43 U. C. D. L. Rev. 715, 725–731 (2010).

named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is "comprised within the term liberty." *Whitney*, 274 U. S., at 373 (Brandeis, J., concurring). As the second Justice Harlan has shown, ever since the Court began considering the applicability of the Bill of Rights to the States, "the Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments." *Malloy* v. *Hogan*, 378 U. S. 1, 24 (1964) (dissenting opinion); see also Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 747–750 (1965). In the pathmarking case of *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925), for example, both the majority and dissent evaluated petitioner's free speech claim not under the First Amendment but as an aspect of "the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[9]

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[9] See also *Gitlow*, 268 U. S., at 672 (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States"). Subsequent decisions repeatedly reaffirmed that persons hold free speech rights against the States on account of the Fourteenth Amendment's liberty clause, not the First Amendment *per se*. See, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460, 466 (1958); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88, 95, and n. 7 (1940); see also *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 336, n. 1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States"). Classic opinions written by Justice Cardozo and Justice Frankfurter endorsed the same basic approach to "incorporation," with the Fourteenth Amendment taken as a distinct source of rights

In his own classic opinion in *Griswold*, 381 U. S., at 500 (opinion concurring in judgment), Justice Harlan memorably distilled these precedents' lesson: "While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."[10] Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment. This Court's "'selective incorporation'" doctrine, *ante*, at 763, is not simply "related" to substantive due process, *ante*, at 767; it is a subset thereof.

Federal/State Divergence

The third precept to emerge from our case law flows from the second: The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights. As drafted, the Bill of Rights directly constrained only the Federal Government. See *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833). Although the enactment of the Fourteenth

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independent from the first eight Amendments. *Palko* v. *Connecticut*, 302 U. S. 319, 322–328 (1937) (opinion for the Court by Cardozo, J.); *Adamson* v. *California*, 332 U. S. 46, 59–68 (1947) (Frankfurter, J., concurring).

[10] See also *Wolf* v. *Colorado*, 338 U. S. 25, 26 (1949) ("The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution . . . has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed"). *Wolf*'s holding on the exclusionary rule was overruled by *Mapp* v. *Ohio*, 367 U. S. 643 (1961), but the principle just quoted has never been disturbed. It is notable that *Mapp*, the case that launched the modern "doctrine of *ad hoc*," "'jot-for-jot'" incorporation, *Williams* v. *Florida*, 399 U. S. 78, 130–131 (1970) (Harlan, J., concurring in result), expressly held "that the exclusionary rule is an essential part of both the Fourth *and Fourteenth* Amendments." 367 U. S., at 657 (emphasis added).

Amendment profoundly altered our legal order, it "did not unstitch the basic federalist pattern woven into our constitutional fabric." *Williams* v. *Florida*, 399 U. S. 78, 133 (1970) (Harlan, J., concurring in result). Nor, for that matter, did it expressly alter the Bill of Rights. The Constitution still envisions a system of divided sovereignty, still "establishes a federal republic where local differences are to be cherished as elements of liberty" in the vast run of cases, *National Rifle Assn. of Am. Inc.* v. *Chicago*, 567 F. 3d 856, 860 (CA7 2009) (Easterbrook, C. J.), still allocates a general "police power . . . to the States and the States alone," *United States* v. *Comstock*, 560 U. S. 126, 153 (2010) (KENNEDY, J., concurring in judgment). Elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas.[11]

It is true, as the Court emphasizes, *ante*, at 763–766, that we have made numerous provisions of the Bill of Rights fully applicable to the States. It is settled, for instance, that the Governor of Alabama has no more power than the President of the United States to authorize unreasonable searches and seizures. *Ker* v. *California*, 374 U. S. 23 (1963). But we have never accepted a "'total incorporation'" theory of the Fourteenth Amendment, whereby the Amendment is deemed to subsume the provisions of the Bill of Rights en masse. See *ante*, at 763. And we have declined to apply several provisions to the States in any measure. See, *e. g.*, *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 (1916) (Seventh Amendment); *Hurtado* v. *California*, 110 U. S. 516 (1884) (Grand Jury Clause). We have, moreover, resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, demanding 12-member panels and unani-

[11] I can hardly improve upon the many passionate defenses of this position that Justice Harlan penned during his tenure on the Court. See *Williams*, 399 U. S., at 131, n. 14 (opinion concurring in result) (cataloging opinions).

mous verdicts in federal trials, yet not in state trials. See *Apodaca* v. *Oregon*, 406 U. S. 404 (1972); *Williams*, 399 U. S. 78. In recent years, the Court has repeatedly declined to grant certiorari to review that disparity.[12] While those denials have no precedential significance, they confirm the proposition that the "incorporation" of a provision of the Bill of Rights into the Fourteenth Amendment does not, in itself, mean the provision must have precisely the same meaning in both contexts.

It is true, as well, that during the 1960's the Court decided a number of cases involving procedural rights in which it treated the Due Process Clause as if it transplanted language from the Bill of Rights into the Fourteenth Amendment. See, *e. g.*, *Benton* v. *Maryland*, 395 U. S. 784, 795 (1969) (Double Jeopardy Clause); *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965) (Confrontation Clause). "Jot-for-jot" incorporation was the norm in this expansionary era. Yet at least one subsequent opinion suggests that these precedents require perfect state/federal congruence only on matters "'at the core'" of the relevant constitutional guarantee. *Crist* v. *Bretz*, 437 U. S. 28, 37 (1978); see also *id.*, at 52–53 (Powell, J., dissenting). In my judgment, this line of cases is best understood as having concluded that, to ensure a criminal trial satisfies essential standards of fairness, some procedures should be the same in state and federal courts: The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue. That principle has little relevance to the question whether a *non*-procedural rule set forth in the Bill of Rights qualifies

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[12] See, *e. g.*, Pet. for Cert. in *Bowen* v. *Oregon*, O. T. 2009, No. 08–1117, p. i, cert. denied, 558 U. S. 815 (2009) (request to overrule *Apodaca*); Pet. for Cert. in *Lee* v. *Louisiana*, O. T. 2008, No. 07–1523, p. i, cert. denied, 555 U. S. 823 (2008) (same); Pet. for Cert. in *Logan* v. *Florida*, O. T. 2007, No. 07–7264, pp. 14–19, cert. denied, 552 U. S. 1189 (2008) (request to overrule *Williams*).

as an aspect of the liberty protected by the Fourteenth Amendment.

Notwithstanding some overheated dicta in *Malloy*, 378 U. S., at 10–11, it is therefore an overstatement to say that the Court has "abandoned," *ante*, at 764, 765 (majority opinion), 786 (plurality opinion), a "two-track approach to incorporation," *ante*, at 784 (plurality opinion). The Court moved away from that approach in the area of criminal procedure. But the Second Amendment differs in fundamental respects from its neighboring provisions in the Bill of Rights, as I shall explain in Part V, *infra;* and if some 1960's opinions purported to establish a general method of incorporation, that hardly binds us in this case. The Court has not hesitated to cut back on perceived Warren Court excesses in more areas than I can count.

I do not mean to deny that there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments. Jot-for-jot incorporation of a provision may entail greater protection of the right at issue and therefore greater freedom for those who hold it; jot-for-jot incorporation may also yield greater clarity about the contours of the legal rule. See *Johnson* v. *Louisiana*, 406 U. S. 356, 384–388 (1972) (Douglas, J., dissenting); *Pointer*, 380 U. S., at 413–414 (Goldberg, J., concurring). In a federalist system such as ours, however, this approach can carry substantial costs. When a federal court insists that state and local authorities follow its dictates on a matter not critical to personal liberty or procedural justice, the latter may be prevented from engaging in the kind of beneficent "experimentation in things social and economic" that ultimately redounds to the benefit of all Americans. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). The costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary

significantly across localities, and when the ruling implicates the States' core police powers.

Furthermore, there is a real risk that, by demanding the provisions of the Bill of Rights apply identically to the States, federal courts will cause those provisions to "be watered down in the needless pursuit of uniformity." *Duncan* v. *Louisiana*, 391 U. S. 145, 182, n. 21 (1968) (Harlan, J., dissenting). When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard. This watering-down risk is particularly acute when we move beyond the narrow realm of criminal procedure and into the relatively vast domain of substantive rights. So long as the requirements of fundamental fairness are always and everywhere respected, it is not clear that greater liberty results from the jot-for-jot application of a provision of the Bill of Rights to the States. Indeed, it is far from clear that proponents of an individual right to keep and bear arms ought to celebrate today's decision.[13]

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[13] The vast majority of States already recognize a right to keep and bear arms in their own constitutions, see Volokh, State Constitutional Rights To Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191 (2006) (cataloging provisions); Brief for Petitioners 69 (observing that "[t]hese Second Amendment analogs are effective and consequential"), but the States vary widely in their regulatory schemes, their traditions and cultures of firearm use, and their problems relating to gun violence. If federal and state courts must harmonize their review of gun-control laws under the Second Amendment, the resulting jurisprudence may prove significantly more deferential to those laws than the *status quo ante*. Once it has been established that a single legal standard must govern nationwide, federal courts will face a profound pressure to reconcile that standard with the diverse interests of the States and their long history of regulating in this sensitive area. Cf. *Williams*, 399 U. S., at 129–130 (Harlan, J., concurring in result) (noting " 'backlash' " potential of jot-for-jot incorporation); Grant, Felix Frankfurter: A Dissenting Opinion, 12 UCLA L. Rev. 1013, 1038 (1965) ("If the Court will not reduce the requirements of the fourteenth amendment below the federal gloss that now overlays the Bill of Rights, then it will have to reduce that gloss to the point where the states can

II

So far, I have explained that substantive due process analysis generally requires us to consider the term "liberty" in the Fourteenth Amendment, and that this inquiry may be informed by, but does not depend upon, the content of the Bill of Rights. How should a court go about the analysis, then? Our precedents have established, not an exact methodology, but rather a framework for decisionmaking. In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine.

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937).[14] If the practice in question lacks any "oppressive and arbitrary" character, if judicial enforcement of the asserted right would not materially contribute to "a fair and enlightened system of justice," then the claim is unsuitable for substantive due process protection. *Id.*, at 327, 325. Implicit in Justice Cardozo's test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature.

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live with it"). *Amici* argue persuasively that, post-"incorporation," federal courts will have little choice but to fix a highly flexible standard of review if they are to avoid leaving federalism and the separation of powers—not to mention gun policy—in shambles. See Brief for Brady Center to Prevent Gun Violence et al. (hereinafter Brady Center Brief).

[14] Justice Cardozo's test itself built upon an older line of decisions. See, *e. g.*, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 237 (1897) (discussing "limitations on [state] power which grow out of the essential nature of all free governments [and] implied reservations of individual rights, . . . and which are respected by all governments entitled to the name" (internal quotation marks omitted)).

Whether conceptualized as a "rational continuum" of legal precepts, *Poe*, 367 U. S., at 543 (Harlan, J., dissenting), or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. In addition to other constraints I will soon discuss, see Part III, *infra*, historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies,[15] and, above all else, the "'traditions and conscience of our people,'" *Palko*, 302 U. S., at 325 (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)), are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.

The Court errs both in its interpretation of *Palko* and in its suggestion that later cases rendered *Palko*'s methodology defunct. Echoing *Duncan*, the Court advises that Justice Cardozo's test will not be satisfied "'if a civilized system could be imagined that would not accord the particular protection.'" *Ante*, at 760 (quoting 391 U. S., at 149, n. 14). *Palko* does contain some language that could be read to set an inordinate bar to substantive due process recognition, reserving it for practices without which "neither liberty nor justice would exist." 302 U. S., at 326. But in view of Justice Cardozo's broader analysis, as well as the numerous cases that have upheld liberty claims under the *Palko* standard, such readings are plainly overreadings. We have never applied *Palko* in such a draconian manner.

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[15] See *Palko*, 302 U. S., at 326, n. 3; see also, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 572–573, 576–577 (2003); *Glucksberg*, 521 U. S., at 710–711, and n. 8.

Nor, as the Court intimates, see *ante*, at 764, did *Duncan* mark an irreparable break from *Palko*, swapping out liberty for history. *Duncan* limited its discussion to "particular procedural safeguard[s]" in the Bill of Rights relating to "criminal processes," 391 U. S., at 149, n. 14; it did not purport to set a standard for other types of liberty interests. Even with regard to procedural safeguards, *Duncan* did not jettison the *Palko* test so much as refine it: The judge is still tasked with evaluating whether a practice "is fundamental . . . [to] ordered liberty," within the context of the "Anglo-American" system. *Duncan*, 391 U. S., at 149–150, n. 14. Several of our most important recent decisions confirm the proposition that substantive due process analysis—from which, once again, "incorporation" analysis derives—must not be wholly backward looking. See, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (internal quotation marks omitted)); *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127–128, n. 6 (1989) (opinion of SCALIA, J.) (garnering only two votes for history-driven methodology that "consult[s] the most specific tradition available"); see also *post*, at 917–918 (BREYER, J., dissenting) (explaining that post-*Duncan* "incorporation" cases continued to rely on more than history).[16]

The Court's flight from *Palko* leaves its analysis, careful and scholarly though it is, much too narrow to provide a satisfying answer to this case. The Court hinges its entire decision on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms.

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[16] I acknowledge that some have read the Court's opinion in *Glucksberg* as an attempt to move substantive due process analysis, for all purposes, toward an exclusively historical methodology—and thereby to debilitate the doctrine. If that were ever *Glucksberg*'s aspiration, *Lawrence* plainly renounced it. As between *Glucksberg* and *Lawrence*, I have little doubt which will prove the more enduring precedent.

Relying on *Duncan* and *Glucksberg*, the principal opinion suggests that only interests that have proved "fundamental from an American perspective," *ante*, at 784–791 (plurality opinion), or "'deeply rooted in this Nation's history and tradition,'" *ante*, at 767 (majority opinion) (quoting *Glucksberg*, 521 U. S., at 721), to the Court's satisfaction, may qualify for incorporation into the Fourteenth Amendment. To the extent the principal opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause, the opinion is seriously mistaken.

A rigid historical test is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms. When the Court applied many of the *procedural* guarantees in the Bill of Rights to the States in the 1960's, it often asked whether the guarantee in question was "fundamental in the context of the criminal processes maintained by the American States."[17] *Duncan*, 391 U. S., at 150, n. 14. That inquiry could extend back through time, but it was focused not so much on historical conceptions of the guarantee as on its functional significance within the States' regimes. This contextualized approach made sense, as the choice to employ any given trial-type procedure means little in the abstract. It is only by inquiring into how that procedure intermeshes with other procedures and practices in a criminal justice system that its relationship to "liberty" and "due process" can be determined.

Yet when the Court has used the Due Process Clause to recognize rights distinct from the trial context—rights relating to the primary conduct of free individuals—Justice Cardozo's test has been our guide. The right to free speech, for

[17] The Court almost never asked whether the guarantee in question was deeply rooted in founding-era practice. See Brief for Respondent City of Chicago et al. 31, n. 17 (hereinafter Municipal Respondents' Brief) (noting that only two opinions extensively discussed such history).

instance, has been safeguarded from state infringement not because the States have always honored it, but because it is "essential to free government" and "to the maintenance of democratic institutions"—that is, because the right to free speech is implicit in the concept of ordered liberty. *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96 (1940); see also, *e. g.*, *Loving*, 388 U. S., at 12 (discussing right to marry person of another race); *Mapp* v. *Ohio*, 367 U. S. 643, 650, 655–657 (1961) (discussing right to be free from arbitrary intrusion by police); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 161 (1939) (discussing right to distribute printed matter).[18] While the verbal formula has varied, the Court has largely been consistent in its liberty-based approach to substantive interests outside of the adjudicatory system. As the question before us indisputably concerns such an interest, the answer cannot be found in a granular inspection of state constitutions or congressional debates.

More fundamentally, a rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," *Glucksberg*, 521 U. S., at 721, n. 17, then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection.[19] Cf. *Duncan*, 391 U. S., at 183 (Harlan, J., dissenting) (critiquing "circular[ity]" of historicized test for in-

[18] Cf. *Robinson* v. *California*, 370 U. S. 660, 666–668 (1962) (invalidating state statute criminalizing narcotics addiction as "cruel and unusual punishment in violation of the Fourteenth Amendment" based on nature of the alleged "'crime,'" without historical analysis); Brief for Respondent National Rifle Association of America, Inc., et al. 29 (noting that "lynchpin" of incorporation test has always been "the importance of the right in question to . . . 'liberty'" and to our "system of government").

[19] I do not mean to denigrate this function, or to imply that only "*new* rights"—whatever one takes that term to mean—ought to "get in" the substantive due process door. *Ante*, at 795 (SCALIA, J., concurring).

corporation). That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently "'rooted'"; it countenances the most revolting injustices in the name of continuity,[20] for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.

No, the liberty safeguarded by the Fourteenth Amendment is not merely preservative in nature but rather is a "dynamic concept." Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 38 (1992). Its dynamism provides a central means through which the Framers enabled the Constitution to "endure for ages to come," *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819), a central example of how they "wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live," Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 694 (1976). "The task of giving concrete meaning to the term 'liberty,'" I have elsewhere explained at some length, "was apart of the work assigned to future generations." Stevens, The Third Branch of Liberty, 41 U.

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[20] See *Bowers* v. *Hardwick*, 478 U. S. 186, 199 (1986) (Blackmun, J., dissenting) ("Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past'" (quoting Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897))).

Miami L. Rev. 277, 291 (1986).[21] The judge who would outsource the interpretation of "liberty" to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.[22]

III

At this point a difficult question arises. In considering such a majestic term as "liberty" and applying it to present circumstances, how are we to do justice to its urgent call and its open texture—and to the grant of interpretive discretion the latter embodies—without injecting excessive subjectivity or unduly restricting the States' "broad latitude in experimenting with possible solutions to problems of vital local concern," *Whalen* v. *Roe*, 429 U. S. 589, 597 (1977)? One part of the answer, already discussed, is that we must ground the analysis in historical experience and reasoned

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[21] JUSTICE KENNEDY has made the point movingly:

"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." *Lawrence*, 539 U. S., at 578–579.

[22] Contrary to JUSTICE SCALIA's suggestion, I emphatically do not believe that "only we judges" can interpret the Fourteenth Amendment, *ante*, at 794, or any other constitutional provision. All Americans can; all Americans should. I emphatically do believe that we judges must exercise—indeed, cannot help but exercise—our own reasoned judgment in so doing. JUSTICE SCALIA and I are on common ground in maintaining that courts should be "guided by what the American people throughout our history have thought." *Ibid.* Where we part ways is in his view that courts should be guided *only* by historical considerations.

There is, moreover, a tension between JUSTICE SCALIA's concern that "courts have the last word" on constitutional questions, *ante*, at 794, n. 2, on the one hand, and his touting of the Constitution's Article V amendment process, *ante*, at 793–794, on the other. The American people can of course reverse this Court's rulings through that same process.

judgment, and never on "merely personal and private notions." *Rochin* v. *California*, 342 U. S. 165, 170 (1952). Our precedents place a number of additional constraints on the decisional process. Although "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992), significant guideposts do exist.[23]

The most basic is that we have eschewed attempts to provide any all-purpose, top-down, totalizing theory of "liberty."[24] That project is bound to end in failure or worse. The Framers did not express a clear understanding of the term to guide us, and the now-repudiated *Lochner* line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good. See, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45 (1905). In its most durable precedents, the Court

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[23] In assessing concerns about the "open-ended[ness]" of this area of law, *Collins*, 503 U. S., at 125, one does well to keep in view the malleability not only of the Court's "deeply rooted"/fundamentality standard but also of substantive due process' constitutional cousin, "equal protection" analysis. Substantive due process is sometimes accused of entailing an insufficiently "restrained methodology." *Glucksberg*, 521 U. S., at 721. Yet "the word 'liberty' in the Due Process Clause seems to provide at least as much meaningful guidance as does the word 'equal' in the Equal Protection Clause." Post, The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 94, n. 440 (2003). And "[i]f the objection is instead that the text of the [Due Process] Clause warrants providing only protections of process rather than protections of substance," "it is striking that even those Justices who are most theoretically opposed to substantive due process, like Scalia and Rehnquist, are also nonetheless enthusiastic about applying the equal protection component of the Due Process Clause of the Fifth Amendment to the federal government." *Ibid.* (citing *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 213–231 (1995)).

[24] That one eschews a comprehensive theory of liberty does not, *pace* JUSTICE SCALIA, mean that one lacks "a coherent theory of the Due Process Clause," *ante*, at 795. It means that one lacks the hubris to adopt a rigid, context-independent definition of a constitutional guarantee that was deliberately framed in open-ended terms.

"has not attempted to define with exactness the liberty . . . guaranteed" by the Fourteenth Amendment. *Meyer*, 262 U. S., at 399; see also, *e. g.*, *Bolling*, 347 U. S., at 499. By its very nature, the meaning of liberty cannot be "reduced to any formula; its content cannot be determined by reference to any code." *Poe*, 367 U. S., at 542 (Harlan, J., dissenting).

Yet while "the 'liberty' specially protected by the Fourteenth Amendment" is "perhaps not capable of being fully clarified," *Glucksberg*, 521 U. S., at 722, it is capable of being refined and delimited. We have insisted that only certain types of especially significant personal interests may qualify for especially heightened protection. Ever since "the deviant economic due process cases [were] repudiated," *id.*, at 761 (Souter, J., concurring in judgment), our doctrine has steered away from "laws that touch economic problems, business affairs, or social conditions," *Griswold*, 381 U. S., at 482, and has instead centered on "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education," *Paul* v. *Davis*, 424 U. S. 693, 713 (1976). These categories are not exclusive. Government action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, perpetrates gross injustice, or simply lacks a rational basis will always be vulnerable to judicial invalidation. Nor does the fact that an asserted right falls within one of these categories end the inquiry. More fundamental rights may receive more robust judicial protection, but the strength of the individual's liberty interests and the State's regulatory interests must always be assessed and compared. No right is absolute.

Rather than seek a categorical understanding of the liberty clause, our precedents have thus elucidated a conceptual core. The clause safeguards, most basically, "the ability independently to define one's identity," *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984), "the individual's right to make certain unusually important decisions that will

affect his own, or his family's, destiny," *Fitzgerald*, 523 F. 2d, at 719, and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty.

Another key constraint on substantive due process analysis is respect for the democratic process. If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate. When the Court declined to establish a general right to physician-assisted suicide, for example, it did so in part because "the States [were] currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," rendering judicial intervention both less necessary and potentially more disruptive. *Glucksberg*, 521 U. S., at 719, 735. Conversely, we have long appreciated that more "searching" judicial review may be justified when the rights of "discrete and insular minorities"—groups that may face systematic barriers in the political system—are at stake. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). Courts have a "comparative . . . advantage" over the elected branches on a limited, but significant, range of legal matters. *Post*, at 919.

Recognizing a new liberty right is a momentous step. It takes that right, to a considerable extent, "outside the arena of public debate and legislative action." *Glucksberg*, 521 U. S., at 720. Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a baseline level of protection. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion.

This sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution. Because the relevant constitutional language is so "spacious," *Duncan*, 391 U. S., at 148, I have emphasized that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U. S., at 125. Many of my colleagues and predecessors have stressed the same point, some with great eloquence. See, *e. g.*, *Casey*, 505 U. S., at 849; *Moore* v. *East Cleveland*, 431 U. S. 494, 502–503 (1977) (plurality opinion); *Poe*, 367 U. S., at 542–545 (Harlan, J., dissenting); *Adamson* v. *California*, 332 U. S. 46, 68 (1947) (Frankfurter, J., concurring). Historical study may discipline as well as enrich the analysis. But the inescapable reality is that no serious theory of §1 of the Fourteenth Amendment yields clear answers in every case, and "[n]o formula could serve as a substitute, in this area, for judgment and restraint." *Poe*, 367 U. S., at 542 (Harlan, J., dissenting).

Several rules of the judicial process help enforce such restraint. In the substantive due process field as in others, the Court has applied both the doctrine of *stare decisis*—adhering to precedents, respecting reliance interests, prizing stability and order in the law—and the common-law method—taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before. This restrained methodology was evident even in the heyday of "incorporation" during the 1960's. Although it would have been much easier for the Court simply to declare certain Amendments in the Bill of Rights applicable to the States *in toto*, the Court took care to parse each Amendment into its component guarantees, evaluating them one by one. This piecemeal approach allowed the Court to scrutinize more closely the right at issue in any given dispute, reducing both the risk and the cost of error.

Relatedly, rather than evaluate liberty claims on an abstract plane, the Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U. S., at 721 (quoting *Reno* v. *Flores*, 507 U. S. 292, 302 (1993); *Collins*, 503 U. S., at 125; *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 277–278 (1990)). And just as we have required such careful description from the litigants, we have required of ourselves that we "focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake." *Collins*, 503 U. S., at 125; see also Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 446–448 (1985). This does not mean that we must define the asserted right at the most specific level, thereby sapping it of a universal valence and a moral force it might otherwise have.[25] It means, simply, that we must pay close attention to the precise liberty interest the litigants have asked us to vindicate.

Our holdings should be similarly tailored. Even if the most expansive formulation of a claim does not qualify for substantive due process recognition, particular components of the claim might. Just because there may not be a cate-

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[25] The notion that we should define liberty claims at the most specific level available is one of JUSTICE SCALIA's signal contributions to the theory of substantive due process. See, *e. g., Michael H.* v. *Gerald D.*, 491 U. S. 110, 127–128, n. 6 (1989) (opinion of SCALIA, J.); *ante*, at 797 (SCALIA, J., concurring). By so narrowing the asserted right, this approach "loads the dice" against its recognition, Roosevelt, Forget the Fundamentals: Fixing Substantive Due Process, 8 U. Pa. J. Const. L. 983, 1002, n. 73 (2006): When one defines the liberty interest at issue in *Lawrence* as the freedom to perform specific sex acts, *ante*, at 792, the interest starts to look less compelling. The Court today does not follow JUSTICE SCALIA's "particularizing" method, *Katzenbach* v. *Morgan*, 384 U. S. 641, 649 (1966), as it relies on general historical references to keeping and bearing arms, without any close study of the States' practice of regulating especially dangerous weapons.

gorical right to physician-assisted suicide, for example, does not "'foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.'" *Glucksberg*, 521 U. S., at 735, n. 24 (quoting *id.*, at 750 (STEVENS, J., concurring in judgments)); see also *Vacco* v. *Quill*, 521 U. S. 793, 809, n. 13 (1997) (leaving open "'the possibility that some applications of the New York [prohibition on assisted suicide] may impose an intolerable intrusion on the patient's freedom'"). Even if a State's interest in regulating a certain matter must be permitted, in the general course, to trump the individual's countervailing liberty interest, there may still be situations in which the latter "is entitled to constitutional protection." *Glucksberg*, 521 U. S., at 742 (STEVENS, J., concurring in judgments).

As this discussion reflects, to acknowledge that the task of construing the liberty clause requires judgment is not to say that it is a license for unbridled judicial lawmaking. To the contrary, only an honest reckoning with our discretion allows for honest argumentation and meaningful accountability.

IV

The question in this case, then, is not whether the Second Amendment right to keep and bear arms (whatever that right's precise contours) applies to the States because the Amendment has been incorporated into the Fourteenth Amendment. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom. And to answer that question, we need to determine, first, the nature of the right that has been asserted and, second, whether that right is an aspect of Fourteenth Amendment "liberty." Even accepting the Court's holding in *Heller*, it remains entirely possible that the right to keep and bear arms identified in that opin-

ion is not judicially enforceable against the States, or that only part of the right is so enforceable.[26] It is likewise possible for the Court to find in this case that some part of the *Heller* right applies to the States, and then to find in later cases that other parts of the right also apply, or apply on different terms.

As noted at the outset, the liberty interest petitioners have asserted is the "right to possess a functional, personal firearm, including a handgun, within the home." Complaint ¶ 34, App. 23. The city of Chicago allows residents to keep functional firearms, so long as they are registered, but it generally prohibits the possession of handguns, sawed-off shotguns, machineguns, and short-barreled rifles. See Chicago, Ill., Municipal Code § 8–20–050 (2009).[27] Petitioners' complaint centered on their desire to keep a handgun at their domicile—it references the "home" in nearly every paragraph, see Complaint ¶¶ 3–4, 11–30, 32, 34, 37, 42, 44, 46, App. 17, 19–26—as did their supporting declarations, see, *e. g.*, App. 34, 36, 40, 43, 49–52, 54–56. Petitioners now frame the question that confronts us as "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privi-

[26] In *District of Columbia* v. *Heller*, 554 U. S. 570, 595 (2008), the Court concluded, over my dissent, that the Second Amendment confers "an individual right to keep and bear arms" disconnected from militia service. If that conclusion were wrong, then petitioners' "incorporation" claim clearly would fail, as they would hold no right against the Federal Government to be free from regulations such as the ones they challenge. Cf. *post*, at 919 (BREYER, J., dissenting). I do not understand petitioners or any of their *amici* to dispute this point. Yet even if *Heller* had never been decided—indeed, even if the Second Amendment did not exist—we would still have an obligation to address petitioners' Fourteenth Amendment claim.

[27] The village of Oak Park imposes more stringent restrictions that may raise additional complications. See *ante*, at 750 (majority opinion) (quoting Oak Park, Ill., Village Code §§ 27–2–1 (2007), 27–1–1 (2009)). The Court, however, declined to grant certiorari on the National Rifle Association's challenge to the Oak Park restrictions. Chicago is the only defendant in this case.

leges or Immunities or Due Process Clauses." Brief for Petitioners i. But it is our duty "to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake," *Collins*, 503 U. S., at 125, and the gravamen of this complaint is plainly an appeal to keep a handgun or other firearm of one's choosing in the home.

Petitioners' framing of their complaint tracks the Court's ruling in *Heller*. The majority opinion contained some dicta suggesting the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places, as "in case of confrontation." 554 U. S., at 592. But the *Heller* plaintiff sought only dispensation to keep an operable firearm in his home for lawful self-defense, see *id.*, at 576, and n. 2, and the Court's opinion was bookended by reminders that its holding was limited to that one issue, *id.*, at 573, 635; accord, *ante*, at 791 (plurality opinion). The distinction between the liberty right these petitioners have asserted and the Second Amendment right identified in *Heller* is therefore evanescent. Both are rooted to the home. Moreover, even if both rights have the logical potential to extend further, upon "future evaluation," *Heller*, 554 U. S., at 635, it is incumbent upon us, as federal judges contemplating a novel rule that would bind all 50 States, to proceed cautiously and to decide only what must be decided.

Understood as a plea to keep their preferred type of firearm in the home, petitioners' argument has real force.[28] The decision to keep a loaded handgun in the house is often motivated by the desire to protect life, liberty, and property. It is comparable, in some ways, to decisions about the education and upbringing of one's children. For it is the kind of

[28] To the extent that petitioners contend the city of Chicago's registration requirements for firearm possessors also, and separately, violate the Constitution, that claim borders on the frivolous. Petitioners make no effort to demonstrate that the requirements are unreasonable or that they impose a severe burden on the underlying right they have asserted.

decision that may have profound consequences for every member of the family, and for the world beyond. In considering whether to keep a handgun, heads of households must ask themselves whether the desired safety benefits outweigh the risks of deliberate or accidental misuse that may result in death or serious injury, not only to residents of the home but to others as well. Millions of Americans have answered this question in the affirmative, not infrequently because they believe they have an inalienable right to do so—because they consider it an aspect of "the supreme human dignity of being master of one's fate rather than a ward of the State," *Indiana* v. *Edwards*, 554 U. S. 164, 186 (2008) (SCALIA, J., dissenting). Many such decisions have been based, in part, on family traditions and deeply held beliefs that are an aspect of individual autonomy the government may not control.[29]

Bolstering petitioners' claim, our law has long recognized that the home provides a kind of special sanctuary in modern life. See, *e. g.*, U. S. Const., Amdts. 3, 4; *Lawrence*, 539 U. S., at 562, 567; *Payton* v. *New York*, 445 U. S. 573, 585–590 (1980); *Stanley* v. *Georgia*, 394 U. S. 557, 565–568 (1969); *Griswold*, 381 U. S., at 484–485. Consequently, we have long accorded special deference to the privacy of the home, whether a humble cottage or a magnificent manse. This veneration of the domestic harkens back to the common law. William Blackstone recognized a "right of habitation," 4 Commentaries *223, and opined that "every man's house is looked upon by the law to be his castle of defence and asylum," 3 *id.*, at *288. *Heller* carried forward this legacy, observing that "the need for defense of self, family, and property is most acute" in one's abode, and celebrating "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U. S., at 628, 635.

While the individual's interest in firearm possession is thus heightened in the home, the State's corresponding interest

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[29] Members of my generation, at least, will recall the many passionate statements of this view made by the distinguished actor, Charlton Heston.

in regulation is somewhat weaker. The State generally has a lesser basis for regulating private as compared to public acts, and firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside. The historical case for regulation is likewise stronger outside the home, as many States have for many years imposed stricter, and less controversial, restrictions on the carriage of arms than on their domestic possession. See, *e. g.*, *id.*, at 626 (noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); *English* v. *State*, 35 Tex. 473, 478–479 (1871) (observing that "almost, if not every one of the States of this Union have [a prohibition on the carrying of deadly weapons] upon their statute books," and lambasting claims of a right to carry such weapons as "little short of ridiculous"); Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 Colum. L. Rev. 1278, 1321–1336 (2009).

It is significant, as well, that a rule limiting the federal constitutional right to keep and bear arms to the home would be less intrusive on state prerogatives and easier to administer. Having unleashed in *Heller* a tsunami of legal uncertainty, and thus litigation,[30] and now on the cusp of imposing a national rule on the States in this area for the first time in United States history, the Court could at least moderate the confusion, upheaval, and burden on the States by adopting a rule that is clearly and tightly bounded in scope.

In their briefs to this Court, several *amici* have sought to bolster petitioners' claim still further by invoking a right to

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[30] See Municipal Respondents' Brief 20, n. 11 (stating that at least 156 Second Amendment challenges were brought in time between *Heller*'s issuance and brief's filing); Brady Center Brief 3 (stating that over 190 Second Amendment challenges were brought in first 18 months since *Heller*); Brief for Villages of Winnetka and Skokie, Illinois, et al. as *Amici Curiae* 15 (stating that, in wake of *Heller*, municipalities have "repealed longstanding handgun laws to avoid costly litigation").

individual self-defense.[31] As petitioners note, the *Heller* majority discussed this subject extensively and remarked that "the inherent right of self-defense has been central to the Second Amendment right." 554 U. S., at 628. And it is true that if a State were to try to deprive its residents of any reasonable means of defending themselves from imminent physical threats, or to deny persons any ability to assert self-defense in response to criminal prosecution, that might pose a significant constitutional problem. The argument that there is a substantive due process right to be spared such untenable dilemmas is a serious one.[32]

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[31] See, *e. g.*, Brief for Professors of Philosophy etc.; Brief for International Law Enforcement Educators and Trainers Association et al. 29–45; Brief for Thirty-four California District Attorneys et al. 12–31.

[32] The argument that this Court should establish any such right, however, faces steep hurdles. All 50 States already recognize self-defense as a defense to criminal prosecution, see 2 P. Robinson, Criminal Law Defenses § 132 (1984 and Supp. 2009), so this is hardly an interest to which the democratic process has been insensitive. And the States have always diverged on how exactly to implement this interest, so there is wide variety across the Nation in the types and amounts of force that may be used, the necessity of retreat, the rights of aggressors, the availability of the "castle doctrine," and so forth. See Brief for Oak Park Citizens Committee for Handgun Control as *Amicus Curiae* 9–21; Brief for American Cities et al. as *Amici Curiae* 17–19; 2 W. LaFave, Substantive Criminal Law § 10.4, pp. 142–160 (2d ed. 2003). Such variation is presumed to be a healthy part of our federalist system, as the States and localities select different rules in light of different priorities, customs, and conditions.

As a historical and theoretical matter, moreover, the legal status of self-defense is far more complicated than it might first appear. We have generally understood Fourteenth Amendment "liberty" as something one holds against direct state interference, whereas a personal right of self-defense runs primarily against other individuals; absent government tyranny, it is only when the State has *failed* to interfere with (violent) private conduct that self-help becomes potentially necessary. Moreover, it was a basic tenet of founding-era political philosophy that, in entering civil society and gaining "the advantages of mutual commerce" and the protections of the rule of law, one had to relinquish, to a significant degree, "that wild and savage liberty" one possessed in the state of nature. 1 W. Blackstone,

But that is not the case before us. Petitioners have not asked that we establish a constitutional right to individual self-defense; neither their pleadings in the District Court nor their filings in this Court make any such request. Nor do petitioners contend that the city of Chicago—which, recall, allows its residents to keep most rifles and shotguns, and to keep them loaded—has unduly burdened any such right. What petitioners have asked is that we "incorporate" the Second Amendment and thereby establish a constitutional entitlement, enforceable against the States, to keep a handgun in the home.

Of course, owning a handgun may be useful for practicing self-defense. But the right to take a certain type of action is analytically distinct from the right to acquire and utilize specific instrumentalities in furtherance of that action. And while some might favor handguns, it is not clear that they are a superior weapon for lawful self-defense, and nothing in petitioners' argument turns on that being the case. The notion that a right of self-defense *implies* an auxiliary right to own a certain type of firearm presupposes not only controversial judgments about the strength and scope of the (posited) self-defense right, but also controversial assumptions

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Commentaries *125; see also, *e. g.*, J. Locke, Second Treatise of Civil Government § 128, pp. 63–64 (J. Gough ed. 1947) (in state of nature man has power "to do whatever he thinks fit for the preservation of himself and others," but this "he gives up when he joins in a . . . particular political society"); *Green* v. *Biddle*, 8 Wheat. 1, 63 (1823) (argument for defendant) ("It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, this liberty is well exchanged for the advantages which flow from law and justice"). Some strains of founding-era thought took a very narrow view of the right to armed self-defense. See, *e. g.*, Brief for Historians on Early American Legal, Constitutional and Pennsylvania History as *Amici Curiae* 6–13 (discussing Whig and Quaker theories). Just because there may be a natural or common-law right to some measure of self-defense, it hardly follows that States may not place substantial restrictions on its exercise or that this Court should recognize a constitutional right to the same.

about the likely effects of making that type of firearm more broadly available. It is a very long way from the proposition that the Fourteenth Amendment protects a basic individual right of self-defense to the conclusion that a city may not ban handguns.[33]

In short, while the utility of firearms, and handguns in particular, to the defense of hearth and home is certainly relevant to an assessment of petitioners' asserted right, there is no freestanding self-defense claim in this case. The question we must decide is whether the interest in keeping in the home a firearm of one's choosing—a handgun, for petitioners—is one that is "comprised within the term liberty" in the Fourteenth Amendment. *Whitney*, 274 U. S., at 373 (Brandeis, J., concurring).

V

While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago. I would not foreclose the possibility that a particular plaintiff—say, an elderly widow who lives in a dangerous neighborhood and does not have the strength to operate a long gun—may have

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[33] The Second Amendment right identified in *Heller* is likewise clearly distinct from a right to protect oneself. In my view, the Court badly misconstrued the Second Amendment in linking it to the value of personal self-defense above and beyond the functioning of the state militias; as enacted, the Second Amendment was concerned with tyrants and invaders, and paradigmatically with the federal military, not with criminals and intruders. But even still, the Court made clear that self-defense plays a limited role in determining the scope and substance of the Amendment's guarantee. The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose. See 554 U. S., at 629. And the Court's common-use gloss on the Second Amendment right, see *id.*, at 627, as well as its discussion of permissible limitations on the right, *id.*, at 626–628, had little to do with self-defense.

a cognizable liberty interest in possessing a handgun. But I cannot accept petitioners' broader submission. A number of factors, taken together, lead me to this conclusion.

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical, for gun crime has devastated many of our communities. *Amici* calculate that approximately 1 million Americans have been wounded or killed by gunfire in the last decade.[34] Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. See *Heller*, 554 U. S., at 710–712 (BREYER, J., dissenting). In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide.[35]

Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence. And while granting you the right

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[34] Brady Center Brief 11 (extrapolating from Government statistics); see also Brief for American Public Health Association et al. as *Amici Curiae* 6–7 (reporting estimated social cost of firearm-related violence of $100 billion per year).

[35] Bogus, Gun Control and America's Cities: Public Policy and Politics, 1 Albany Govt. L. Rev. 440, 447 (2008) (drawing on Federal Bureau of Investigation data); see also *Heller*, 554 U. S., at 697–698 (BREYER, J., dissenting) (providing additional statistics on handgun violence); Municipal Respondents' Brief 13–14 (same).

to own a handgun might make you safer on any given day—assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

The practical impact of various gun-control measures may be highly controversial, but this basic insight should not be. The idea that deadly weapons pose a distinctive threat to the social order—and that reasonable restrictions on their usage therefore impose an acceptable burden on one's personal liberty—is as old as the Republic. As THE CHIEF JUSTICE observed just the other day, it is a foundational premise of modern government that the State holds a monopoly on legitimate violence: "A basic step in organizing a civilized society is to take [the] sword out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson* v. *United States ex rel. Watson*, 560 U. S. 272, 282–283 (2010) (dissenting opinion). The same holds true for the handgun. The power a man has in the state of nature "of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up," to a significant extent, "to be regulated by laws made by the society." J. Locke, Second Treatise of Civil Government § 129, p. 64 (J. Gough ed. 1947).

Limiting the federal constitutional right to keep and bear arms to the home complicates the analysis but does not dislodge this conclusion. Even though the Court has long afforded special solicitude for the privacy of the home, we have never understood that principle to "infring[e] upon" the authority of the States to proscribe certain inherently dangerous items, for "[i]n such cases, compelling reasons may exist for overriding the right of the individual to possess those

materials." *Stanley,* 394 U. S., at 568, n. 11. And, of course, guns that start out in the home may not stay in the home. Even if the government has a weaker basis for restricting domestic possession of firearms as compared to public carriage—and even if a blanket, statewide prohibition on domestic possession might therefore be unconstitutional—the line between the two is a porous one. A state or local legislature may determine that a prophylactic ban on an especially portable weapon is necessary to police that line.

Second, the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. Despite the plethora of substantive due process cases that have been decided in the post-*Lochner* century, I have found none that holds, states, or even suggests that the term "liberty" encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither petitioners nor their *amici* make such a contention. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate.[36]

[36] JUSTICE SCALIA worries that there is no "objective" way to decide what is essential to a "liberty-filled" existence: Better, then, to ignore such messy considerations as how an interest actually affects people's lives. *Ante,* at 800. Both the constitutional text and our cases use the term "liberty," however, and liberty is not a purely objective concept. Substantive due process analysis does not require any "political" judgment, *ibid.* It does require some amount of practical and normative judgment. The only way to assess what is essential to fulfilling the Constitution's guarantee of "liberty," in the present day, is to provide reasons that apply to the

Indeed, in some respects the substantive right at issue may be better viewed as a property right. Petitioners wish to *acquire* certain types of firearms, or to *keep* certain firearms they have previously acquired. Interests in the possession of chattels have traditionally been viewed as property interests subject to definition and regulation by the States. Cf. *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 707 (2010) (opinion for the Court by SCALIA, J.) ("Generally speaking, state law defines property interests"). Under that tradition, Chicago's ordinance is unexceptional.[37]

The liberty interest asserted by petitioners is also dissimilar from those we have recognized in its capacity to undermine the security of others. To be sure, some of the Bill of Rights' procedural guarantees may place "restrictions on

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present day. I have provided many; JUSTICE SCALIA and the Court have provided virtually none.

JUSTICE SCALIA also misstates my argument when he refers to "the right to keep and bear arms," without qualification. *Ante*, at 799. That is what the Second Amendment protects against Federal Government infringement. I have taken pains to show why the Fourteenth Amendment liberty interest asserted by petitioners—the interest in keeping a firearm of one's choosing in the home—is not necessarily coextensive with the Second Amendment right.

[37] It has not escaped my attention that the Due Process Clause refers to "property" as well as "liberty." Cf. *ante*, at 792, n. 1, 799–800, n. 6 (opinion of SCALIA, J.). Indeed, in *Moore* v. *East Cleveland*, 431 U. S. 494 (1977), I alone viewed "the critical question" as "whether East Cleveland's housing ordinance [was] a permissible restriction on appellant's right to use her own property as she sees fit," *id.*, at 513 (opinion concurring in judgment). In that case, unlike in this case, the asserted property right was coextensive with a right to organize one's family life, and I could find "no precedent" for the ordinance at issue, which "exclude[d] any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis." *Id.*, at 520. I am open to property claims under the Fourteenth Amendment. This case just involves a weak one. And ever since the Court "incorporated" the more specific property protections of the Takings Clause in 1897, see *Chicago, B. & Q. R. Co.*, 166 U. S. 226, substantive due process doctrine has focused on liberty.

law enforcement" that have "controversial public safety implications." *Ante*, at 783 (plurality opinion); see also *ante*, at 799 (opinion of SCALIA, J.). But those implications are generally quite attenuated. A defendant's invocation of his right to remain silent, to confront a witness, or to exclude certain evidence cannot directly cause any threat. The defendant's liberty interest is constrained by (and is itself a constraint on) the adjudicatory process. The link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun's bullets *are* the violence.

Similarly, it is undeniable that some may take profound offense at a remark made by the soapbox speaker, the practices of another religion, or a gay couple's choice to have intimate relations. But that offense is moral, psychological, or theological in nature; the actions taken by the rights bearers do not actually threaten the physical safety of any other person.[38] Firearms may be used to kill another person. If a legislature's response to dangerous weapons ends up impinging upon the liberty of any individuals in pursuit of the greater good, it invariably does so on the basis of more than the majority's "'own moral code,'" *Lawrence*, 539 U. S., at 571 (quoting *Casey*, 505 U. S., at 850). While specific policies may of course be misguided, gun control is an area in which it "is quite wrong . . . to assume that regulation and liberty occupy mutually exclusive zones—that as one expands, the other must contract." Stevens, 41 U. Miami L. Rev., at 280.

Third, the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation.

[38] Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 913–914 (1992) (STEVENS, J., concurring in part and dissenting in part).

See Municipal Respondents' Brief 21–23 (discussing laws of England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand). That the United States is an international outlier in the permissiveness of its approach to guns does not suggest that our laws are bad laws. It does suggest that this Court may not need to assume responsibility for making our laws still more permissive.

Admittedly, these other countries differ from ours in many relevant respects, including their problems with violent crime and the traditional role that firearms have played in their societies. But they are not so different from the United States that we ought to dismiss their experience entirely. Cf. *ante*, at 781–782 (plurality opinion); *ante*, at 800–801 (opinion of SCALIA, J.). The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners' submission that the right to possess a gun of one's choosing is fundamental to a life of liberty. While the "American perspective" must always be our focus, *ante*, at 784, 791 (plurality opinion), it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders.

Fourth, the Second Amendment differs in kind from the Amendments that surround it, with the consequence that its inclusion in the Bill of Rights is not merely unhelpful but positively harmful to petitioners' claim. Generally, the inclusion of a liberty interest in the Bill of Rights points toward the conclusion that it is of fundamental significance and ought to be enforceable against the States. But the Second Amendment plays a peculiar role within the Bill, as announced by its peculiar opening clause.[39] Even accepting the *Heller* Court's view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that "the purpose for which

[39] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

the right was codified" was "to prevent elimination of the militia." *Heller*, 554 U. S., at 599; see also *United States* v. *Miller*, 307 U. S. 174, 178 (1939) (Second Amendment was enacted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"). It was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the *Heller* Court's efforts to write the Second Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government.

The Second Amendment, in other words, "is a federalism provision," *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 45 (2004) (THOMAS, J., concurring in judgment). It is directed at preserving the autonomy of the sovereign States, and its logic therefore "resists" incorporation by a federal court *against* the States. *Ibid.* No one suggests that the Tenth Amendment, which provides that powers not given to the Federal Government remain with "the States," applies to the States; such a reading would border on incoherent, given that the Tenth Amendment exists (in significant part) to safeguard the vitality of state governance. The Second Amendment is no different.[40]

The Court is surely correct that Americans' conceptions of the Second Amendment right evolved over time in a more individualistic direction; that Members of the Reconstruction Congress were urgently concerned about the safety of the newly freed slaves; and that some Members believed that,

[40] Contrary to JUSTICE SCALIA's suggestion, this point is perfectly compatible with my opinion for the Court in *Elk Grove Unified School Dist.*, 542 U. S. 1. Cf. *ante*, at 801. Like the Court itself, I have never agreed with JUSTICE THOMAS' view that the Establishment Clause is a federalism provision. But I agree with his underlying logic: If a clause in the Bill of Rights exists to safeguard federalism interests, then it makes little sense to "incorporate" it. JUSTICE SCALIA's further suggestion that I ought to have revisited the Establishment Clause debate in this opinion, *ibid.*, is simply bizarre.

following ratification of the Fourteenth Amendment, the Second Amendment would apply to the States. But it is a giant leap from these data points to the conclusion that the Fourteenth Amendment "incorporated" the Second Amendment as a matter of original meaning or postenactment interpretation. Consider, for example, that the text of the Fourteenth Amendment says nothing about the Second Amendment or firearms; that there is substantial evidence to suggest that, when the Reconstruction Congress enacted measures to ensure newly freed slaves and Union sympathizers in the South enjoyed the right to possess firearms, it was motivated by antidiscrimination and equality concerns rather than arms-bearing concerns *per se;*[41] that many contemporaneous courts and commentators did not understand the Fourteenth Amendment to have had an "incorporating" effect; and that the States heavily regulated the right to keep and bear arms both before and after the Amendment's passage. The Court's narrative largely elides these facts. The complications they raise show why even the most dogged historical inquiry into the "fundamentality" of the Second Amendment right (or any other) necessarily entails judicial judgment—and therefore judicial discretion—every step of the way.

I accept that the evolution in Americans' understanding of the Second Amendment may help shed light on the question whether a right to keep and bear arms is included

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[41] See *post,* at 934–935 (BREYER, J., dissenting); Municipal Respondents' Brief 62–69; Brief for Thirty–four Professional Historians and Legal Historians as *Amici Curiae* 22–26; Rosenthal, Second Amendment Plumbing After *Heller:* Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1, 73–75 (2009). The plurality insists that the Reconstruction-era evidence shows the right to bear arms was regarded as "a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner." *Ante,* at 780. That may be so, but it does not resolve the question whether the Fourteenth Amendment's Due Process Clause was originally understood to encompass a right to keep and bear arms, or whether it ought to be so construed now.

within Fourteenth Amendment "liberty." But the reasons that motivated the Framers to protect the ability of militiamen to keep muskets available for military use when our Nation was in its infancy, or that motivated the Reconstruction Congress to extend full citizenship to the freedmen in the wake of the Civil War, have only a limited bearing on the question that confronts the homeowner in a crime-infested metropolis today. The many episodes of brutal violence against African-Americans that blight our Nation's history, see *ante*, at 771–776 (majority opinion); *ante*, at 843–847, 856–858 (THOMAS, J., concurring in part and concurring in judgment), do not suggest that every American must be allowed to own whatever type of firearm he or she desires—just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists. And the fact that some Americans may have thought or hoped that the Fourteenth Amendment would nationalize the Second Amendment hardly suffices to justify the conclusion that it did.

Fifth, although it may be true that Americans' interest in firearm possession and state-law recognition of that interest are "deeply rooted" in some important senses, *ante*, at 767 (internal quotation marks omitted), it is equally true that the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. Federalism is a far "older and more deeply rooted tradition than is a right to carry," or to own, "any particular kind of weapon." 567 F. 3d, at 860 (Easterbrook, C. J.).

From the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities have placed extensive licensing requirements on firearm acquisition, restricted the public carriage of weapons, and banned altogether the possession of especially dangerous

weapons, including handguns. See *Heller*, 554 U. S., at 683–687 (BREYER, J., dissenting) (reviewing colonial laws); Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Ford. L. Rev. 487, 502–516 (2004) (reviewing pre-Civil War laws); Brief for Thirty-four Professional Historians and Legal Historians as *Amici Curiae* 4–22 (reviewing Reconstruction-era laws); Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 711–712, 716–726 (2007) (reviewing 20th-century laws); see generally *post*, at 931–941.[42] After the 1860's just as before, the state courts almost uniformly upheld these measures: Apart from making clear that all regulations had to be constructed and applied in a nondiscriminatory manner, the Fourteenth Amendment hardly made a dent. And let us not forget that this Court did not recognize *any* non-militia-related interests under the Second Amendment until two Terms ago, in *Heller*. Petitioners do not dispute the city of Chicago's observation that "[n]o other substantive Bill of Rights protection has been regulated nearly as intrusively" as the right to keep and bear arms. Municipal Respondents' Brief 25.[43]

This history of intrusive regulation is not surprising given that the very text of the Second Amendment calls out for

[42] I am unclear what the plurality means when it refers to "the paucity of precedent sustaining bans comparable to those at issue here." *Ante*, at 786. There is only one ban at issue here—the city of Chicago's handgun prohibition—and the municipal respondents cite far more than "one case," *ibid.*, from the post-Reconstruction period. See Municipal Respondents' Brief 24–30. The evidence adduced by respondents and their *amici* easily establishes their contentions that the "consensus in States that recognize a firearms right is that arms possession, even in the home, is . . . subject to interest-balancing," *id.*, at 24; and that the practice of "[b]anning weapons routinely used for self-defense," when deemed "necessary for the public welfare," "has ample historical pedigree," *id.*, at 28. Petitioners do not even try to challenge these contentions.

[43] I agree with JUSTICE SCALIA that a history of regulation hardly proves a right is not "of fundamental character." *Ante*, at 802. An unbroken history of extremely intensive, carefully considered regulation does, however, tend to suggest that it is not.

regulation,[44] and the ability to respond to the social ills associated with dangerous weapons goes to the very core of the States' police powers. Our precedent is crystal clear on this latter point. See, *e. g.*, *Gonzales* v. *Oregon*, 546 U. S. 243, 270 (2006) ("[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)); *United States* v. *Morrison*, 529 U. S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); *Kelley* v. *Johnson*, 425 U. S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power"); *Automobile Workers* v. *Wisconsin Employment Relations Bd.*, 351 U. S. 266, 274 (1956) ("The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern"). Compared with today's ruling, most if not all of

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[44] The *Heller* majority asserted that "the adjective 'well-regulated' " in the Second Amendment's preamble "implies nothing more than the imposition of proper discipline and training." 554 U. S., at 597. It is far from clear that this assertion is correct. See, *e. g.*, U. S. Const., Art. I, § 4, cl. 1; § 8, cls. 3, 5, 14; § 9, cl. 6; Art. III, § 2, cl. 2; Art. IV, § 2, cl. 3; § 3, cl. 2 (using "regulate" or "Regulation" in manner suggestive of broad, discretionary governmental authority); Art. I, § 8, cl. 16 (invoking powers of "disciplining" and "training" militia in manner suggestive of narrower authority); *Heller*, 554 U. S., at 579–581 (investigating Constitution's separate references to "people" as clue to term's meaning in Second Amendment); cf. Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Ford. L. Rev. 487, 504 (2004) ("The authors of this curious interpretation of the Second Amendment have constructed a fantasy world where words mean their opposite, and regulation is really anti-regulation"). But even if the assertion were correct, the point would remain that the preamble envisions an active state role in overseeing how the right to keep and bear arms is utilized, and in ensuring that it is channeled toward productive ends.

this Court's decisions requiring the States to comply with other provisions in the Bill of Rights did not exact nearly so heavy a toll in terms of state sovereignty.

Finally, even apart from the States' long history of firearms regulation and its location at the core of their police powers, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Whether or not we *can* assert a plausible constitutional basis for intervening, there are powerful reasons why we *should not* do so.

Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful gun use they claim. Cf. *post*, at 927. The city of Chicago, for example, faces a pressing challenge in combating criminal street gangs. Most rural areas do not. The city of Chicago has a high population density, which increases the potential for a gunman to inflict mass terror and casualties. Most rural areas do not.[45] The city of Chicago offers little in the way of hunting opportunities. Residents of rural communities are, one presumes, much more likely to stock the dinner table with game they have personally felled.

Given that relevant background conditions diverge so much across jurisdictions, the Court ought to pay particular heed to state and local legislatures' "right to experiment." *New State Ice*, 285 U. S., at 311 (Brandeis, J., dissenting). So long as the regulatory measures they have chosen are not "arbitrary, capricious or unreasonable," we should be allowing them to "try novel social and economic" policies. *Ibid.* It "is more in keeping . . . with our status as a court in a federal system," under these circumstances, "to avoid impos-

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[45] Cf. *Heller*, 554 U. S., at 698 (BREYER, J., dissenting) (detailing evidence showing that a "disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime").

ing a single solution . . . from the top down." *Smith* v. *Robbins*, 528 U. S. 259, 275 (2000).

It is all the more unwise for this Court to limit experimentation in an area "where the best solution is far from clear." *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring). Few issues of public policy are subject to such intensive and rapidly developing empirical controversy as gun control. See *Heller*, 554 U. S., at 699–704 (BREYER, J., dissenting). Chicago's handgun ban, in itself, has divided researchers. Compare Brief for Professors of Criminal Justice as *Amici Curiae* (arguing that ordinance has been effective at reducing gun violence) with Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17–26 (arguing that ordinance has been a failure).[46] Of course, on some matters the Constitution requires that we ignore such pragmatic considerations. But the Constitution's text, history, and structure are not so clear on the matter before us—as evidenced by the groundbreaking nature of today's fractured decision—and this Court lacks both the technical capacity and the localized expertise to assess "the wisdom, need, and propriety" of most gun-control measures. *Griswold*, 381 U. S., at 482.[47]

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[46] The fact that Chicago's handgun murder rate may have "actually increased since the ban was enacted," *ante*, at 751 (majority opinion), means virtually nothing in itself. Countless factors unrelated to the policy may have contributed to that trend. Without a sophisticated regression analysis, we cannot even begin to speculate as to the efficacy or effects of the handgun ban. Even with such an analysis, we could never be certain as to the determinants of the city's murder rate.

[47] In some sense, it is no doubt true that the "'best'" solution is elusive for many "serious social problems." *Ante*, at 802 (opinion of SCALIA, J.). Yet few social problems have raised such heated empirical controversy as the problem of gun violence. And few, if any, of the liberty interests we have recognized under the Due Process Clause have raised as many complications for judicial oversight as the interest that is recognized today. See *post*, at 921–927.

I agree with the plurality that for a right to be eligible for substantive due process recognition, there need not be "a 'popular consensus' that the

Nor will the Court's intervention bring any clarity to this enormously complex area of law. Quite to the contrary, today's decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established. See *post*, at 923–926. The plurality's "assuranc[e]" that "incorporation does not imperil every law regulating firearms," *ante*, at 786, provides only modest comfort. For it is also an admission of just how many different types of regulations are potentially implicated by today's ruling, and of just how ad hoc the Court's initial attempt to draw distinctions among them was in *Heller*. The practical significance of the proposition that "the Second Amendment right is fully applicable to the States," *ante*, at 750 (majority opinion), remains to be worked out by this Court over many, many years.

Furthermore, and critically, the Court's imposition of a national standard is still more unwise because the elected branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms. The strength of a liberty claim must be assessed in connection with its status in the democratic process. And in this case, no one disputes "that opponents of [gun] control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process," or that "the widespread commitment to an individual right to own guns . . . operates as a safeguard against excessive or unjustified gun

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right is fundamental." *Ante*, at 789. In our remarkably diverse, pluralistic society, there will almost never be such uniformity of opinion. But to the extent that popular consensus is relevant, I do not agree with the plurality that the *amicus* brief filed in this case by numerous state attorneys general constitutes evidence thereof. *Ibid.* It is puzzling that so many state lawmakers have asked us to limit their *option* to regulate a dangerous item. Cf. *post*, at 920.

control laws."[48] Sunstein, Second Amendment Minimalism: *Heller* as *Griswold*, 122 Harv. L. Rev. 246, 260 (2008). Indeed, there is a good deal of evidence to suggest that, if anything, American lawmakers tend to *under*-regulate guns, relative to the policy views expressed by majorities in opinion polls. See K. Goss, Disarmed: The Missing Movement for Gun Control in America 6 (2006). If a particular State or locality has enacted some "improvident" gun-control measures, as petitioners believe Chicago has done, there is no apparent reason to infer that the mistake will not "eventually be rectified by the democratic process." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979).

This is not a case, then, that involves a "special condition" that "may call for a correspondingly more searching judicial inquiry." *Carolene Products*, 304 U. S., at 153, n. 4. Neither petitioners nor those most zealously committed to their views represent a group or a claim that is liable to receive unfair treatment at the hands of the majority. On the contrary, petitioners' views are supported by powerful participants in the legislative process. Petitioners have given us no reason to believe that the interest in keeping and bearing arms entails any special need for judicial lawmaking, or that federal judges are more qualified to craft appropriate rules than the people's elected representatives. Having failed to show why their asserted interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena, they have failed to show why "the word liberty in the Fourteenth Amendment" should be "held to prevent the natural outcome of a dominant opinion" about how to deal with the problem of handgun violence in the city of Chicago. *Lochner*, 198 U. S., at 76 (Holmes, J., dissenting).

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[48] Likewise, no one contends that those interested in personal self-defense—every American, presumably—face any particular disadvantage in the political process. All 50 States recognize self-defense as a defense to criminal prosecution. See n. 32, *supra*.

VI

The preceding sections have already addressed many of the points made by JUSTICE SCALIA in his concurrence. But in light of that opinion's fixation on this one, it is appropriate to say a few words about JUSTICE SCALIA's broader claim: that his preferred method of substantive due process analysis, a method "that makes the traditions of our people paramount," *ante*, at 792, is both more restrained and more facilitative of democracy than the method I have outlined. Colorful as it is, JUSTICE SCALIA's critique does not have nearly as much force as does his rhetoric. His theory of substantive due process, moreover, comes with its own profound difficulties.

Although JUSTICE SCALIA aspires to an "objective," "neutral" method of substantive due process analysis, *ante*, at 800, his actual method is nothing of the sort. Under the "historically focused" approach he advocates, *ante*, at 803, numerous threshold questions arise before one ever gets to the history. At what level of generality should one frame the liberty interest in question? See n. 25, *supra*. What does it mean for a right to be "'deeply rooted in this Nation's history and tradition,'" *ante*, at 793 (quoting *Glucksberg*, 521 U. S., at 721)? By what standard will that proposition be tested? Which types of sources will count, and how will those sources be weighed and aggregated? There is no objective, neutral answer to these questions. There is not even a theory—at least, JUSTICE SCALIA provides none—of how to go about answering them.

Nor is there any escaping *Palko*, it seems. To qualify for substantive due process protection, JUSTICE SCALIA has stated, an asserted liberty right must be not only deeply rooted in American tradition, "but it must *also* be implicit in the concept of ordered liberty." *Lawrence*, 539 U. S., at 593, n. 3 (dissenting opinion) (internal quotation marks omitted). Applying the latter, *Palko*-derived half of that test requires

precisely the sort of reasoned judgment—the same multifaceted evaluation of the right's contours and consequences—that JUSTICE SCALIA mocks in his concurrence today.

So does applying the first half. It is hardly a novel insight that history is not an objective science, and that its use can therefore "point in any direction the judges favor," *ante*, at 804 (opinion of SCALIA, J.). Yet 21 years after the point was brought to his attention by Justice Brennan, JUSTICE SCALIA remains "oblivious to the fact that [the concept of 'tradition'] can be as malleable and as elusive as 'liberty' itself." *Michael H.*, 491 U. S., at 137 (dissenting opinion). Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole. In *Heller*, JUSTICE SCALIA preferred to rely on sources created much earlier and later in time than the Second Amendment itself, see, *e. g.*, 554 U. S., at 577–578 (consulting late-19th-century treatises to ascertain how Americans would have read the Amendment's preamble in 1791); I focused more closely on sources contemporaneous with the Amendment's drafting and ratification.[49] No mechanical yardstick can measure which of us was correct, either with respect to the materials we chose to privilege or the insights we gleaned from them.

The malleability and elusiveness of history increase exponentially when we move from a pure question of original meaning, as in *Heller*, to JUSTICE SCALIA's theory of substan-

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[49] See *Heller*, 554 U. S., at 662 (STEVENS, J., dissenting) ("Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history"); see also *post*, at 914–916 (discussing professional historians' criticisms of *Heller*).

tive due process. At least with the former sort of question, the judge can focus on a single legal provision; the temporal scope of the inquiry is (or should be) relatively bounded; and there is substantial agreement on what sorts of authorities merit consideration. With JUSTICE SCALIA's approach to substantive due process, these guideposts all fall away. The judge must canvas the entire landscape of American law as it has evolved through time, and perhaps older laws as well, see, *e. g., Lawrence*, 539 U. S., at 596 (SCALIA, J., dissenting) (discussing " 'ancient roots' " of proscriptions against sodomy (quoting *Bowers* v. *Hardwick*, 478 U. S. 186, 192 (1986))), pursuant to a standard (deeply rootedness) that has never been defined. In conducting this rudderless, panoramic tour of American legal history, the judge has more than ample opportunity to "look over the heads of the crowd and pick out [his] friends," *Roper* v. *Simmons*, 543 U. S. 551, 617 (2005) (SCALIA, J., dissenting).

My point is not to criticize judges' use of history in general or to suggest that it always generates indeterminate answers; I have already emphasized that historical study can discipline as well as enrich substantive due process analysis. My point is simply that JUSTICE SCALIA's defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be *buried* in the analysis. At least with my approach, the judge's cards are laid on the table for all to see, and to critique. The judge must exercise judgment, to be sure. When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces.[50] But there is also transparency.

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[50] Indeed, this is truly one of our most deeply rooted legal traditions.

JUSTICE SCALIA's approach is even less restrained in another sense: It would effect a major break from our case law outside of the "incorporation" area. JUSTICE SCALIA does not seem troubled by the fact that his method is largely inconsistent with the Court's canonical substantive due process decisions, ranging from *Meyer*, 262 U. S. 390, and *Pierce*, 268 U. S. 510, in the 1920's, to *Griswold*, 381 U. S. 479, in the 1960's, to *Lawrence*, 539 U. S. 558, in the 2000's. To the contrary, he seems to embrace this dissonance. My method seeks to synthesize dozens of cases on which the American people have relied for decades. JUSTICE SCALIA's method seeks to vaporize them. So I am left to wonder, which of us is more faithful to this Nation's constitutional history? And which of us is more faithful to the values and commitments of the American people, as they stand today? In 1967, when the Court held in *Loving*, 388 U. S. 1, that adults have a liberty-based as well as equality-based right to wed persons of another race, interracial marriage was hardly "deeply rooted" in American tradition. Racial segregation and subordination were deeply rooted. The Court's substantive due process holding was nonetheless correct—and we should be wary of any interpretive theory that implies, emphatically, that it was not.

Which leads me to the final set of points I wish to make: JUSTICE SCALIA's method invites not only bad history, but also bad constitutional law. As I have already explained, in evaluating a claimed liberty interest (or any constitutional claim for that matter), it makes perfect sense to give history significant weight: JUSTICE SCALIA's position is closer to my own than he apparently feels comfortable acknowledging. But it makes little sense to give history dispositive weight in every case. And it makes *especially* little sense to answer questions like whether the right to bear arms is "fundamental" by focusing only on the past, given that both the practical significance and the public understandings of such a right often change as society changes. What if the evidence had

shown that, whereas at one time firearm possession contributed substantially to personal liberty and safety, nowadays it contributes nothing, or even tends to undermine them? Would it still have been reasonable to constitutionalize the right?

The concern runs still deeper. Not only can historical views be less than completely clear or informative, but they can also be wrong. Some notions that many Americans deeply believed to be true, at one time, turned out not to be true. Some practices that many Americans believed to be consistent with the Constitution's guarantees of liberty and equality, at one time, turned out to be inconsistent with them. The fact that we have a written Constitution does not consign this Nation to a static legal existence. Although we should always "pa[y] a decent regard to the opinions of former times," it is "not the glory of the people of America" to have "suffered a blind veneration for antiquity." The Federalist No. 14, pp. 99, 104 (C. Rossiter ed. 1961) (J. Madison). It is not the role of federal judges to be amateur historians. And it is not fidelity to the Constitution to ignore its use of deliberately capacious language, in an effort to transform foundational legal commitments into narrow rules of decision.

As for "the democratic process," *ante,* at 804, 805, a method that looks exclusively to history can easily do more harm than good. Just consider this case. The net result of JUSTICE SCALIA's supposedly objective analysis is to vest federal judges—ultimately a majority of the judges on this Court—with unprecedented lawmaking powers in an area in which they have no special qualifications, and in which the give-and-take of the political process has functioned effectively for decades. Why this "intrudes much less upon the democratic process," *ante,* at 804, than an approach that would defer to the democratic process on the regulation of firearms is, to say the least, not self-evident. I cannot even tell what, under JUSTICE SCALIA's view, constitutes an "intrusion."

It is worth pondering, furthermore, the vision of democracy that underlies JUSTICE SCALIA's critique. Very few of us would welcome a system in which majorities or powerful interest groups always get their way. Under our constitutional scheme, I would have thought that a judicial approach to liberty claims such as the one I have outlined—an approach that investigates both the intrinsic nature of the claimed interest and the practical significance of its judicial enforcement, that is transparent in its reasoning and sincere in its effort to incorporate constraints, that is guided by history but not beholden to it, and that is willing to protect some rights even if they have not already received uniform protection from the elected branches—has the capacity to improve, rather than "[im]peril," *ante*, at 805, our democracy. It all depends on judges' exercising careful, reasoned judgment. As it always has, and as it always will.

VII

The fact that the right to keep and bear arms appears in the Constitution should not obscure the novelty of the Court's decision to enforce that right against the States. By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The Second Amendment was adopted to protect the *States* from federal encroachment. And the Fourteenth Amendment has never been understood by the Court to have "incorporated" the entire Bill of Rights. There was nothing foreordained about today's outcome.

Although the Court's decision in this case might be seen as a mere adjunct to its decision in *Heller*, the consequences could prove far more destructive—quite literally—to our Nation's communities and to our constitutional structure. Thankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for now, to the home. But neither the "assurances" provided by the plurality, *ante*, at 786, nor the

many historical sources cited in its opinion should obscure the reality that today's ruling marks a dramatic change in our law—or that the Justices who have joined it have brought to bear an awesome amount of discretion in resolving the legal question presented by this case.

I would proceed more cautiously. For the reasons set out at length above, I cannot accept either the methodology the Court employs or the conclusions it draws. Although impressively argued, the majority's decision to overturn more than a century of Supreme Court precedent and to unsettle a much longer tradition of state practice is not, in my judgment, built "upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Griswold*, 381 U. S., at 501 (Harlan, J., concurring in judgment).

Accordingly, I respectfully dissent.

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

In my view, JUSTICE STEVENS has demonstrated that the Fourteenth Amendment's guarantee of "substantive due process" does not include a general right to keep and bear firearms for purposes of private self-defense. As he argues, the Framers did not write the Second Amendment with this objective in view. See *ante*, at 896–899 (dissenting opinion). Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others' lives at risk. See *ante*, at 891–893. And the use of arms for private self-defense does not warrant federal constitutional protection from state regulation. See *ante*, at 899–905.

The Court, however, does not expressly rest its opinion upon "substantive due process" concerns. Rather, it directs its attention to this Court's "incorporation" precedents and asks whether the Second Amendment right to private self-

defense is "fundamental" so that it applies to the States through the Fourteenth Amendment. See *ante*, at 759–766.

I shall therefore separately consider the question of "incorporation." I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as "fundamental" insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government. I therefore conclude that the Fourteenth Amendment does not "incorporate" the Second Amendment's right "to keep and bear Arms." And I consequently dissent.

I

The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Two years ago, in *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), the Court rejected the pre-existing judicial consensus that the Second Amendment was primarily concerned with the need to maintain a "well regulated Militia." See *id.*, at 638, and n. 2 (STEVENS, J., dissenting); *id.*, at 672–679. *United States* v. *Miller*, 307 U. S. 174, 178 (1939). Although the Court acknowledged that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms *was the reason* that right . . . was codified in a written Constitution," the Court asserted that "individual self-defense . . . was the *central component* of the right itself." *Heller*, 554 U. S., at 599 (some emphasis added). The Court went on to hold that the Second Amendment restricted Congress' power to regulate handguns used for self-defense, and the Court found unconstitutional the District of Columbia's ban on the possession of handguns in the home. *Id.*, at 635.

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history.

Since *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed. See, *e. g.*, Konig, Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America, 56 UCLA L. Rev. 1295 (2009); Finkelman, It Really Was About a Well Regulated Militia, 59 Syracuse L. Rev. 267 (2008); P. Charles, The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court (2009); Merkel, *The District of Columbia v. Heller* and Antonin Scalia's Perverse Sense of Originalism, 13 Lewis & Clark L. Rev. 349 (2009); Kozuskanich, Originalism in a Digital Age: An Inquiry Into the Right To Bear Arms, 29 J. Early Republic 585 (2009); Cornell, St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment, 103 Nw. U. L. Rev. 1541 (2009); Posner, In Defense of Looseness: The Supreme Court and Gun Control, New Republic, Aug. 27, 2008, pp. 32–35; see also Epstein, A Structural Interpretation of the Second Amendment: Why *Heller* Is (Probably) Wrong on Originalist Grounds, 59 Syracuse L. Rev. 171 (2008).

Consider as an example of these critiques an *amici* brief filed in this case by historians who specialize in the study of the English Civil Wars. They tell us that *Heller* misunderstood a key historical point. See Brief for English/Early American Historians as *Amici Curiae* (hereinafter English Historians' Brief) (filed by 21 professors at leading universities in the United States, United Kingdom, and Australia). *Heller*'s conclusion that "individual self-defense" was "the

central component" of the Second Amendment's right "to keep and bear Arms" rested upon its view that the Amendment "codified a *pre-existing* right" that had "nothing whatever to do with service in a militia." 554 U. S., at 599, 592–593. That view in turn rested in significant part upon Blackstone having described the right as "'the right of having and using arms for self-preservation and defence,'" which reflected the provision in the English Declaration of Right of 1689 that gave the King's Protestant "'subjects'" the right to "'have arms for their defence suitable to their Conditions, and as allowed by Law.'" *Id.*, at 593–594 (quoting 1 W. Blackstone, Commentaries on the Laws of England 140 (1765) (hereinafter Blackstone), and 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)). The Framers, said the majority, understood that right "as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" 554 U. S., at 595 (quoting 1 Blackstone's Commentaries 145–146, n. 42 (S. Tucker ed. 1803)).

The historians now tell us, however, that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia. As properly understood at the time of the English Civil Wars, the historians claim, the right to bear arms "ensured that *Parliament* had the power" to arm the citizenry: "to defend the realm" in the case of a foreign enemy, and to "secure the right of 'self-preservation,'" or "self-defense," should "*the sovereign* usurp the English Constitution." English Historians' Brief 3, 8–13, 23–24 (emphasis added). Thus, the Declaration of Right says that private persons can possess guns only "'as allowed by law.'" *Id.*, at 13. See *id.*, at 20–24. Moreover, when Blackstone referred to "'the right of having and using arms for self-preservation and defence,'" he was referring to the right of the people "*to take part in the militia* to defend their political liberties," and *to the right of Parliament* (which represented the people) to *raise a militia* even when the King sought to deny it

that power. *Id.*, at 4, 24–27 (emphasis added). Nor can the historians find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant. Compare *Heller*, *supra*, at 593–595, with English Historians' Brief 28–40. The historians concede that at least one historian takes a different position, see *id.*, at 7, but the Court, they imply, would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1.

If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views? See *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 923–924 (2007) (BREYER, J., dissenting) (noting that *stare decisis* interests are at their lowest with respect to recent and erroneous constitutional decisions that create unworkable legal regimes); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 362–363 (2010) (listing similar factors); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 99 (1985) (Rehnquist, J., dissenting) ("*[S]tare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history"). At the least, where *Heller*'s historical foundations are so uncertain, why extend its applicability?

My aim in referring to this history is to illustrate the reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations. In my own view, the Court should not look to history alone but to other factors as well—above all, in cases where the history is so unclear that the experts themselves strongly disagree. It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance. And it should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process. See *ante*, at 873–

877 (STEVENS, J., dissenting) (discussing shortcomings of an exclusively historical approach).

II

A

In my view, taking *Heller* as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense. Under this Court's precedents, to incorporate the private self-defense right the majority must show that the right is, *e. g.*, "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968); see *ibid.*, n. 14; see also *ante*, at 791 (plurality opinion) (finding that the right is "fundamental" and therefore incorporated). And this it fails to do.

The majority here, like that in *Heller*, relies almost exclusively upon history to make the necessary showing. *Ante*, at 768–780. But to do so for incorporation purposes is both wrong and dangerous. As JUSTICE STEVENS points out, our society has historically made mistakes—for example, when considering certain 18th- and 19th-century property rights to be fundamental. *Ante*, at 876. And in the incorporation context, as elsewhere, history often is unclear about the answers. See Part I, *supra;* Part III, *infra.*

Accordingly, this Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration. Rather, the Court has either explicitly or implicitly made clear in its opinions that the right in question has remained fundamental over time. See, *e. g.*, *Apodaca* v. *Oregon*, 406 U. S. 404, 410 (1972) (plurality opinion) (stating that the incorporation "inquiry must focus upon the function served" by the right in question in "*contemporary society*" (emphasis added)); *Duncan*, *supra*, at 154 (noting that the right in question "continues to receive strong support"); *Klopfer* v. *North Carolina*, 386

U. S. 213, 226 (1967) (same). And, indeed, neither of the parties before us in this case has asked us to employ the majority's history-constrained approach. See Brief for Petitioners 67–69 (arguing for incorporation based on trends in contemporary support for the right); Brief for Respondent City of Chicago et al. 23–31 (hereinafter Brief for Municipal Respondents) (looking to current state practices with respect to the right).

I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State. I would include among those factors the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions (and the people as well). Is incorporation needed, for example, to further the Constitution's effort to ensure that the government treats each individual with equal respect? Will it help maintain the democratic form of government that the Constitution foresees? In a word, will incorporation prove consistent, or inconsistent, with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises?

Finally, I would take account of the Framers' basic reason for believing the Court ought to have the power of judicial review. Alexander Hamilton feared granting that power to Congress alone, for he feared that Congress, acting as judges, would not overturn as unconstitutional a popular statute that it had recently enacted, as legislators. The Federalist No. 78, p. 405 (G. Carey & J. McClellan eds. 2001) ("This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the

effects of those ill humours which" can, at times, lead to "serious oppressions of the minor party in the community"). Judges, he thought, may find it easier to resist popular pressure to suppress the basic rights of an unpopular minority. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). That being so, it makes sense to ask whether that particular comparative judicial advantage is relevant to the case at hand. See, *e. g.*, J. Ely, Democracy and Distrust (1980).

B

How do these considerations apply here? For one thing, I would apply them only to the private self-defense right directly at issue. After all, the Amendment's militia-related purpose is primarily to protect *States* from *federal* regulation, not to protect individuals from militia-related regulation. *Heller*, 554 U. S., at 599; see also *Miller*, 307 U. S., at 178. Moreover, the Civil War Amendments, the electoral process, the courts, and numerous other institutions today help to safeguard the States and the people from any serious threat of federal tyranny. How are state militias additionally necessary? It is difficult to see how a right that, as the majority concedes, has "largely faded as a popular concern" could possibly be so fundamental that it would warrant incorporation through the Fourteenth Amendment. *Ante*, at 770. Hence, the incorporation of the Second Amendment cannot be based on the militia-related aspect of what *Heller* found to be more extensive Second Amendment rights.

For another thing, as *Heller* concedes, the private self-defense right that the Court would incorporate has nothing to do with "the *reason*" the Framers "codified" the right to keep and bear arms "in a written Constitution." 554 U. S., at 599 (emphasis added). *Heller* immediately adds that the self-defense right was nonetheless "the *central component* of the right." *Ibid.* In my view, this is the historical equivalent of a claim that water runs uphill. See Part I, *supra.* But, taking it as valid, the Framers' basic *reasons* for includ-

ing language in the Constitution would nonetheless seem more pertinent (in deciding about the contemporary *importance* of a right) than the particular *scope* 17th- or 18th-century listeners would have then assigned to the words they used. And examination of the Framers' motivation tells us they did not think the private armed self-defense right was of paramount importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1164 (1991) ("[T]o see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home," would be "like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge"); see also, *e. g.*, Rakove, The Second Amendment: The Highest Stage of Originalism, 76 Chi.-Kent L. Rev. 103, 127–128 (2000); Brief for Historians on Early American Legal, Constitutional, and Pennsylvania History as *Amici Curiae* 22–33.

Further, there is no popular consensus that the private self-defense right described in *Heller* is fundamental. The plurality suggests that two *amici* briefs filed in the case show such a consensus, see *ante*, at 789, but, of course, numerous *amici* briefs have been filed opposing incorporation as well. Moreover, every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation. Much of this disagreement rests upon empirical considerations. One side believes the right essential to protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or the other. And the appropriate level of firearm regulation has thus long been, and continues to be, a hotly contested matter of political debate. See, *e. g.*, Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*, 122 Harv. L. Rev. 191, 201–245 (2008). (Numerous sources supporting arguments and data in Part II–B can be found in the Appendix, *infra*.)

Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective. We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting "discrete and insular minorities." *Carolene Products Co.*, *supra*, at 153, n. 4; see, *e. g.*, *ante*, at 904–905 (STEVENS, J., dissenting). Nor will incorporation help to ensure equal respect for individuals. Unlike the First Amendment's rights of free speech, free press, assembly, and petition, the private self-defense right does not constitute a necessary part of the democratic process that the Constitution seeks to establish. See, *e. g.*, *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring). Unlike the First Amendment's religious protections, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth and Sixth Amendments' insistence upon fair criminal procedure, and the Eighth Amendment's protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority. Unlike the protections offered by many of these same Amendments, it does not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation. And, unlike the Fifth Amendment's insistence on just compensation, it does not involve a matter where a majority might unfairly seize for itself property belonging to a minority.

Finally, incorporation of the right *will* work a significant disruption in the constitutional allocation of decisionmaking authority, thereby interfering with the Constitution's ability to further its objectives.

First, on any reasonable accounting, the incorporation of the right recognized in *Heller* would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the

States and the Federal Government. Private gun regulation is the quintessential exercise of a State's "police power"—*i. e.*, the power to "protec[t] . . . the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State," by enacting "all kinds of restraints and burdens" on both "persons and property." *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (internal quotation marks omitted). The Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to this power. See, *e. g.*, *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 475 (1996) (noting that States have "great latitude" to use their police powers (internal quotation marks omitted)); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 756 (1985). A decade ago, we wrote that there is "no better example of the police power" than "the suppression of violent crime." *United States* v. *Morrison*, 529 U. S. 598, 618 (2000). And examples in which the Court has deferred to state legislative judgments in respect to the exercise of the police power are legion. See, *e. g.*, *Gonzales* v. *Oregon*, 546 U. S. 243, 270 (2006) (assisted suicide); *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (same); *Berman* v. *Parker*, 348 U. S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless . . . ").

Second, determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make. See, *e. g.*, *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 440 (2002) (plurality opinion); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 195–196 (1997). And it may require this kind of analysis in virtually every case.

Government regulation of the right to bear arms normally embodies a judgment that the regulation will help save lives. The determination whether a gun regulation is constitutional would thus almost always require the weighing of the consti-

tutional right to bear arms against the "primary concern of every government—a concern for the safety and indeed the lives of its citizens." *United States* v. *Salerno*, 481 U. S. 739, 755 (1987). With respect to other incorporated rights, this sort of inquiry is *sometimes* present. See, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)* (free speech); *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963) (religion); *Brigham City* v. *Stuart*, 547 U. S. 398, 403–404 (2006) (Fourth Amendment); *New York* v. *Quarles*, 467 U. S. 649, 655 (1984) (Fifth Amendment); *Salerno*, *supra*, at 755 (bail). But here, this inquiry—calling for the fine tuning of protective rules—is likely to be part of a daily judicial diet.

Given the competing interests, courts will have to try to answer empirical questions of a particularly difficult kind. Suppose, for example, that after a gun regulation's adoption the murder rate went up. Without the gun regulation would the murder rate have risen even faster? How is this conclusion affected by the local recession which has left numerous people unemployed? What about budget cuts that led to a downsizing of the police force? How effective was that police force to begin with? And did the regulation simply take guns from those who use them for lawful purposes without affecting their possession by criminals?

Consider too that countless gun regulations of many shapes and sizes are in place in every State and in many local communities. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semiautomatic? Where are different kinds of weapons likely needed? Does time of day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders?

Prior alcohol abusers? How would the right interact with a state or local government's ability to take special measures during, say, national security emergencies? As the questions suggest, state and local gun regulation can become highly complex, and these "are only a few uncertainties that quickly come to mind." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 898 (2009) (ROBERTS, C. J., dissenting).

The difficulty of finding answers to these questions is exceeded only by the importance of doing so. Firearms cause well over 60,000 deaths and injuries in the United States each year. Those who live in urban areas, police officers, women, and children, all may be particularly at risk. And gun regulation may save their lives. Some experts have calculated, for example, that Chicago's handgun ban has saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983. Other experts argue that stringent gun regulations "can help protect police officers operating on the front lines against gun violence," have reduced homicide rates in Washington, D. C., and Baltimore, and have helped to lower New York's crime and homicide rates. Brief for Association of Prosecuting Attorneys et al. as *Amici Curiae* 13–16, 20.

At the same time, the opponents of regulation cast doubt on these studies. And who is right? Finding out may require interpreting studies that are only indirectly related to a particular regulatory statute, say, one banning handguns in the home. Suppose studies find more accidents and suicides where there is a handgun in the home than where there is a long gun in the home or no gun at all? To what extent do such studies justify a ban? What if opponents of the ban put forth counterstudies?

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone's 18th-century perception that a man's home is his castle. See 4 Blackstone 223. Nor can the plurality so simply reject, by mere assertion, the fact that "incorporation will require judges to assess the

costs and benefits of firearms restrictions." *Ante*, at 790–791. How can the Court assess the strength of the government's regulatory interests without addressing issues of empirical fact? How can the Court determine if a regulation is appropriately tailored without considering its impact? And how can the Court determine if there are less restrictive alternatives without considering what will happen if those alternatives are implemented?

Perhaps the Court could lessen the difficulty of the mission it has created for itself by adopting a jurisprudential approach similar to the many state courts that administer a state constitutional right to bear arms. See *infra*, at 930 (describing state approaches). But the Court has not yet done so. Cf. *Heller*, 554 U. S., at 634–635 (rejecting an "'interest-balancing' approach" similar to that employed by the States); *ante*, at 790–791 (plurality opinion). Rather, the Court has haphazardly created a few simple rules, such as that it will not touch "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," or "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, *supra*, at 626–627; *ante*, at 786 (plurality opinion). But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible without being able to explain why or how Chicago's handgun ban is different.

The fact is that judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available "tools" for finding and evaluating the technical material submitted by others. *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 74 (2009); see also *Turner Broadcasting*, 520 U. S., at 195–196. Judges cannot easily make empirically based predic-

tions; they have no way to gather and evaluate the data required to see if such predictions are accurate; and the nature of litigation and concerns about *stare decisis* further make it difficult for judges to change course if predictions prove inaccurate. Nor can judges rely upon local community views and values when reaching judgments in circumstances where prediction is difficult because the basic facts are unclear or unknown.

At the same time, there is no institutional need to send judges off on this "mission-almost-impossible." Legislators are able to "amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U. S. 63, 67 (1965). They are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article III judges, can be held democratically responsible for their empirically based and value-laden conclusions. We have thus repeatedly affirmed our preference for "legislative not judicial solutions" to this kind of problem, see, *e. g.*, *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 513 (1982), just as we have repeatedly affirmed the Constitution's preference for democratic solutions legislated by those whom the people elect.

In *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 310–311 (1932), Justice Brandeis stated in dissent:

> "Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct [the social problems we face]."

There are 50 state legislatures. The fact that this Court may already have refused to take this wise advice with respect to Congress in *Heller* is no reason to make matters worse here.

Third, the ability of States to reflect local preferences and conditions—both key virtues of federalism—here has particular importance. The incidence of gun ownership varies substantially as between crowded cities and uncongested rural communities, as well as among the different geographic regions of the country. Thus, approximately 60% of adults who live in the relatively sparsely populated Western States of Alaska, Montana, and Wyoming report that their household keeps a gun, while fewer than 15% of adults in the densely populated Eastern States of Rhode Island, New Jersey, and Massachusetts say the same.

The nature of gun violence also varies as between rural communities and cities. Urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately greater problems with nonhomicide gun deaths, such as suicides and accidents. And idiosyncratic local factors can lead to two cities finding themselves in dramatically different circumstances: For example, in 2008, the murder rate was 40 times higher in New Orleans than it was in Lincoln, Nebraska.

It is thus unsurprising that States and local communities have historically differed about the need for gun regulation as well as about its proper level. Nor is it surprising that "primarily, and historically," the law has treated the exercise of police powers, including gun control, as "matter[s] of local concern." *Medtronic*, 518 U. S., at 475 (internal quotation marks omitted).

Fourth, although incorporation of any right removes decisions from the democratic process, the incorporation of this particular right does so without strong offsetting justification—as the example of Oak Park's handgun ban helps to show. See Oak Park, Ill., Village Code § 27–2–1 (2007).

Oak Park decided to ban handguns in 1983, after a local attorney was shot to death with a handgun that his assailant had smuggled into a courtroom in a blanket. Brief for Oak Park Citizens Committee for Handgun Control as *Amicus Curiae* 1, 21. A citizens committee spent months gathering information about handguns. *Id.*, at 21. It secured 6,000 signatures from community residents in support of a ban. *Id.*, at 21–22. And the village board enacted a ban into law. *Id.*, at 22.

Subsequently, at the urging of ban opponents the board held a community referendum on the matter. *Ibid.* The citizens committee argued strongly in favor of the ban. *Id.*, at 22–23. It pointed out that most guns owned in Oak Park were handguns and that handguns were misused more often than citizens used them in self-defense. *Id.*, at 23. The ban opponents argued just as strongly to the contrary. *Ibid.* The public decided to keep the ban by a vote of 8,031 to 6,368. *Ibid.* And since that time, Oak Park now tells us, crime has decreased and the community has seen no accidental handgun deaths. *Id.*, at 2.

Given the empirical and local value-laden nature of the questions that lie at the heart of the issue, why, in a Nation whose Constitution foresees democratic decisionmaking, is it so *fundamental* a matter as to require taking that power from the people? What is it here that the people did not know? What is it that a judge knows better?

* * *

In sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. Where the incorporation of other rights has been at issue, *some* of these problems have arisen. But in this instance *all* these problems are present, *all* at

the same time, and *all* are likely to be present in most, perhaps nearly all, of the cases in which the constitutionality of a gun regulation is at issue. At the same time, the important factors that favor incorporation in other instances—*e. g.*, the protection of broader constitutional objectives—are not present here. The upshot is that all factors militate against incorporation—with the possible exception of historical factors.

III

I must, then, return to history. The Court, in seeking to justify incorporation, asks whether the interests the Second Amendment protects are "'deeply rooted in this Nation's history and tradition.'" *Ante*, at 767 (quoting *Glucksberg*, 521 U. S., at 721). It looks to selected portions of the Nation's history for the answer. And it finds an affirmative reply.

As I have made clear, I do not believe history is the only pertinent consideration. Nor would I read history as broadly as the majority does. In particular, since we here are evaluating a more particular right—namely, the right to bear arms for purposes of private self-defense—general historical references to the "right to keep and bear arms" are not always helpful. Depending upon context, early historical sources may mean to refer to a militia-based right—a matter of considerable importance 200 years ago—which has, as the majority points out, "largely faded as a popular concern." *Ante*, at 770. There is no reason to believe that matters of such little contemporary importance should play a significant role in answering the incorporation question. See *Apodaca*, 406 U. S., at 410 (plurality opinion) (incorporation "inquiry must focus upon the function served" by the right in question in "contemporary society"); *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949) (incorporation must take into account "the movements of a free society" and "the gradual and empiric process of inclusion and exclusion" (internal quotation marks omitted)); cf. U. S. Const., Art. I, § 9 (prohibit-

ing federal officeholders from accepting a "Title, of any kind whatever, from [a] foreign State"—presumably a matter of considerable importance 200 years ago).

That said, I can find much in the historical record that shows that some Americans in some places at certain times thought it important to keep and bear arms for private self-defense. For instance, the reader will see that many States have constitutional provisions protecting gun possession. But, as far as I can tell, those provisions typically do no more than guarantee that a gun regulation will be a *reasonable* police power regulation. See Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 686, 716–717 (2007) (hereinafter Winkler, Scrutinizing) (the "courts of every state to consider the question apply a deferential 'reasonable regulation' standard"); see also *id.*, at 716–717 (explaining the difference between that standard and ordinary rational-basis review). It is thus altogether unclear whether such provisions would prohibit cities such as Chicago from enacting laws, such as the law before us, banning handguns. See *id.*, at 723. The majority, however, would incorporate a right that is likely *inconsistent* with Chicago's law; and the majority would almost certainly *strike down* that law. Cf. *Heller*, 554 U. S., at 628–635 (striking down the District of Columbia's handgun ban).

Thus, the specific question before us is not whether there are references to the right to bear arms for self-defense throughout this Nation's history—of course there are—or even whether the Court should incorporate a simple constitutional requirement that firearms regulations not unreasonably burden the right to keep and bear arms, but rather whether there is a consensus that *so substantial* a private self-defense right as the one described in *Heller* applies to the States. See, *e. g.*, *Glucksberg*, *supra*, at 721 (requiring "a careful description" of the right at issue when deciding whether it is "deeply rooted in this Nation's history and tradition" (internal quotation marks omitted)). On this ques-

tion, the reader will have to make up his or her own mind about the historical record that I describe in part below. In my view, that record is insufficient to say that the right to bear arms for private self-defense, as explicated by *Heller*, is fundamental in the sense relevant to the incorporation inquiry. As the evidence below shows, States and localities have consistently enacted firearms regulations, including regulations similar to those at issue here, throughout our Nation's history. Courts have repeatedly upheld such regulations. And it is, at the very least, possible, and perhaps likely, that incorporation will impose on every, or nearly every, State a different right to bear arms than they currently recognize—a right that threatens to destabilize settled state legal principles. Cf. 554 U. S., at 634–635 (rejecting an "'interest-balancing' approach" similar to that employed by the States).

I thus cannot find a historical consensus with respect to whether the right described by *Heller* is "fundamental" as our incorporation cases use that term. Nor can I find sufficient historical support for the majority's conclusion that that right is "deeply rooted in this Nation's history and tradition." Instead, I find no more than ambiguity and uncertainty that perhaps even expert historians would find difficult to penetrate. And a historical record that is so ambiguous cannot itself provide an adequate basis for incorporating a private right of self-defense and applying it against the States.

The 18th Century

The opinions in *Heller* collect much of the relevant 18th-century evidence. See 554 U. S., at 579–605; *id.*, at 640–665 (STEVENS, J., dissenting); *id.*, at 683–687 (BREYER, J., dissenting). In respect to the relevant question—the "deeply rooted nature" of a right to keep and bear arms for purposes of private self-defense—that evidence is inconclusive, particularly when augmented as follows:

First, as I have noted earlier in this opinion, and JUSTICE STEVENS argued in dissent, the history discussed in *Heller* shows that the Second Amendment was enacted primarily for the purpose of protecting militia-related rights. See *supra,* at 915–916; *Heller*, *supra,* at 579–605. Many of the scholars and historians who have written on the subject apparently agree. See *supra,* at 914–916.

Second, historians now tell us that the right to which Blackstone referred, an important link in the *Heller* majority's historical argument, concerned the right of Parliament (representing the people) to form a militia to oppose a tyrant (the King) threatening to deprive the people of their traditional liberties (which did not include an unregulated right to possess guns). Thus, 18th-century language referring to a "right to keep and bear arms" does not *ipso facto* refer to a private right of self-defense—certainly not unambiguously so. See English Historians' Brief 3–27; see also *supra,* at 914–916.

Third, scholarly articles indicate that firearms were heavily regulated at the time of the framing—perhaps more heavily regulated than the Court in *Heller* believed. For example, one scholar writes that "[h]undreds of individual statutes regulated the possession and use of guns in colonial and early national America." Churchill, Gun Regulation, the Police Power, and the Right To Keep Arms, 25 Law & Hist. Rev. 139, 143 (2007). Among these statutes was a ban on the private firing of weapons in Boston, as well as comprehensive restrictions on similar conduct in Philadelphia and New York. See Acts and Laws of Massachusetts Bay, p. 208 (1746); 5 J. Mitchell & H. Flanders, Statutes at Large of Pennsylvania From 1682 to 1801, pp. 108–109 (1898); 4 Colonial Laws of New York ch. 1233, p. 748 (1894); see also Churchill, *supra,* at 162–163 (discussing bans on the shooting of guns in Pennsylvania and New York).

Fourth, after the Constitution was adopted, several States continued to regulate firearms possession by, for example,

adopting rules that would have prevented the carrying of loaded firearms in the city, *Heller*, 554 U. S., at 684–686 (BREYER, J., dissenting); see also *id.*, at 631–633. Scholars have thus concluded that the primary Revolutionary-era limitation on a State's police power to regulate guns appears to be only that regulations were "aimed at a legitimate public purpose" and "consistent with reason." Cornell, Early American Gun Regulation and the Second Amendment, 25 Law & Hist. Rev. 197, 198 (2007).

The Pre-Civil War 19th Century

I would also augment the majority's account of this period as follows:

First, additional States began to regulate the discharge of firearms in public places. See, *e. g.*, Act of Feb. 17, 1831, § 6, reprinted in 3 Statutes of Ohio and the Northwestern Territory 1740 (S. Chase ed. 1835); Act of Dec. 3, 1825, 1825 Tenn. Priv. Acts ch. 292, pp. 306–307.

Second, States began to regulate the possession of concealed weapons, which were both popular and dangerous. See, *e. g.*, C. Cramer, Concealed Weapon Laws of the Early Republic 143–152 (1999) (collecting examples); see also 1837–1838 Tenn. Acts ch. 137, pp. 200–201 (banning the wearing, sale, or giving of Bowie knives); 1847 Va. Acts ch. 7, § 8, p. 110 ("Any free person who shall habitually carry about his person, hidden from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, from the use of which the death of any person might probably ensue, shall for every offence be punished by [a] fine not exceeding fifty dollars").

State courts repeatedly upheld the validity of such laws, finding that, even when the state constitution granted a right to bear arms, the legislature was permitted to, *e. g.*, "abolish" these small, inexpensive, "most dangerous weapons entirely from use," even in self-defense. *Day* v. *State*, 37 Tenn. 496, 500 (1858); see also, *e. g.*, *State* v. *Jumel*, 13 La. Ann. 399, 400 (1858) (upholding concealed weapon ban because it "prohib-

it[ed] only *a particular mode* of bearing arms which is found dangerous to the peace of society"); *State* v. *Chandler*, 5 La. Ann. 489, 489–490 (1850) (upholding concealed weapon ban and describing the law as "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons"); *State* v. *Reid*, 1 Ala. 612, 616–617 (1840).

The Post-Civil War 19th Century

It is important to read the majority's account with the following considerations in mind:

First, the plurality today properly declines to revisit our interpretation of the Privileges or Immunities Clause. See *ante*, at 758. The Court's case for incorporation must thus rest on the conclusion that the right to bear arms is "fundamental." But the very evidence that it advances in support of the conclusion that Reconstruction-era Americans strongly supported a private self-defense right shows with equal force that Americans wanted African-American citizens to have the *same* rights to possess guns as did white citizens. *Ante*, at 770–778. Here, for example, is what Congress said when it enacted a Fourteenth Amendment predecessor, the Second Freedmen's Bureau Act. It wrote that the statute, in order to secure "the constitutional right to bear arms . . . for all citizens," would ensure that each citizen:

> "shall have . . . *full and equal benefit* of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, [by securing] . . . to . . . all the citizens of [every] . . . State or district without *respect to race or color, or previous condition of slavery.*" § 14, 14 Stat. 176–177 (emphasis added).

This sounds like an *antidiscrimination* provision. See Rosenthal, The New Originalism Meets the Fourteenth Amend-

ment: Original Public Meaning and the Problem of Incorporation, 18 J. Contemp. Legal Issues 361, 383–384 (2009) (discussing evidence that the Freedmen's Bureau was focused on discrimination).

Another Fourteenth Amendment predecessor, the Civil Rights Act of 1866, also took aim at *discrimination.* See § 1, 14 Stat. 27 (citizens of "every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right [to engage in various activities] and to full and equal benefit of all laws . . . as is enjoyed by white citizens"). And, of course, the Fourteenth Amendment itself insists that all States guarantee their citizens the "equal protection of the laws."

There is thus every reason to believe that the *fundamental* concern of the Reconstruction Congress was the eradication of discrimination, not the provision of a new substantive right to bear arms free from reasonable state police power regulation. See, *e. g.*, Brief for Municipal Respondents 62–69 (discussing congressional record evidence that Reconstruction Congress was concerned about discrimination). Indeed, why would those who wrote the Fourteenth Amendment have wanted to give such a right to Southerners who had so recently waged war against the North, and who continued to disarm and oppress recently freed African-American citizens? Cf. Act of Mar. 2, 1867, § 6, 14 Stat. 487 (disbanding Southern militias because they were, *inter alia*, disarming the freedmen).

Second, firearms regulation in the later part of the 19th century was common. The majority is correct that the Freedmen's Bureau points to a right to bear arms, and it stands to reason, as the majority points out, that "[i]t would have been nonsensical for Congress to guarantee the . . . equal benefit of a . . . right that does not exist." *Ante,* at 779. But the majority points to no evidence that there existed during this period a fundamental right to bear arms for private self-defense immune to the reasonable exercise of the

state police power. See Emberton, The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 Stan. L. & Pol'y Rev. 615, 621–622 (2006) (noting that history shows that "nineteenth-century Americans" were "not opposed to the idea that the state should be able to control the use of firearms").

To the contrary, in the latter half of the 19th century, a number of state constitutions adopted or amended after the Civil War explicitly recognized the legislature's general ability to limit the right to bear arms. See Tex. Const., Art. I, § 13 (1869) (protecting "the right to keep and bear arms," "under such regulations as the legislature may prescribe"); Idaho Const., Art. I, § 11 (1889) ("The people shall have the right to bear arms . . . ; but the Legislature shall regulate the exercise of this right by law"); Utah Const., Art. I, § 6 (1896) (same). And numerous other state constitutional provisions adopted during this period explicitly granted the legislature various types of regulatory power over firearms. See Brief for Thirty-Four Professional Historians and Legal Historians as *Amici Curiae* 14–15 (hereinafter Legal Historians' Brief).

Moreover, four States largely banned the possession of all nonmilitary handguns during this period. See 1879 Tenn. Acts ch. 186, § 1 (prohibiting citizens from carrying "publicly or privately, any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand"); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "concealed or ope[n]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"); 1881 Ark. Acts no. 96, § 1 (prohibiting the "wear[ing] or carry[ing]" of "any pistol . . . except such pistols as are used in the army or navy," except while traveling or at home); 1871 Tex. Gen. Laws ch. 34 (prohibiting the carrying of pistols unless there are "immediate and pressing" reasonable grounds to fear "immediate and pressing" attack or for militia service). Fifteen States

banned the concealed carrying of pistols and other deadly weapons. See Legal Historians' Brief 16, n. 14. And individual municipalities enacted stringent gun controls, often in response to local conditions—Dodge City, Kansas, for example, joined many western cattle towns in banning the carrying of pistols and other dangerous weapons in response to violence accompanying western cattle drives. See Brief for Municipal Respondents 30 (citing Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876)); Courtwright, The Cowboy Subculture, in Guns in America: A Reader 86, 96 (J. Dizard, R. Muth, & S. Andrews eds. 1999) (discussing how Western cattle towns required cowboys to "'check'" their guns upon entering town).

Further, much as they had during the period before the Civil War, state courts routinely upheld such restrictions. See, *e. g.*, *English* v. *State*, 35 Tex. 473 (1871); *Hill* v. *State*, 53 Ga. 472, 475 (1874); *Fife* v. *State*, 31 Ark. 455, 461 (1876); *State* v. *Workman*, 35 W. Va. 367, 373, 14 S. E. 9, 11 (1891). The Tennessee Supreme Court, in upholding a ban on possession of nonmilitary handguns and certain other weapons, summarized the Reconstruction understanding of the States' police power to regulate firearms:

> "Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; *and where certain weapons are forbidden to be kept or used by the law of the land*, in order to the prevention of *[sic]* crime—a great public end—*no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense.* The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute pro-

> hibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end." *Andrews* v. *State*, 50 Tenn. 165, 188–189 (1871) (emphasis added).

The 20th and 21st Centuries

Although the majority does not discuss 20th- or 21st-century evidence concerning the Second Amendment at any length, I think that it is essential to consider the recent history of the right to bear arms for private self-defense when considering whether the right is "fundamental." To that end, many States now provide state constitutional protection for an individual's right to keep and bear arms. See Volokh, State Constitutional Rights To Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191, 205 (2006) (identifying over 40 States). In determining the importance of this fact, we should keep the following considerations in mind:

First, by the end of the 20th century, in every State and many local communities, highly detailed and complicated regulatory schemes governed (and continue to govern) nearly every aspect of firearm ownership: Who may sell guns and how they must be sold; who may purchase guns and what type of guns may be purchased; how firearms must be stored and where they may be used; and so on. See generally Legal Community Against Violence, Regulating Guns in America (2008), online at http://www.lcav.org/publications-briefs/regulating_guns.asp (all Internet materials as visited June 24, 2010, and available in Clerk of Court's case file) (detailing various arms regulations in every State).

Of particular relevance here, some municipalities ban handguns, even in States that constitutionally protect the right to bear arms. See Chicago, Ill., Municipal Code §8–20–050(c) (2009); Oak Park, Ill., Village Code §§27–2–1 (2007), 27–1–1 (2009); Toledo, Ohio, Municipal Code, ch. 549.25 (2010). Moreover, at least seven States and Puerto Rico ban

assault weapons or semiautomatic weapons. See Cal. Penal Code Ann. §12280(b) (2009 West Supp.); Conn. Gen. Stat. §53–202c (2007); Haw. Rev. Stat. §134–8 (1993); Md. Crim. Law Code Ann. §4–303(a) (Lexis 2002); Mass. Gen. Laws, ch. 140, §131M (West 2006); N. J. Stat. Ann. §2C:39–5 (West Supp. 2010); N. Y. Penal Law Ann. §265.02(7) (West Supp. 2008); 25 Laws P. R. Ann. §456m (Supp. 2006); see also 18 U. S. C. §922(*o*) (federal machinegun ban).

Thirteen municipalities do the same. See Albany, N. Y., City Code §193–16(A) (2005); Aurora, Ill., Code of Ordinances §29–49(a) (2010); Buffalo, N. Y., City Code §180–1(F) (2000); Chicago, Ill., Municipal Code §8–24–025(a) (2009); Cincinnati, Ohio, Municipal Code §708–37(a) (2008); Cleveland, Ohio, Codified Ordinances §628.03(a) (2008); Columbus, Ohio, City Code §2323.31 (2005); Denver, Colo., Municipal Code §38–130(e) (2008); Morton Grove, Ill., Village Code §6–2–3(A) (2009); N. Y. C. Admin. Code §10–303.1 (2009); Oak Park, Ill., Village Code §27–2–1 (2007); Rochester, N. Y., City Code §47–5(F) (2008); Toledo, Ohio, Municipal Code §549.23(a). And two States, Maryland and Hawaii, ban assault pistols. See Haw. Rev. Stat. §134–8; Md. Crim. Law Code Ann. §4–303.

Second, as I stated earlier, state courts in States with constitutions that provide gun rights have almost uniformly interpreted those rights as providing protection only against *unreasonable* regulation of guns. See, *e. g.*, Winkler, Scrutinizing 686 (the "courts of every state to consider" a gun regulation apply the "'reasonable regulation'" approach); *State* v. *McAdams*, 714 P. 2d 1236, 1238 (Wyo. 1986); *Robertson* v. *City and County of Denver*, 874 P. 2d 325, 328 (Colo. 1994).

When determining reasonableness those courts have normally adopted a highly deferential attitude toward legislative determinations. See Winkler, Scrutinizing 723 (identifying only six cases in the 60 years before the article's publication striking down gun-control laws: three that banned "the transportation of any firearms for any purpose

whatsoever," a single "permitting law," and two as-applied challenges in "unusual circumstances"). Hence, as evidenced by the breadth of existing regulations, States and local governments maintain substantial flexibility to regulate firearms—much as they seemingly have throughout the Nation's history—even in those States with an arms right in their constitutions.

Although one scholar implies that state courts are less willing to permit total gun prohibitions, see Volokh, Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1458 (2009), I am aware of no instances in the past 50 years in which a state court has struck down as unconstitutional a law banning a particular class of firearms, see Winkler, Scrutinizing 723.

Indeed, state courts have specifically upheld as constitutional (under their state constitutions) firearms regulations that have included handgun bans. See *Kalodimos* v. *Morton Grove*, 103 Ill. 2d 483, 499–500, 470 N. E. 2d 266, 273 (1984) (upholding a handgun ban because the arms right is merely a right "to possess some form of weapon suitable for self-defense or recreation"); *Cleveland* v. *Turner*, 1977 WL 201393, *5 (Ohio App., Aug. 4, 1977) (handgun ban "does not absolutely interfere with the right of the people to bear arms, but rather proscribes possession of a specifically defined category of handguns"); *State* v. *Bolin* 378 S. C. 96, 99, 662 S. E. 2d 38, 39 (2008) (ban on handgun possession by persons under 21 did not infringe arms right because they can "posses[s] other types of guns"). Thus, the majority's decision to incorporate the private self-defense right recognized in *Heller* threatens to alter state regulatory regimes, at least as they pertain to handguns.

Third, the plurality correctly points out that *only a few* state courts, a "paucity" of state courts, have specifically upheld handgun bans. *Ante*, at 786. But which state courts have struck them down? The absence of supporting infor-

mation does not help the majority find support. Cf. *United States* v. *Wells*, 519 U. S. 482, 496 (1997) (noting that it is "treacherous to find in congressional silence alone the adoption of a controlling rule of law" (internal quotation marks omitted)). Silence does not show or tend to show a consensus that a private self-defense right (strong enough to strike down a handgun ban) is "deeply rooted in this Nation's history and tradition."

* * *

In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self-defense. There has been, and is, no consensus that the right is, or was, "fundamental." No broader constitutional interest or principle supports legal treatment of that right as fundamental. To the contrary, broader constitutional concerns of an institutional nature argue strongly against that treatment.

Moreover, nothing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense, as described in *Heller*, is "deeply rooted in this Nation's history [or] tradition" or is otherwise "fundamental." Indeed, incorporating the right recognized in *Heller* may change the law in many of the 50 States. Read in the majority's favor, the historical evidence is at most ambiguous. And, in the absence of any other support for its conclusion, ambiguous history cannot show that the Fourteenth Amendment incorporates a private right of self-defense against the States.

With respect, I dissent.

APPENDIX

Sources Supporting Data in Part II–B

Popular Consensus

Please see the following sources to support the paragraph on popular opinion, *supra*, at 920:

- Briefs filed in this case that argue against incorporation include: Brief for United States Conference of Mayors as *Amicus Curiae* 1, 17–33 (organization representing "all United States cities with populations of 30,000 or more"); Brief for American Cities et al. as *Amici Curiae* 1–3 (brief filed on behalf of many cities, *e. g.*, Philadelphia, Seattle, San Francisco, Oakland, Cleveland); Brief for Representative Carolyn McCarthy et al. as *Amici Curiae* 5–10; Brief for State of Illinois et al. as *Amici Curiae* 7–35.
- Wilkinson, Of Guns, Abortions, and the Unraveling Rule of Law, 95 Va. L. Rev. 253, 301 (2009) (discussing divided public opinion over the correct level of gun control).

Data on Gun Violence

Please see the following sources to support the sentences concerning gun violence, *supra*, at 924:

- Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. Strom, Firearm Injury and Death From Crime, 1993–97, p. 2 (Oct. 2000) (over 60,000 deaths and injuries caused by firearms each year).
- Campbell et al., Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1092 (2003) (noting that an abusive partner's access to a firearm increases the risk of homicide eightfold for women in physically abusive relationship).
- American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (noting that in 1997 "firearm-related deaths accounted for 22.5% of all injury deaths" for individuals between 1 and 19).
- Dept. of Justice, Federal Bureau of Investigation, Law Enforcement Officers Killed & Assaulted, 2006 (Table 27) (noting that firearms killed 93% of the 562 law en-

forcement officers feloniously killed in the line of duty between 1997 and 2006), online at http://www2.fbi.gov/ucr/killed/2006/table27.html.

- Dept. of Justice, Bureau of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993–98, pp. 1, 9 (Oct. 2000) (those who live in urban areas particularly at risk of firearm violence).
- Wintemute, The Future of Firearm Violence Prevention, 281 JAMA 475 (1999) ("half of all homicides occurred in 63 cities with 16% of the nation's population").

Data on the Effectiveness of Regulation

Please see the following sources to support the sentences concerning the effectiveness of regulation, *supra,* at 924:

- See Brief for Professors of Criminal Justice as *Amici Curiae* 13 (noting that Chicago's handgun ban saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983).
- Brief for Association of Prosecuting Attorneys et al. as *Amici Curiae* 13–16, 20 (arguing that stringent gun regulations "can help protect police officers operating on the front lines against gun violence," and have reduced homicide rates in Washington, D. C., and Baltimore).
- Brief for United States Conference of Mayors as *Amicus Curiae* 4–13 (arguing that gun regulations have helped to lower New York's crime and homicide rates).

Data on Handguns in the Home

Please see the following sources referenced in the sentences discussing studies concerning handguns *in the home, supra,* at 924:

- Brief for American Public Health Association et al. as *Amici Curiae* 13–16 (discussing studies that show handgun ownership in the home is associated with increased risk of homicide).

- Wiebe, Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality, 35 Accident Analysis and Prevention 711, 713–714 (2003) (showing that those who die in firearms accidents are nearly four times more likely than average to have a gun in their home).
- Kellermann et al., Suicide in the Home in Relation to Gun Ownership, 327 New England J. Medicine 467, 470 (1992) (demonstrating that "homes with one or more handguns were associated with a risk of suicide almost twice as high as that in homes containing only long guns").

Data on Regional Views and Conditions

Please see the following sources referenced in the section on the diversity of regional views and conditions, *supra*, at 927:

- Okoro et al., Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings From the Behavioral Risk Factor Surveillance System, 2002, 116 Pediatrics e370, e372 (2005) (presenting data on firearm ownership by State).
- *Heller*, 554 U. S., at 698–699 (BREYER, J., dissenting) (discussing various sources showing that gun violence varies by State, including Wintemute, *supra*.
- *Heller*, *supra*, at 698–699 (BREYER, J., dissenting) (discussing the fact that urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately greater problems with nonhomicide gun deaths, such as suicides and accidents (citing Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Public Health 1750, 1752 (2004))).
- Dept. of Justice, Federal Bureau of Investigation, 2008 Crime in the United States (Table 6) (noting that murder rate is 40 times higher in New Orleans than it is in Lincoln, Nebraska).

Per Curiam

SEARS *v.* UPTON, WARDEN

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

No. 09–8854. Decided June 29, 2010

At the penalty phase of petitioner Sears' capital trial in a Georgia state court, his counsel presented mitigation evidence that focused on the adverse impact of Sears' execution on his family and loved ones. Sears was sentenced to death. At state postconviction proceedings, Sears raised a Sixth Amendment ineffective-assistance-of-counsel claim, introducing additional mitigation evidence relating to his childhood and youth, including evidence of physical abuse, significant frontal lobe brain damage, substantial deficits in mental cognition and reasoning, and drug and alcohol abuse. The court denied relief. The court concluded that counsel's performance had been constitutionally deficient, but that counsel had presented a reasonable mitigation theory. Thus, the court reasoned, Sears failed to prove a reasonable likelihood of a different outcome had a different theory been advanced. The Georgia Supreme Court denied review.

Held: The postconviction trial court erred in its prejudice analysis. First, it curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. That a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. Second, the court failed to undertake the probing and fact-specific inquiry required by *Strickland* v. *Washington*, 466 U. S. 668. A proper *Strickland* analysis would have taken into account the newly uncovered evidence of Sears' significant mental and psychological impairments, along with the mitigation evidence from the penalty phase, to assess whether there is a reasonable probability that Sears would have received a different sentence had there been a constitutionally sufficient mitigation investigation. See *Porter* v. *McCollum*, 558 U. S. 30. The state court should undertake this reweighing in the first instance.

Certiorari granted; vacated and remanded.

PER CURIAM.

According to an expert who testified during state postconviction relief, petitioner Demarcus A. Sears performs at or

below the bottom first percentile in several measures of cognitive functioning and reasoning. The cause of this abnormality appears to be significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens. But because—in the words of the state trial court—his counsel conducted a penalty phase investigation that was "on its face . . . constitutionally inadequate," App. to Pet. for Cert. 27B, evidence relating to Sears' cognitive impairments and childhood difficulties was not brought to light at the time he was sentenced to death.

After finding constitutionally deficient attorney performance under the framework we set forth in *Strickland* v. *Washington*, 466 U. S. 668 (1984), the state postconviction court found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears. App. to Pet. for Cert. 29B–30B. Because Sears' counsel did present *some* mitigation evidence during Sears' penalty phase—but not the significant mitigation evidence a constitutionally adequate investigation would have uncovered—the state court determined it could not speculate as to what the effect of additional evidence would have been. *Id.*, at 30B. Accordingly, it denied Sears postconviction relief. *Id.*, at 34B. Thereafter, the Supreme Court of Georgia summarily denied review of his claims. *Id.*, at 1A.

For the reasons that follow, it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim. We therefore grant the petition for writ of certiorari, vacate the judgment, and remand for further proceedings not inconsistent with this opinion.[1]

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[1] Although this is a state-court decision, it resolved a federal issue on exclusively federal-law grounds. We therefore have jurisdiction. 28 U. S. C. § 1257; see also *Padilla* v. *Kentucky*, 559 U. S. 356 (2010) (reviewing state postconviction decision raising Sixth Amendment question).

I

In 1993, a Georgia jury convicted Sears of armed robbery and kidnaping with bodily injury (which also resulted in death), a capital crime under state law. See Ga. Code Ann. § 16–5–40(d)(4) (2006).[2] During the penalty phase of Sears' capital trial, his counsel presented evidence describing his childhood as stable, loving, and essentially without incident. Seven witnesses offered testimony along the following lines: Sears came from a middle-class background; his actions shocked and dismayed his relatives; and a death sentence, the jury was told, would devastate the family. See Pet. for Cert. 6–7. Counsel's mitigation theory, it seems, was calculated to portray the adverse impact of Sears' execution on his family and loved ones. 20 Record 5181. But the strategy backfired. The prosecutor ultimately used the evidence of Sears' purportedly stable and advantaged upbringing against him during the State's closing argument. With Sears, the prosecutor told the jury, "[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every op-

[2] Sears was sentenced to death for the Kentucky murder of a woman whom he and an accomplice kidnaped in Georgia. Under Georgia law, a jury may "impose a death sentence for the offense of kidnapping with bodily injury on the ground that the offense of kidnapping with bodily injury was committed while the offender was engaged in the commission of the capital felon[y] of murder . . . ." *Potts* v. *State*, 261 Ga. 716, 720, 410 S. E. 2d 89, 93 (1991). So long as "the murder . . . [is] sufficiently a part of the same criminal transaction," it may count as a "statutory aggravating circumstanc[e] of the offense of kidnapping with bodily injury." *Ibid.*, 410 S. E. 2d, at 94. Sears has raised a categorical Eighth Amendment challenge to the constitutionality of his death sentence for a kidnaping offense, which we decline to reach. And any jurisdictional or constitutional issue with respect to Georgia's ability to execute Sears for a murder occurring in Kentucky is not before us.

portunity that was afforded him." Pet. for Cert. 7–8 (quoting trial transcript; internal quotation marks omitted).

The mitigation evidence that emerged during the state postconviction evidentiary hearing, however, demonstrates that Sears was far from "privileged in every way." Sears' home life, while filled with material comfort, was anything but tranquil: His parents had a physically abusive relationship, Exh. 26, 6 Record 1676 (Affidavit of Demetrius A. Sears), and divorced when Sears was young, Exh. 22, *id.*, at 1654 (Affidavit of Virginia Sears Graves); he suffered sexual abuse at the hands of an adolescent male cousin, Exh. 26, *id.*, at 1681–1682; his mother's "favorite word for referring to her sons was 'little mother fuckers,'" Exh. 3, 2 *id.*, at 265 (Affidavit of Richard G. Dudley, Jr., M. D.); and his father was "verbally abusive," Exh. 37, 6 *id.*, at 1746–1747 (Affidavit of Carol Becci-Youngs),[3] and disciplined Sears with age-inappropriate military-style drills, Exh. 3, 2 *id.*, at 263–264; Exh. 19, 6 *id.*, at 1622 (Affidavit of Frank Sears); Exh. 22, *id.*, at 1651; Exh. 28, *id.*, at 1694 (Affidavit of Kenneth Burns, Sr.). Sears struggled in school, demonstrating substantial behavior problems from a very young age. For example, Sears repeated the second grade, Exh. 6, 3 *id.*, at 500–501, and was referred to a local health center for evaluation at age nine, Exh. 7, *id.*, at 503, 504, 508. By the time Sears reached high school, he was "described as severely learning disabled and as severely behaviorally handicapped." Exh. A to Exh. 1, 2 *id.*, at 174–176 (Affidavit of Tony L. Strickland, M. S., Ph. D.).

[3] In the particular instance recounted in this affidavit, Sears' art teacher stated that his father "berate[d] [him] in front of" the school principal and her during a parent-teacher conference. Exh. 37, 6 Record 1746. The event was significant: "I'll never forget the way he bullied him," the art teacher explained, "Mr. Sears was so verbally abusive and made such a scene, that it made everyone in the room uncomfortable." *Ibid.* The art teacher had "never been in a conference where a parent severely criticized a child in the presence of his teachers and meant it, as Mr. Sears did." *Id.*, at 1747.

Environmental factors aside, and more significantly, evidence produced during the state postconviction relief process also revealed that Sears suffered "significant frontal lobe abnormalities." Exh. 1, *id.*, at 147. Two different psychological experts testified that Sears had substantial deficits in mental cognition and reasoning—*i. e.*, "problems with planning, sequencing and impulse control," *ibid.*—as a result of several serious head injuries he suffered as a child, as well as drug and alcohol abuse. See 1 Record 37–40 (Testimony of Dr. Strickland); *id.*, at 95–96 (Testimony of Dr. Dudley). Regardless of the cause of his brain damage, his scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function, "making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Exh. 1, 2 *id.*, at 148; see also 1 *id.*, at 37. The assessment also revealed that Sears' "ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired." Exh. 1, 2 *id.*, at 149. From an etiological standpoint, one expert explained that Sears' "history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected" to lead to these significant impairments. *Id.*, at 150; see also 1 *id.*, at 44.

Whatever concern the dissent has about some of the sources relied upon by Sears' experts—informal personal accounts, see *post*, at 960–963 (opinion of SCALIA, J.)—it does not undermine the well-credentialed expert's assessment,[4] based

[4] Dr. Strickland, a psychologist, is the director of a mild head injury clinic and the Sports Concussion Institute at Centinella Freeman Medical Center in Los Angeles. 1 *id.*, at 30. He is an associate professor of psychiatry in residence at the University of California at Los Angeles and directs a memory disorder and cerebral palsy clinic for that university's department of neuroscience. *Id.*, at 30–31. The State had no objection to his being tendered as an expert in neuropsychology. *Id.*, at 31.

on between 12 and 16 hours of interviews, testing, and observations, see 1 Record 32, that Sears suffers from substantial cognitive impairment. Sears performed dismally on several of the forensic tests administered to him to assess his frontal lobe functioning. On the Stroop Word Interference Test, which measures response inhibition, *id.*, at 36–37, 99.6% of those individuals in his cohort (which accounts for age, education, and background) performed better than he did. *Ibid.* On the Trail-Making B test, which also measures frontal lobe functioning, *id.*, at 37–38, Sears performed at the first (and lowest) percentile. *Id.*, at 38. Based on these results, the expert's firsthand observations, and an extensive review of Sears' personal history, the expert's opinion was unequivocal: There is "clear and compelling evidence" that Sears has "pronounced frontal lobe pathology."[5] *Id.*, at 68.

Further, the fact that Sears' brother is a convicted drug dealer and user, and introduced Sears to a life of crime, 6 *id.*, at 1683–1686, actually would have been consistent with a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills, who may have desired to follow in the footsteps of an older brother who had shut him out of his life, *post*, at 962. And the fact that some of such evidence may have been "hearsay" does not necessarily undermine its value—or its admissibility—for penalty phase purposes.[6] *Post*, at 961, n. 3.

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[5] During a colloquy with the court, Dr. Strickland further explained:

"THE COURT: But by taking some history of head injuries, coupled with the results of the tests that you've given, you can comfortably conclude that the results of the tests that you've given were a consequence of frontal lobe head injuries?

"THE WITNESS: Absolutely. And, moreover, Your Honor, the patient has a lesion on the front of his head, which is something I can observe." *Id.*, at 78.

[6] Like Georgia's "necessity exception" to its hearsay rules, see Ga. Code Ann. §24–3–1(b) (2006), we have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. See *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)* ("Regardless of whether the

Finally, the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, *post*, at 962–963, given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking, *ibid.*, were features, in another well-credentialed expert's view,[7] of a "profound personality disorder." 1 Record 104. This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing.

Because they failed to conduct an adequate mitigation investigation, *none* of this evidence was known to Sears' trial counsel. It emerged only during state postconviction relief.

II

Unsurprisingly, the state postconviction trial court concluded that Sears had demonstrated his counsel's penalty phase investigation was constitutionally deficient. See *Strickland*, 466 U. S., at 688 (explaining that first inquiry

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proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause . . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); see also *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"). We take no view on whether the evidence at issue would satisfy the considerations we set forth in *Green*, or would be otherwise admissible under Georgia law.

[7] Dr. Dudley, a psychiatrist, completed his internship and residency at Northwestern University Medical Center, and has been board certified in psychiatry by the American Board of Psychiatry and Neurology for more than 35 years. 1 Record 91–92. The State also had no objection to his being tendered as an expert in psychiatry. *Id.*, at 93.

when evaluating Sixth Amendment ineffectiveness claim is whether counsel's representation "fell below an objective standard of reasonableness"). In its view, the cursory nature of counsel's investigation into mitigation evidence—"limited to one day or less, talking to witnesses selected by [Sears'] mother"—was "on its face . . . constitutionally inadequate." App. to Pet. for Cert. 27B.

What is surprising, however, is the court's analysis regarding whether counsel's facially inadequate mitigation investigation prejudiced Sears. See *Strickland*, *supra*, at 694. Although the court appears to have stated the proper prejudice standard,[8] it did not correctly conceptualize how that standard applies to the circumstances of this case. Because Sears' counsel did present some mitigation evidence during his penalty phase, the court concluded that "[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." App. to Pet. for Cert. 30B. The court explained that "it is impossible to know what effect [a different mitigation theory] would have had on [the jury]." *Ibid.* "Because counsel put forth a reasonable theory with supporting evidence," the court reasoned, "[Sears] . . . failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced."[9] *Ibid.*

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[8] The court asked whether "there is a reasonable likelihood that the outcome of his trial would have been different if his counsel had done more investigation." App. to Pet. for Cert. 29B–30B; see *Strickland*, 466 U. S., at 694 ("The 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").

[9] Channeling powers of telepathy, JUSTICE SCALIA asserts that what the trial court actually decided in this case is that "Sears' trial counsel presented a reasonable mitigation theory and offered evidence sufficient to

There are two errors in the state court's analysis of Sears' Sixth Amendment claim. First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation should have, at the very least, called into question the reasonableness of this theory. Cf. *Wiggins* v. *Smith*, 539 U. S. 510, 522 (2003) (explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background' " (quoting *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000); alteration in original)). And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

JUSTICE SCALIA chides the Court for concluding that the trial court assumed, rather than found, that counsel's mitigation theory was a reasonable one. *Post*, at 957. But our point is that any finding with respect to the reasonableness of the mitigation theory counsel utilized—in this case, family impact—is in tension with the trial court's unambiguous find-

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support it, so the prejudice inquiry was more difficult—so difficult that Sears could not make the requisite showing." *Post*, at 960. Such a highly favorable reading of the trial court's analysis would be far more convincing had the trial court engaged with the evidence as JUSTICE SCALIA does. But it offered no such analysis in its opinion; indeed, it appears the court did not even conduct any real analysis, explaining that it was "*impossible* to know what effect" the evidence might have had on the jury. App. to Pet. for Cert. 30B (emphasis added).

ing that counsel's investigation was itself so unreasonable as to be facially unconstitutional. This point is plain in *Williams:* We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy—in that case, petitioner's voluntary confession—was "justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U. S., at 396. A "tactical decision" is a precursor to concluding that counsel has developed a "reasonable" mitigation theory in a particular case.[10]

Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented, App. to Pet. for Cert. 30B. True, we have considered cases involving such circumstances,[11] and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, *Strickland*, 466 U. S., at 700. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. *E. g., Williams*, *supra*, at 398 (remorse and cooperation with police); *Rompilla* v. *Beard*, 545 U. S. 374, 378 (2005) (residual doubt). We did so most recently in *Porter*

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[10] Moreover, the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory. This point was also plain in *Williams:* "Whether or not . . . omissions [in the investigation] were sufficiently prejudicial to have affected the outcome of sentencing," they may nevertheless demonstrate deficiency. 529 U. S., at 396. The one inquiry, deficient mitigation investigation, is distinct from the second, whether there was prejudice as a result.

[11] See, *e. g., Wiggins* v. *Smith*, 539 U. S. 510, 515–516 (2003); *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984).

v. *McCollum*, 558 U. S. 30, 32 (2009) *(per curiam)*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id.*, at 40–41. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U. S. C. § 2254(d)(1)—we also concluded the state court had *unreasonably* applied *Strickland*'s prejudice prong when it analyzed Porter's claim. *Porter*, *supra*, at 42.

We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.[12] In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. 529 U. S., at 397–398. And, in *Porter*, we recently explained:

> "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available

[12] Whether it did so implicitly is far from apparent, notwithstanding JUSTICE SCALIA's suggestion to the contrary. See *post*, at 959–960. The trial court stated that the record was "largely silent" on "what [evidence] would have been shown if [additional mitigating evidence] had been sought." App. to Pet. for Cert. 28B. This is a curious assertion in light of the 22 volumes of evidentiary hearing transcripts and submissions in the record, which spell out the findings discussed above. It also undermines any suggestion that the court did, in fact, do the reweighing JUSTICE SCALIA believes it undertook; it is plain the record is not "largely silent." And it also undermines any suggestion that the court simply discounted the value of the testimony; had it made any such finding, the court could have easily stated, instead, that the record evidence was unpersuasive.

> mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U. S., at 41 (internal quotation marks omitted; third alteration in original).

That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that JUSTICE SCALIA now undertakes, *post*, at 960–964, and that the trial court failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

III

A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' "significant" mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. See *Porter*, *supra*, at 40; *Williams*, *supra*, at 397–398; *Strickland*, *supra*, at 694. It is for the state court—and not for either this Court or even JUSTICE SCALIA—to undertake this reweighing in the first instance.

Accordingly, the petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment below is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE ALITO would deny the petition for a writ of certiorari.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court concludes, *ante*, at 951–956, that the Superior Court of Butts County, Georgia, made errors of law in applying the prejudice inquiry for ineffective-assistance-of-counsel claims under *Strickland* v. *Washington*, 466 U. S. 668 (1984). In my view there was no error of law, and the Court today remands for the state court to do what it has already done: find no reasonable likelihood that the mitigation evidence the Court details in its opinion would have persuaded a jury to change its mind about the death sentence for this brutal rape-murder.

The state habeas court responsibly executed the first step in the *Strickland* analysis, finding that the investigation of mitigation evidence by Sears' trial counsel was deficient performance. The issue here is the second step: whether Sears was prejudiced by that deficiency. As the Court acknowledges, *ante*, at 952, the state habeas court correctly stated the prejudice standard under *Strickland:* The defendant has the burden to establish "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." App. to Pet. for Cert. 24B–25B (citing 466 U. S., at 688, 694). "When applied to the sentencing phase of death penalty trials," that means "a reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." App. to Pet. for Cert. 25B–26B.

The Court today concludes that there were two errors in the *application* of that proper standard. First, it reasons that the court erroneously "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory" at trial. *Ante*, at 953. That argument is flawed on several levels. To begin with, the state habeas court did not *assume* trial counsel's mitigation theory was reasonable; it *found* that it was.

It said: "[A]lthough counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it." App. to Pet. for Cert. 30B. After interviews of roughly a dozen potential mitigation witnesses, who, with the exception of Sears' father, gave positive accounts of Sears and his family, see 7 Record 2025, 2051–2052; 8 *id.*, at 2129, 2291–2344, Sears' trial counsel developed a mitigation theory that Sears came from a good family and had a solid middle-class upbringing; that his offense was completely out of character; that he cooperated with police; and that sentencing Sears to death would devastate his family and friends, see *id.*, at 2124–2125; 19 *id.*, at 4861–4862, 4916–4917, 4954–4955; 20 *id.*, at 5181. To support that approach his attorneys called seven witnesses, including Sears' mother, four family friends, and his high school guidance counselor. See Pet. for Cert. 6–7 (citing trial transcript pages between 2375 and 2451). The state habeas court did not declare that this mitigation theory "might be reasonable, in the abstract," as the Court puts it, *ante*, at 953. Rather, it concluded that counsel "put forth a reasonable theory with supporting evidence." App. to Pet. for Cert. 30B.

The Court's argument is also flawed because the habeas court's reasonableness finding did *not* cause it to "curtai[l]" its prejudice inquiry, or lead to the conclusion that it could "obviate the need to analyze" whether pursuing a different mitigation theory would have made a difference. *Ante*, at 953. The reasonableness finding merely meant that the prejudice determination had to be made by asking, not whether the jury's mind would probably have been changed by hearing Sears' new mitigation theory instead of hearing no mitigation theory at all; but rather whether it would probably have been changed by substituting Sears' new mitigation theory for the reasonable mitigation theory that was presented and rejected.[1] After hearing all the witnesses

[1] The Court contends, *ante*, at 953, that there was a "tension" between the state court's conclusion that the investigation was deficient and its conclu-

and other evidence Sears presented before it, the state court concluded that "it is just not possible to know what effect a *different* mitigation theory would have had." App. to Pet. for Cert. 30B (emphasis added).[2]

The second, "and more fundamenta[l]," legal error the Court alleges, *ante*, at 954, is really encased within the first. The Court claims that the state habeas court "limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." *Ibid.* (quoting App. to Pet. for Cert. 30B). The court erred, we are told, by determining that "present[ation of] *some* mitigation evidence should foreclose an inquiry into whether" Sears was prejudiced. *Ante*, at 955. That is not a fair reading of the opinion. The state court did not hold that a defendant could never suffer prejudice whenever his counsel provided *any* mitigation evidence. Rather, it stated that "[t]his case *cannot be fairly compared* with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." App. to Pet. for Cert. 30B (emphasis added). That is absolutely correct. This case is not like the prejudice cases on which the Court relies, where it could readily be said that the overlooked mitigation theory would have made a much deeper impression on the jury than the utterly unsupported theory (or absence of any theory) offered at trial. See *Porter* v. *McCollum*, 558 U. S. 30, 41 (2009) *(per curiam); Rompilla* v. *Beard*, 545 U. S. 374, 378, 393 (2005); *Wiggins* v. *Smith*, 539 U. S. 510,

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sion that the mitigation theory presented to the jury was reasonable. This terribly misreads the state court's opinion. It did not say (as the Court's point assumes) that counsel's *using* the mitigation theory they did was reasonable; it said that the *theory itself* was reasonable, making it hard to say whether a different theory would have persuaded the jury. This presents no conceivable "tension."

[2] On the fair reading we owe the state court, its opinion provides no basis for inferring that it failed to "engag[e] with the evidence" and "did not even conduct any real analysis." *Ante*, at 953, n. 9.

515, 537 (2003); *Williams* v. *Taylor*, 529 U. S. 362, 369 (2000). Sears' trial counsel presented a reasonable mitigation theory and offered evidence sufficient to support it, so the prejudice inquiry was more difficult—so difficult that Sears could not make the requisite showing. Clearly referring to the evidence in this particular case, the court said:

> "Although here, the Petitioner can argue that a prior appeal shows the difficulty one juror was having reaching the same verdict as the others, it is just not possible to know what effect a different mitigation theory would have had on her, just as it is impossible to know what effect it would have had on other jurors." App. to Pet. for Cert. 30B.

Since the habeas court made no legal error en route to its *Strickland* conclusion, the only basis for reversing the judgment here would be disagreement with the conclusion itself: that Sears had not established that his new mitigation theory would probably have caused the jury to impose a life sentence instead of death.

The Court makes no attempt to contradict that conclusion. Doing so would require a fact-intensive inquiry into the 22-volume record to measure the persuasiveness of the evidence supporting Sears' new mitigation theory—an inquiry the Court purports to disavow, *ante*, at 956, but nonetheless tendentiously undertakes, *ante*, at 948–950. The reader might think the state habeas court's conclusion highly questionable from the Court's account, which recites as solid all the evidence supporting Sears' new mitigation theory, see *ante*, at 948–951. It is far from solid. Some is likely inadmissible as unreliable hearsay under Georgia law, see *Gissendaner* v. *State*, 272 Ga. 704, 714, 532 S. E. 2d 677, 688–689 (2000); *Gulley* v. *State*, 271 Ga. 337, 347, 519 S. E. 2d 655, 664 (1999)—such as much of the evidence for the uncorroborated second-hand claim that Sears "suffered sexual abuse at the hands of

an adolescent male cousin," *ante*, at 948.[3] Other evidence a competent attorney would likely not have placed before the jury—such as all the testimony about Sears' childhood from his brother Demetrius, an admitted drug dealer and drug user, 6 Record 1682–1684, 1695, 1752, and a convicted felon (for bank fraud, wire fraud, identity theft, and cocaine trafficking), *id.*, at 1687. No juror would have been impressed by such a character witness.

Some of the evidence is incredible, such as the psychiatrist's assertion that Sears had "substantial deficits in mental cognition and reasoning . . . as a result of several serious head injuries he suffered as a child," *ante*, at 949. The serious head injuries consisted of Sears' hitting his head at a roller-skating rink sometime early in elementary school, 1 Record 76; 2 *id.*, at 225, running into an end table as a child, 6 *id.*, at 1651, and getting hit with a golf club sometime later in elementary school, 1 *id.*, at 79; 2 *id.*, at 225.[4] (The last of

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[3] The Court's reliance on *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)*, *ante*, at 950–951, n. 6, to suggest that this unreliable hearsay would be admissible for sentencing purposes is entirely misplaced. In *Green*, we held it violated constitutional due process to exclude testimony regarding a co-conspirator's confession that he alone committed the capital murder with which the defendant was charged. Our holding depended on "th[e] unique circumstances" of the case: The testimony to be used at sentencing was "highly relevant" and "substantial[ly]" reliable as a statement against penal interest made to a close friend; it was corroborated by "ample" evidence and was used by the State to obtain a conviction in a separate trial against the co-conspirator. 442 U. S., at 97. Here there are no such circumstances. The testimony is uncorroborated secondhand reporting from self-interested witnesses that is unreliable and therefore likely inadmissible.

[4] There is an unsubstantiated claim from Sears himself, 8 Record 2195, that when he was a teenager he was hit with a "hatchet" above his right eye. Of course, that is the same place where he collided with an end table, 6 *id.*, at 1651, leaving the "lesion"—better known as a scar—on his head that Dr. Strickland noted, *ante*, at 950, n. 5 (quoting 1 Record 78). There is no corroborating evidence for this event: no medical records, 1

these major injuries might not have been introduced anyway, since that would have provided the prosecution an opportunity to refute both the extent of the injury and the mercy-worthiness of Sears, by introducing into evidence Sears' boast that when he was 11 or 12 he "beat the s*** out of" someone after he was hit on the head with a golf club, 8 *id.*, at 2195.) Likewise incredible was the assertion that Demetrius "introduced Sears to a life of crime," *ante*, at 950. According to testimony on which the Court relies, Demetrius would "never let [Sears] hang around" with him and his drug-dealing friends. 6 Record 1685–1686.

A jury also would have discredited the psychiatric testimony of Dr. Strickland that "[f]rom an etiological standpoint . . . Sears' 'history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected' to lead to these significant [mental] impairments," *ante*, at 949 (quoting 2 Record 150). As already noted, the evidence of brain-damaging trauma is nonexistent. The psychiatric testimony of Dr. Dudley relied upon the self-interested reporting of Sears himself and the testimony of his less-than-trustworthy brother, Demetrius, see, *e. g.*, 1 *id.*, at 122, 133. And then there are the unfavorable parts of Dr. Dudley's testimony: Sears is a "narcissis[t]," *id.*, at 135, with a "grandiose" opinion of himself, *id.*, at 98–99; 2 *id.*, at 246. Dr. Dudley's affidavit portrays Sears as arrogant and self-centered, *id.*, at 246, 247, and notes what he termed Sears' "fantastical" boasting of his first sexual experience with a woman at the age of six and his other "innumerable sexual experiences," 1 *id.*, at 98–99, 100; 2 *id.*, at 246–247. It is hard to see how it could be thought probable that Sears' so-called "magical thinking," 1 *id.*, at 84, would have helped his plea for leniency, see *ante*, at 951. It seems to me more likely the jury would conclude that Sears' "profoun[d] per-

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id., at 77, no other apparent scars, 2 *id.*, at 245; 6 *id.*, at 1651, and, tellingly, no family or friends to confirm what surely would have been memorable had it happened.

sonality disorder," 1 Record 104, made him exactly the kind of person who would commit heinous crimes in the future.

And some of the evidence the Court recounts is so utterly unlikely to affect a jury's determination that this brutal murder deserved death that its recitation is just plain hilarious. For example, the claim that Sears' father "was 'verbally abusive,'" *ante*, at 948, resting on nothing more than an art teacher's recollection that Sears' father "severely criticized" him—"and meant it"!—at a conference with the principal concerning his son's poor academic performance, 6 Record 1747; the claim that his father "disciplined Sears with age-inappropriate military-style drills," *ante*, at 948, which consisted of positively VonSteubenesque acts such as dousing the kid with cold water when he refused to get up for school, and making him run extra laps after sports practices, 6 Record 1622; and the claim that his mother's "'favorite word'"—actually three words—to refer to her sons was scatological, *ante*, at 948 (quoting 2 Record 265).

While the Court takes pains to describe all the elements of Sears' new mitigation theory, down to the silliest, it does not trouble to describe the brutal circumstances of the crime—which are at least just as relevant to assessing whether the different mitigation theory would probably have altered the sentence. But the jury heard all about them. See *Sears* v. *State*, 268 Ga. 759, 759–760, 493 S. E. 2d 180, 182 (1997). They heard Sears' confession that he kidnaped, raped, and murdered Gloria Wilbur, a 59-year-old wife and mother. Sears, carrying a briefcase containing various instruments of mayhem—brass knuckles, knives, and handcuffs—and his accomplice, Phillip Williams, were surveying a supermarket parking lot on a Sunday evening in October 1990, looking for a car to steal to drive back home to Ohio from Georgia. As the victim was putting her groceries in the trunk of her car, Sears approached, punched her in the face with his brass knuckles, shoved her into the car, and drove to pick up Williams. Sears then handcuffed her and pulled her into the

backseat as Williams drove. After they passed into Tennessee, Sears raped her. Later in the evening, after they had crossed into Kentucky, Sears told Williams to stop the car. Sears forced her, still handcuffed, into the woods by the side of the highway as she begged for her life. After throwing her on the ground, he stabbed her in the neck. In his confession he showed no regret or remorse for his heinous crimes.[5]

I do not know how anyone could disagree with the habeas court's conclusion that it is impossible to say that substituting the "deprived-childhood-*cum*-brain-damage" defense for the "good-middle-class-kid-who-made-a-mistake" defense would probably have produced a different verdict. I respectfully dissent.

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[5] The jury also heard from several corrections officers who testified that while Sears was incarcerated awaiting trial and sentencing, he racked up dozens of disciplinary infractions, including assaults on other inmates. "'Predatory,'" "'[i]ncorrigible,'" and incapable of reform was how they described him. 10 *id.*, at 2951–2957; 19 *id.*, at 4868.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 964 and 1001 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 21 THROUGH
SEPTEMBER 28, 2010

JUNE 21, 2010

Certiorari Granted—Vacated and Remanded

No. 08–1335. ASTRUE, COMMISSIONER OF SOCIAL SECURITY *v.* WILSON. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Astrue* v. *Ratliff,* 560 U. S. 586 (2010).

No. 09–203. ESCOBAR *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–539. CARDONA-LOPEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir.;

No. 09–676. SIMMONS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 340 Fed. Appx. 141;

No. 09–733. YOUNG *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Reported below: 344 Fed. Appx. 944; and

No. 09–955. ALEXIS *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Reported below: 354 Fed. Appx. 62. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Carachuri-Rosendo* v. *Holder,* 560 U. S. 563 (2010).

No. 09–5373. MELSON *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Petition for rehearing granted. Order entered October 5, 2009 [558 U. S. 900], denying petition for writ of certiorari vacated. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Holland* v. *Florida,* 560 U. S. 631 (2010). Reported below: 548 F. 3d 993.

No. 09–5386. FERNANDEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Reported below: 544 F. 3d 862;

No. 09–8003. WATSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 336 Fed. Appx. 363;

No. 09–8235. GARZA-GONZALEZ *v.* UNITED STATES (Reported below: 333 Fed. Appx. 893); and MEJIA-PORTILLO *v.* UNITED STATES (348 Fed. Appx. 990). C. A. 5th Cir.;

No. 09–8474. DE JESUS RODRIGUEZ *v.* UNITED STATES (Reported below: 348 Fed. Appx. 960); and MENDOZA-DELGADO *v.* UNITED STATES. C. A. 5th Cir.;

No. 09–8822. GARBUTT *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Reported below: 351 Fed. Appx. 106;

No. 09–8935. ALVAREZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–9041. LOPEZ-MENDOZA *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–9049. BECKFORD *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–9071. RODRIGUEZ-DIAZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–9146. RAMIREZ-SOLIS *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir.;

No. 09–9351. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 353 Fed. Appx. 839;

No. 09–9611. SMITH *v.* UNITED STATES. C. A. 4th Cir. Reported below: 354 Fed. Appx. 830; and

No. 09–9647. REYES-HOBBS *v.* UNITED STATES (Reported below: 366 Fed. Appx. 511); PEREZ-PADRON *v.* UNITED STATES; and REYES *v.* UNITED STATES (357 Fed. Appx. 596). C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563 (2010).

No. 09–5776. WHITFIELD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.; and

No. 09–7493. FORD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Holland* v. *Florida*, 560 U. S. 631 (2010).

No. 09–8640. FU SHENG KUO ET AL. *v.* UNITED STATES. C. A. 9th 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 *Dolan* v.

United States, 560 U. S. 605 (2010). Reported below: 588 F. 3d 729.

No. 09–8859. RYALS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for the Seventh Circuit for further consideration in light of that court's en banc opinion in *United States* v. *Corner*, 598 F. 3d 411 (2010). Reported below: 351 Fed. Appx. 102.

No. 09–8915. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed May 21, 2010. THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO dissent for the reasons stated in *Nunez* v. *United States*, 554 U. S. 911, 912 (2008) (SCALIA, J., dissenting). Reported below: 337 Fed. Appx. 288.

Certiorari Dismissed

No. 09–10467. ASEMANI *v.* CHRONISTER ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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: 371 Fed. Appx. 392.

Miscellaneous Orders

No. D–2464. IN RE DISBARMENT OF ARAGON. Disbarment entered. [For earlier order herein, see 559 U. S. 968.]

No. D–2470. IN RE DISCIPLINE OF MARTIN. Timothy John Martin, of Lakewood, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2471. IN RE DISCIPLINE OF ISAAC. John L. Isaac, of Parker, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2472. IN RE DISCIPLINE OF ROZAN. Steven Jay Rozan, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2473. IN RE DISCIPLINE OF AMATO. Jacob J. Amato, Jr., of Gretna, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 09M103. MCCAFFERY *v.* HORNBEAK, WARDEN;
No. 09M104. VULPIS *v.* FLORIDA; and
No. 09M105. BRUNKHORST *v.* PIERCE, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M106. SEALED PETITIONER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 09–1444. IN RE ANDERSON ET AL. Motion of petitioners to expedite consideration of petition for writ of mandamus denied.

No. 09–8802. SPUCK *v.* MCVEY, CHAIRWOMAN, PENNSYLVANIA BOARD OF PROBATION AND PAROLE, ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1034] denied.

No. 09–9332. ROBENSON *v.* HASZINGER. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1104] denied.

No. 09–10505. SHAHIN *v.* DELAWARE DEPARTMENT OF FINANCE. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 12, 2010, 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. 09–11024. IN RE HOLLIHAN;
No. 09–11050. IN RE MCGHEE-BEY; and
No. 09–11059. IN RE CUTAIA. Petitions for writs of habeas corpus denied.

No. 09–10292. IN RE RAYNOR;
No. 09–10805. IN RE SMITH; and
No. 09–10809. IN RE GRANDA. Petitions for writs of mandamus denied.

Certiorari Granted

No. 09–329. CHASE BANK USA, N. A. *v.* MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 9th Cir. Certiorari granted. Reported below: 559 F. 3d 963.

No. 09–529. VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY *v.* REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 568 F. 3d 110.

No. 09–996. WALKER, WARDEN, ET AL. *v.* MARTIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 357 Fed. Appx. 793.

Certiorari Denied

No. 09–654. ORTHO BIOTECH PRODUCTS, L. P. *v.* UNITED STATES EX REL. DUXBURY. C. A. 1st Cir. Certiorari denied. Reported below: 579 F. 3d 13.

No. 09–875. RAFF *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–935. SHORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 660.

No. 09–949. MATSUO ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 3d 1180.

No. 09–1065. UNITED STATES EX REL. HOPPER ET AL. *v.* SOLVAY PHARMACEUTICALS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 588 F. 3d 1318.

No. 09–1116. 573 JACKSON AVENUE REALTY CORP. *v.* NYCTL 1999–1 TRUST ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 13 N. Y. 3d 573, 921 N. E. 2d 195.

No. 09–1124. GUEVARA MENDOZA, INDIVIDUALLY AND AS SURVIVING FATHER OF GUEVARA RODRIGUEZ, DECEASED, ET AL. *v.* BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 3d 406.

No. 09–1127. R. R., BY HIS NEXT FRIEND E. R. *v.* EL PASO INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 3d 417.

No. 09–1140. BANK OF GUAM *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 578 F. 3d 1318.

No. 09–1146. YUMA ANESTHESIA MEDICAL SERVICES LLC *v.* FLEMING. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 3d 938.

No. 09–1204. CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE. Sup. Ct. Wis. Certiorari denied. Reported below: 319 Wis. 2d 553, 768 N. W. 2d 749.

No. 09–1245. HORITA *v.* KAUAI ISLAND UTILITY COOPERATIVE. C. A. 9th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 194.

No. 09–1253. GILES *v.* WAL-MART DISTRIBUTION CENTER. C. A. 11th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 91.

No. 09–1256. CORBOY ET AL. *v.* BENNETT, ATTORNEY GENERAL OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 09–1257. LESSARD ET AL. *v.* VELSICOL CHEMICAL CORP. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 09–1258. LONG BEACH MORTGAGE CO. *v.* EVANS, AS RECEIVER FOR TLC AMERICA, INC. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 284 S. W. 3d 406.

No. 09–1260. MOHAMED ET AL. *v.* DAUD ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–1261. ANDERSON *v.* AMR, PARENT OF AMERICAN AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 322.

No. 09–1268. FONTICOBA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 299 Ga. App. XXIII.

No. 09–1276. QUIGLEY *v.* ESQUIRE DEPOSITION SERVICES, LLC. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 409 N. J. Super. 69, 975 A. 2d 1042.

No. 09–1280. BARAGONA ET AL. *v.* KUWAIT GULF LINK TRANSPORTATION CO. C. A. 11th Cir. Certiorari denied. Reported below: 594 F. 3d 852.

No. 09–1283. LAHR *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 3d 964.

No. 09–1291. CAPACI *v.* FOLMAR KENNER, LLC. Sup. Ct. Ala. Certiorari denied. Reported below: 43 So. 3d 1234.

No. 09–1297. HASSAN *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 3d 785.

No. 09–1307. MADANI ET AL. *v.* SHELL OIL CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 158.

No. 09–1308. MARTIN MARIETTA MATERIALS, INC., ET AL. *v.* CITY OF GREENWOOD, MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 299 S. W. 3d 606.

No. 09–1312. PORTNOY ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–1316. BROWN, SHERIFF, TIPPECANOE COUNTY, INDIANA *v.* OLSON. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 3d 577.

No. 09–1326. KIM *v.* PARKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 373 Fed. Appx. 606.

No. 09–1344. FISCHER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 322 Wis. 2d 265, 778 N. W. 2d 629.

No. 09–1347. HARPER *v.* UNITED SERVICES AUTOMOBILE ASSN. Sup. Ct. Fla. Certiorari denied.

No. 09–1350. SEGUIN *v.* CIRCUIT COURT OF VIRGINIA, FAIRFAX COUNTY, ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–1357. MARSHALL *v.* WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied. Reported below: 167 Wash. 2d 51, 217 P. 3d 291.

No. 09–1388. HARPER *v.* UNITED SERVICES AUTOMOBILE ASSN. (two judgments). Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 09–1393. ENDICOTT *v.* ICICLE SEAFOODS, INC. Sup. Ct. Wash. Certiorari denied. Reported below: 167 Wash. 2d 873, 224 P. 3d 761.

No. 09–1408. MILLER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 69 M. J. 43.

No. 09–1410. GEBHART ET UX. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 3d 1034.

No. 09–6760. BALENTINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 569 F. 3d 801.

No. 09–7117. ADAMS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7374. MOSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–7395. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–7405. SANDERS, AKA BROWN, AKA MCKINNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 458.

No. 09–7441. LLOYD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–7445. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 575 F. 3d 1075.

No. 09–7495. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 557.

No. 09–7604. BENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 37.

No. 09–7690. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 91.

No. 09–7768. BASHFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 910.

No. 09–7825. NEWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 903.

No. 09–7855. BRYAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–7963. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 150.

No. 09–8081. MITCHELL, AKA JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 897.

No. 09–8088. MASS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8159. HIGHTOWER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 377.

No. 09–8162. VELEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 550.

No. 09–8214. LANCE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 285.

No. 09–8225. PERALTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 794.

No. 09–8245. CASTRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 846.

No. 09–8249. PORTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8297. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 428.

No. 09–8566. CALDWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 105.

No. 09–8585. PITTS, AKA SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 174.

No. 09–8616. ISHMAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 539.

No. 09–8642. MALONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 121.

No. 09–8644. JOSEPH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 715.

No. 09–8691. SCAIFE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 153.

No. 09–8706. STORY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 710.

No. 09–8708. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 709.

No. 09–8709. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 885.

No. 09–8729. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 713.

No. 09–8730. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 924.

No. 09–8734. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 199.

No. 09–8741. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 714.

No. 09–8751. LIGHTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 713.

No. 09–8752. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 989.

No. 09–8762. HEARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 712.

No. 09–8879. WATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 3d 974.

No. 09–8939. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 3d 667.

No. 09–9007. THOMAS *v.* CARROLL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 581 F. 3d 118.

No. 09–9197. PATILLAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 595 F. 3d 1138.

No. 09–9243. TAYLOR *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 3d 848.

No. 09–9248. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 674.

No. 09–9311. BULLOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9357. BARNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 678.

No. 09–9371. COFFEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 85.

No. 09–9453. GERALDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 557.

No. 09–9488. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 292.

No. 09–9494. PUGH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 718.

No. 09–9599. CARTWRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9609. MIMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9658. LAYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 286.

No. 09–9702. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 581 F. 3d 1310.

No. 09–9706. PRIDE *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 09–9738. SIMS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9868. DEGLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 310.

No. 09–9901. MURPHY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 550.

No. 09–10105. BOLDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 66.

No. 09–10214. LAMBERT *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–10224. VILLARREAL *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 09–10237. GARLAND *v.* GARLAND. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–10238. ANDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–10242. GETZ *v.* TAYLOR ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 986 A. 2d 1164.

No. 09–10243. HAWTHORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 595.

No. 09–10251. DIVINE *v.* MICHAEL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–10253. MCQUEEN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 09–10255. JONES *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL INSTITUTION. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 569.

No. 09–10260. REAVES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 23 So. 3d 729.

No. 09–10267. WILLIS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–10271. CLARKE *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–10273. EASON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 3 So. 3d 685.

No. 09–10282. PERIGO *v.* EMBRY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 206.

No. 09–10285. COLLADO *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 19 So. 3d 995.

No. 09–10288. COLBERT *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 831.

No. 09–10294. SELL *v.* JP MORGAN CHASE BANK NA ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10295. BURNS *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 937.

No. 09–10299. MALDONADO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–10304. WASHINGTON *v.* NEW YORK STATE DEPARTMENT OF STATE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 127.

No. 09–10305. YSAIS *v.* YSAIS. C. A. 10th Cir. Certiorari denied. Reported below: 372 Fed. Appx. 843.

No. 09–10311. YOUNG *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–10312. VICK *v.* MCKINNIE ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10313. PATTERSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 46.

No. 09–10318. BROOKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–10322. JONES *v.* WAINWRIGHT. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 317.

No. 09–10324. CLEMENTS *v.* CLARKE, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 3d 45.

No. 09–10327. DAVIS ET AL. *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 3d 580.

No. 09–10328. PERRY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 201.

No. 09–10335. MARTINEZ *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 732.

No. 09–10378. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 912.

No. 09–10394. ELAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 1177, 981 N. E. 2d 536.

No. 09–10395. BELLAMY *v.* HORRY COUNTY SCHOOL DISTRICT. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 776.

No. 09–10403. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 913.

No. 09–10416. KNIGHT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 1102, 985 N. E. 2d 724.

No. 09–10429. CHASE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 795.

No. 09–10437. GUILLORY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 585.

No. 09–10439. GRAY *v.* BERGERON, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 3d 296.

No. 09–10450. ROBERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 988.

No. 09–10466. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 937.

No. 09–10468. BRAVO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1115, 982 N. E. 2d 986.

No. 09–10492. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 3d 693.

No. 09–10535. OLBA *v.* UNGER, SUPERINTENDENT, WYOMING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–10555. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 540.

No. 09–10576. AKHTAR *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 373 Fed. Appx. 727.

No. 09–10582. FLOWERS *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 3d 413.

No. 09–10592. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 3d 284.

No. 09–10611. RAMIREZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 925.

No. 09–10612. STATIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 492.

No. 09–10641. NORMAN *v.* OHIO. Ct. App. Ohio, 4th App. Dist. Certiorari denied. Reported below: 2009-Ohio-5458.

No. 09–10648. SMITH *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 394.

No. 09–10649. BOWMAN *v.* MILYARD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 397.

No. 09–10672. JONES *v.* BRITTEN. C. A. 8th Cir. Certiorari denied.

No. 09–10694. TYSON *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 744.

No. 09–10787. HATCHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 659.

No. 09–10811. GROSS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 514.

No. 09–10812. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10813. HAUGHTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–10824. BLOOM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 366 Fed. Appx. 285.

No. 09–10827. MULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 723.

No. 09–10843. CHILDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 409.

No. 09–10844. DENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 591.

No. 09–10845. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 136.

No. 09–10846. CRUZ-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 581.

No. 09–10849. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 195.

No. 09–10850. STEWART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 33.

No. 09–10856. ALJABRI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 403.

No. 09–10860. COTTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 566.

No. 09–10861. MORAIDA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 502.

No. 09–10867. HENDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 595 F. 3d 1198.

No. 09–10869. HAMPTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 803.

No. 09–10873. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 3d 373.

No. 09–10879. GETACHEW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 931.

No. 09–10880. GALARZA-RAMOS, AKA GALARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 503.

No. 09–10883. L. G. H. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 776.

No. 09–10889. HARRISON, AKA GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 954.

No. 09–10894. CARRILLO-DIAZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 707.

No. 09–10898. AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10902. MCNEILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 372 Fed. Appx. 420.

No. 09–10908. GOLDING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 374 Fed. Appx. 208.

No. 09–10910. SHIELDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 691.

No. 09–10912. PENA-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10913. CHARLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 532.

No. 09–10917. GONZALEZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 581.

No. 09–10918. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 763.

No. 09–10921. GRANDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 524.

No. 09–10926. CASEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 238.

No. 09–10930. GRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 335 Fed. Appx. 924.

No. 09–10934. CASTRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 229.

No. 09–10942. MALLARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–10944. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 377 Fed. Appx. 236.

No. 09–10947. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 543.

No. 09–10949. BLACKWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 413.

No. 09–10955. HAMANI, AKA CLEMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10956. GREENHILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–10957. EVERHART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 455.

No. 09–10961. COTTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 18.

No. 09–10962. LABOY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10963. JOSE-MILAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10969. TATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 799.

No. 09–10971. BATTLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 560.

No. 09–10972. AGUILAR-AGUILAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 612.

No. 09–1123. WYETH LLC ET AL. *v.* SCROGGIN. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 586 F. 3d 547.

No. 09–7596. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 326 Fed. Appx. 48.

No. 09–9411. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 361 Fed. Appx. 174.

No. 09–10320. TAFARI *v.* ANNETTS ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 363 Fed. Appx. 80.

No. 09–10343. MCDAVIS *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 09–10906. GUZMAN *v.* UNITED STATES; and

No. 09–10907. HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 591 F. 3d 83.

Rehearing Granted. (See No. 09–5373, *supra.*)

Rehearing Denied

No. 09–790. ZAGORSKI *v.* BELL, WARDEN, 559 U. S. 1068;

No. 09–1037. WILSON *v.* ROBERT J. ADAMS & ASSOCIATES, 559 U. S. 1092;

No. 09–1135. KRIEG *v.* DAWSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, ET AL., 559 U. S. 1093;

No. 09–7010. CAIN *v.* UNITED STATES, 558 U. S. 1033;

No. 09–8952. NUNEZ *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 559 U. S. 1052;

No. 09–8992. BARBER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL., 559 U. S. 1073;

No. 09–9026. MILLER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 1073;

No. 09–9179. SPUCK *v.* RIDGE ET AL., 559 U. S. 1095;

No. 09–9293. MANNIX *v.* MADIGAN ET AL., 559 U. S. 1096;

No. 09–9530. CHAMBERS *v.* OHIO, 559 U. S. 1098;

No. 09–9587. JOHNSON *v.* FLORIDA, 559 U. S. 1098;

No. 09–9843. TSOSIE *v.* ARIZONA ET AL., 559 U. S. 1101; and

No. 09–9867. IN RE CHRONISTER, 559 U. S. 1066. Petitions for rehearing denied.

No. 09–999. MALLERY ET AL. *v.* NBC UNIVERSAL, INC., ET AL., 559 U. S. 1101. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–1016. SIMONELLI *v.* UNIVERSITY OF CALIFORNIA AT BERKELEY ET AL., 559 U. S. 1102. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

JUNE 24, 2010

Dismissal Under Rule 46

No. 09–758. COBELL ET AL. *v.* SALAZAR, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 573 F. 3d 808.

JUNE 28, 2010

Affirmed on Appeal

No. 09–1318. HENDERSON *v.* SONY PICTURES ET AL. C. A. 9th Cir. Because the Court lacks a quorum, 28 U. S. C. § 1, and

since the only qualified Justice is of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." THE CHIEF JUSTICE, JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE ALITO took no part in the consideration or decision of this petition.

Certiorari Granted—Vacated and Remanded

No. 09–213. NORTHEASTERN LAND SERVICES, LTD., DBA NLS GROUP *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Reported below: 560 F. 3d 36; and

No. 09–328. SNELL ISLAND SKILLED NURSING FACILITY, LLC, DBA SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Reported below: 568 F. 3d 410. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *New Process Steel, L. P.* v. *NLRB*, 560 U. S. 674 (2010).

No. 09–787. UNION PACIFIC RAILROAD CO. *v.* SOMPO JAPAN INSURANCE COMPANY OF AMERICA ET AL. (two judgments). C. A. 2d Cir. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, *ante*, p. 89. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 341 Fed. Appx. 706 (first judgment) and 707 (second judgment).

No. 09–9751. CANTU CHAPA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Padilla* v. *Kentucky*, 559 U. S. 356 (2010). Reported below: 354 Fed. Appx. 203.

Certiorari Dismissed

No. 09–10460. TAYLOR *v.* DEGROTT 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. As petitioner has repeatedly abused this Court's process, the Clerk

is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–10504. SCHRADER *v.* NEW MEXICO ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 361 Fed. Appx. 971.

No. 09–10712. WATERFIELD *v.* FLORIDA. Sup. Ct. Fla. 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: 36 So. 3d 86.

No. 09–10808. FRANKLIN *v.* CHATTERTON ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 358 Fed. Appx. 970.

No. 09–10970. RAITPORT *v.* UNITED STATES ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–11052. POWELL *v.* KELLER ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 367 Fed. Appx. 402.

Miscellaneous Orders

No. 09M107. HOOKS *v.* BERGERON, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER;

No. 09M108. WILLIAMS *v.* GONZALEZ ET AL.;

No. 09M110. LOWERY *v.* STRENGTH, SHERIFF, RICHMOND COUNTY, GEORGIA, ET AL.; and

No. 09M111. BYLER *v.* WEISNER. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M109. YOUNG *v.* INTEL CORP. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 09–797. RODEARMEL *v.* CLINTON, SECRETARY OF STATE, ET AL., 560 U. S. 950. Motion of appellant to vacate and remand denied.

No. 09–868. WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* KHOLI. C. A. 1st Cir. [Certiorari granted, 560 U. S. 903.] Motion of respondent for appointment of counsel granted. Judith H. Mizner, Esq., of Boston, Mass., is appointed to serve as counsel for respondent in this case.

No. 09–1159. BOARD OF TRUSTEES OF LELAND STANFORD UNIVERSITY *v.* ROCHE MOLECULAR SYSTEMS, INC., ET AL. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–10916. HEGHMANN *v.* GEITHNER, SECRETARY OF THE TREASURY, ET AL. C. A. 2d Cir.; and

No. 09–10968. PO KEE WONG *v.* UNITED STATES. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 19, 2010, 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. 09–11202. SEDAGHATY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON ET AL. C. A. 9th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 09–11143. IN RE BUSH; and

No. 09–11178. IN RE LENOIR. Petitions for writs of habeas corpus denied.

No. 09–9861. IN RE BANSAL;

No. 09–10381. IN RE WILKINS;

No. 09–10676. IN RE TORRENCE; and

No. 09–11036. IN RE ROBINSON. Petitions for writs of mandamus denied.

No. 09–10456. IN RE RIVAS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 09–115. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ET AL. *v.* WHITING ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 558 F. 3d 856.

No. 09–525. JANUS CAPITAL GROUP, INC., ET AL. *v.* FIRST DERIVATIVE TRADERS. C. A. 4th Cir. Certiorari granted. Reported below: 566 F. 3d 111.

No. 09–1036. HENDERSON *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari granted. Reported below: 589 F. 3d 1201.

No. 09–1163. MILNER *v.* DEPARTMENT OF THE NAVY. C. A. 9th Cir. Certiorari granted. Reported below: 575 F. 3d 959.

No. 09–804. CIGNA CORP. ET AL. *v.* AMARA ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 2d Cir. Certiorari granted. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 348 Fed. Appx. 627.

No. 09–6822. PEPPER *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 570 F. 3d 958.

Certiorari Denied

No. 08–1515. GOLDEN GATE RESTAURANT ASSN. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 3d 639.

No. 09–1. HOLY SEE *v.* DOE. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 3d 1066.

No. 09–377. NATIONAL LABOR RELATIONS BOARD *v.* LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 564 F. 3d 469.

No. 09–683. CARMICHAEL, INDIVIDUALLY AND AS GUARDIAN FOR CARMICHAEL *v.* KELLOGG, BROWN & ROOT SERVICE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 572 F. 3d 1271.

No. 09–840. HARDIE'S FRUIT & VEGETABLE CO.-SOUTH, LP *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 363 Fed. Appx. 741.

No. 09–870. ARMSTRONG ET AL. *v.* COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 3d 950.

No. 09–942. CORTEZ-URQUILLA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 09–976. PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC. *v.* UNITED STATES ET AL.;

No. 09–977. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* UNITED STATES ET AL.;

No. 09–978. UNITED STATES *v.* PHILIP MORRIS USA INC.;

No. 09–979. ALTRIA GROUP, INC. *v.* UNITED STATES ET AL.;

No. 09–980. BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD. *v.* UNITED STATES ET AL.;

No. 09–994. TOBACCO-FREE KIDS ACTION FUND ET AL. *v.* PHILIP MORRIS USA INC.; and

No. 09–1012. LORILLARD TOBACCO CO. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 566 F. 3d 1095.

No. 09–1014. STOLAJ ET UX. *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 3d 651.

No. 09–1051. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 570 F. 3d 327.

No. 09–1131. MORGAN ET AL. *v.* PLANO INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 740.

No. 09–1161. US BANK NATIONAL ASSN. ND ET AL. *v.* THOMAS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 3d 794.

No. 09–1164. NORFOLK DREDGING CO. *v.* MISENER MARINE CONSTRUCTION, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 594 F. 3d 832.

No. 09–1172. ARCTIC SLOPE NATIVE ASSN., LTD. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 583 F. 3d 785.

No. 09–1176. PIRATE INVESTOR LLC ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 3d 233.

No. 09–1183. LITTLE ROCK CARDIOLOGY CLINIC, P. A., ET AL. *v.* BAPTIST HEALTH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 3d 591.

No. 09–1274. CLEMONS ET AL. *v.* CRAWFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 3d 1119.

No. 09–1277. REGER DEVELOPMENT, LLC *v.* NATIONAL CITY BANK. C. A. 7th Cir. Certiorari denied. Reported below: 592 F. 3d 759.

No. 09–1278. T. B. *v.* SUPERIOR COURT OF CALIFORNIA, SAN BERNARDINO COUNTY, ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–1286. OSEI-AFRIYIE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–1288. SHOPE ET AL. *v.* NEW JERSEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 409 N. J. Super. 495, 978 A. 2d 312.

No. 09–1292. SCHARFF *v.* RAYTHEON COMPANY SHORT TERM DISABILITY PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 3d 899.

No. 09–1293. SEGOVIA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 09–1299. LANCE *v.* HALL, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 286 Ga. 365, 687 S. E. 2d 809.

No. 09–1309. NIZIO *v.* COOK ET AL. Sup. Ct. Pa. Certiorari denied.

No. 09–1315. BAUER ET AL. *v.* DEAN MORRIS, L. L. P., ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–1320. PROCTOR *v.* ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 38, 360 S. W. 3d 61.

No. 09–1321. MIZRACH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 571.

No. 09–1330. NEWSOM *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–1331. ZHANG *v.* FOOTBRIDGE LIMITED TRUST. C. A. D. C. Cir. Certiorari denied. Reported below: 358 Fed. Appx. 189.

No. 09–1341. AJIWOJU *v.* UNIVERSITY OF MISSOURI-KANSAS CITY. C. A. 8th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 420.

No. 09–1348. HELLMAN *v.* WEISBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 776.

No. 09–1351. C. D. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–1365. ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 875.

No. 09–1368. JOHNSON *v.* POTTER, POSTMASTER GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 159.

No. 09–1394. BROWN *v.* LEWIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 51.

No. 09–1415. STOYANOV *v.* MABUS, SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 511.

No. 09–1419. RADAR SOLUTIONS, LTD., DBA ROCKY MOUNTAIN RADAR, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 480.

No. 09–1441. ATKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8755. HOOD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9118. V. M. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES; and

No. 09–9144. B. G. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 408 N. J. Super. 222, 974 A. 2d 448.

No. 09–9476. GRAHAM *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9701. MAHAFFEY *v.* RAMOS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 3d 1142.

No. 09–9711. CLINTON *v.* BRENNER. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9834. HERRERA-CASTILLO *v.* HOLDER, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 3d 1004.

No. 09–9838. DECK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 303 S. W. 3d 527.

No. 09–9938. YATES *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 40.

No. 09–9956. SOFFAR *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–9988. LIGGON-REDDING *v.* SOUSER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 618.

No. 09–10030. BINGLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–10053. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 859.

No. 09–10290. WRIGHT *v.* RACEWAY PARK, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10300. COLE *v.* HILAND ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–10332. ROBINSON *v.* LIVINGSTON. C. A. 6th Cir. Certiorari denied.

No. 09–10336. LOPEZ *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 09–10338. SPURLOCK *v.* NORTHRIP ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10340. BROWN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 09–10342. CAMPBELL, MOTHER AND NEXT FRIEND OF J. P. E. H. *v.* HOOKSETT SCHOOL DISTRICT ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–10346. CORTEZ *v.* MCDONALD, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10347. ELLISON *v.* BIEBEL ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–10348. R. K. C. *v.* J. M. F. Ct. App. Iowa. Certiorari denied. Reported below: 776 N. W. 2d 111.

No. 09–10351. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 26 So. 3d 519.

No. 09–10352. EVERETT *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 17 So. 3d 1240.

No. 09–10355. WILSON *v.* GAVANGI ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–10362. DUNCAN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 28 So. 3d 665.

No. 09–10365. COLE *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 794.

No. 09–10367. CARVAJAL *v.* LOS ANGELES POLICE DEPARTMENT. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 901.

No. 09–10368. ELLISON *v.* BLACK ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–10369. CARROLL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10371. CLARK *v.* FRONTERA ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10372. CRAWFORD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–10373. DUNKERLEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 46 So. 3d 974.

No. 09–10376. LEWIS *v.* SMITH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 421.

No. 09–10393. DODGION *v.* HARTLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10398. BUNCH *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–10402. KELLEGHAN *v.* UNDERWOOD. C. A. 7th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 68.

No. 09–10405. LARSON *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10406. JACKSON *v.* KIRKLAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10413. PETTY *v.* PETTY. Ct. App. N. C. Certiorari denied. Reported below: 199 N. C. App. 192, 680 S. E. 2d 894.

No. 09–10415. KLEIN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 19 So. 3d 991.

No. 09–10421. CANTER *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 2009-Ohio-4837.

No. 09–10426. PYLE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–10427. POOLER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–10444. McAfee *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–10445. Mendenhall *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–10451. Geise *v.* Kernan, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 09–10452. Gonzalez *v.* McNeil, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 09–10454. Falso *v.* Salzman Group, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 327 Fed. Appx. 303.

No. 09–10458. Martinez *v.* Zavaras, Executive Director, Colorado Department of Corrections, et al. C. A. 10th Cir. Certiorari denied.

No. 09–10465. Bailey *v.* Johnson, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 46.

No. 09–10469. Bowens *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–10475. Johnson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 09–10480. Wilson *v.* Emond. C. A. 2d Cir. Certiorari denied. Reported below: 373 Fed. Appx. 98.

No. 09–10497. Perez *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 124 Ohio St. 3d 122, 2009-Ohio-6179, 920 N. E. 2d 104.

No. 09–10506. Hae Lee *v.* Holder, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 296.

No. 09–10529. Griffin *v.* Department of the Army. C. A. 1st Cir. Certiorari denied.

No. 09–10568. FLETCHER *v.* SIMMS ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–10574. TRIMBLE *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 27.

No. 09–10594. LAND *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 56 So. 3d 6.

No. 09–10605. RICHARDSON *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–10609. LEE *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10616. ROBERTS *v.* TERRY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 524.

No. 09–10628. SCOTT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 850.

No. 09–10640. CAMP *v.* SHELDON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–10656. CRAIN *v.* NEVADA PAROLE AND PROBATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10658. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 133.

No. 09–10678. WINNINGHAM *v.* WAKE, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–10691. BECKER *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 3d 907.

No. 09–10760. SMITH *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 09–10769. BOYLE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 98.

No. 09–10776. HALLFORD *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–10777. GANDY *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–10785. HARRISON *v.* WATTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 835.

No. 09–10793. FLOYD *v.* STELMA, SHERIFF, KENT COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10797. JACKSON *v.* SCOTTS CO. C. A. 2d Cir. Certiorari denied. Reported below: 356 Fed. Appx. 513.

No. 09–10801. SCHMIDT *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 2009–MT–450, 354 Mont. 280, 224 P. 3d 618.

No. 09–10826. PARMLEY *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 3d 1066.

No. 09–10830. JONES *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–10851. BURDETTE *v.* BRITTEN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–10874. WILBOURN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 392 Ill. App. 3d 1147, 984 N. E. 2d 216.

No. 09–10887. ROBINSON *v.* SUPREME COURT OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–10895. CONSIDINE *v.* NATIONAL CREDIT UNION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 366 Fed. Appx. 157.

No. 09–10897. CLARK *v.* SHERRILL, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. C. A. D. C. Cir. Certiorari denied. Reported below: 358 Fed. Appx. 199.

No. 09–10909. HINES *v.* JACKSON, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 415.

No. 09–10928. CLARK *v.* UNITED STATES GYPSUM CO. C. A. 7th Cir. Certiorari denied.

No. 09–10939. LONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 3d 720.

No. 09–10953. HINES *v.* RICHARDS ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–10958. DAVIS *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 368 Fed. Appx. 124.

No. 09–10966. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 380.

No. 09–10980. CULBERTSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 998.

No. 09–10983. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 74.

No. 09–10986. MARQUEZ-REYES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10990. JENNEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 3d 594.

No. 09–10991. MANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 592 F. 3d 779.

No. 09–10993. MORENO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 977.

No. 09–10994. NIETO-RESENDIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 962.

No. 09–10995. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 129.

No. 09–10998. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 416.

No. 09–11001. SAUNDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–11003. SANDRES *v.* NOLAND, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–11004. Salas de la Rosa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 757.

No. 09–11008. Brown *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 784.

No. 09–11009. Branch *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 609.

No. 09–11010. Adams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 372 Fed. Appx. 946.

No. 09–11011. Agron *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 593 F. 3d 82.

No. 09–11012. Barrington *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 09–11014. Savoca *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 3d 154.

No. 09–11020. Medrano, aka Andrade *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 102.

No. 09–11022. Flannigan *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 732.

No. 09–11027. Soto-Ramirez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 09–11032. Thompson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 3d 1165.

No. 09–11034. Richards *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 09–11035. Cardona Sandoval *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 09–11043. Jenkins *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 983.

No. 09–11046. Knight *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 349 Fed. Appx. 694.

No. 09–11047. Gregory *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 769.

No. 09–11054. DOODY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 3d 752.

No. 09–11060. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 30.

No. 09–11064. GOODWYN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 596 F. 3d 233.

No. 09–11069. VAZQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 601 F. 3d 1202.

No. 09–11071. GRANADOS-GUTIERREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 307.

No. 09–11073. TAKELE *v.* MAYO CLINIC. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 3d 834.

No. 09–11077. COPPEDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 369 Fed. Appx. 338.

No. 09–11078. COOPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 3d 582.

No. 09–11079. WASHINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 F. 3d 777.

No. 09–11083. MORALES-ESCOBEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 804.

No. 09–11084. WALLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 926.

No. 09–11086. WHITELAW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 567.

No. 09–11087. SELLERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 595 F. 3d 791.

No. 09–11090. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 647.

No. 09–11091. BRUMMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 598 F. 3d 1248.

No. 09–11095. MORELOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 681.

No. 09–11097. STANKO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–11101. GOSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–11103. DADAILLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 373 Fed. Appx. 380.

No. 09–11106. HORNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–11109. CRUZ-VALLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 160.

No. 09–11110. DODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 598 F. 3d 449.

No. 09–11115. MCLAUGHLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 09–11116. CROSBY *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION AT RAY BROOK. C. A. 2d Cir. Certiorari denied. Reported below: 353 Fed. Appx. 591.

No. 09–11117. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–11120. ABDULLAH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 725.

No. 09–11122. ACOSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 367 Fed. Appx. 259.

No. 09–11127. SOSA-MORENO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 929.

No. 09–11128. RAMNATH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 365 Fed. Appx. 230.

No. 09–11129. WALSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 377 Fed. Appx. 331.

No. 09–233. TRIPLE-S MANAGEMENT CORP. ET AL. *v.* MUNICIPAL REVENUE COLLECTION CENTER. Sup. Ct. P. R. Motion of Council on State Taxation for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 09–438. PROVIDENCE HOSPITAL ET AL. *v.* MOSES, PERSONAL REPRESENTATIVE OF THE ESTATE OF MOSES-IRONS, DECEASED. C. A. 6th Cir. Motion of Michigan Health & Hospital Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 561 F. 3d 573.

No. 09–930. FITZGERALD ET AL. *v.* THOMPSON ET AL. C. A. 2d Cir. Motion of American Legion, Department of New York, for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 353 Fed. Appx. 532.

No. 09–1149. CITY OF WARREN, MICHIGAN, ET AL. *v.* MOLDOWAN. C. A. 6th Cir. Motions of National Fraternal Order of Police and National Association of Police Organizations et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 578 F. 3d 351.

No. 09–1150. UNIVERSAL TRADING & INVESTMENT CO., INC. *v.* KIRITCHENKO ET AL. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 346 Fed. Appx. 232.

No. 09–1175. FERRING B. V. ET AL. *v.* MEIJER, INC., ET AL. C. A. 2d Cir. Motion of Intellectual Property Owners Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 585 F. 3d 677.

No. 09–1229. LONECKE ET AL. *v.* CITIGROUP PENSION PLAN ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 584 F. 3d 457.

No. 09–1310. LINDSAY ET AL. *v.* ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 581 F. 3d 47.

No. 09–1412. PARAGUAY HUMANITARIAN FOUNDATION, INC., FKA CQZ HUMANITARIAN FOUNDATION, INC., ET AL. *v.* BANCO CENTRAL DEL PARAGUAY ET AL. C. A. 2d Cir. Certiorari de-

nied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 366 Fed. Appx. 250.

No. 09–9345. WASHINGTON *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 355 Fed. Appx. 543.

No. 09–11031. TONKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 372 Fed. Appx. 168.

Rehearing Denied

No. 08–6726. INGRAM *v.* WARDEN, RIVER BEND DETENTION CENTER, 555 U. S. 1056;

No. 09–825. BURDICK *v.* PRITCHETT & BIRCH, PLLC, ET AL., 559 U. S. 1006;

No. 09–900. CARTY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 1106;

No. 09–8544. BERGARA *v.* UNITED STATES, 559 U. S. 960;

No. 09–8986. OCHEI *v.* ALL CARE/ONWARD HEALTHCARE ET AL., 559 U. S. 1072;

No. 09–9150. SMITH *v.* ESTES EXPRESS, 559 U. S. 1076;

No. 09–9323. BROWN *v.* HOWARD COUNTY POLICE DEPARTMENT ET AL., 559 U. S. 1108;

No. 09–9324. BROWN *v.* COUNCIL, BARADEL, KOSMERL & NOLAN ET AL., 559 U. S. 1108;

No. 09–9325. BROWN *v.* UPPER MARLBORO TOWN POLICE ET AL., 559 U. S. 1108;

No. 09–9346. TAFARI *v.* STEIN ET AL., 559 U. S. 1109;

No. 09–9379. BRUNER *v.* OKLAHOMA, 559 U. S. 1109;

No. 09–9403. NICHOLS *v.* GEORGIA, 559 U. S. 1110;

No. 09–9483. BROWN *v.* INDUSTRIAL BANK ET AL., 560 U. S. 908;

No. 09–9484. BROWN *v.* MCCARTHY, 559 U. S. 1098;

No. 09–9485. BROWN *v.* MILLER, 560 U. S. 908;

No. 09–9514. BROWN *v.* SUBURBAN PROPANE, L. P., 560 U. S. 909;

No. 09–9516. HUDSON *v.* KAPTURE, WARDEN, 559 U. S. 1079;

No. 09–9520. THOMPSON *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, 559 U. S. 1111;

No. 09–9529. DE LA GARZA *v.* FABIAN, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, 559 U. S. 1111; and

No. 09–9795. EDWARDS *v.* BOEING CO. ET AL., 560 U. S. 930. Petitions for rehearing denied.

No. 09–1042. SHAH *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE ET AL., 559 U. S. 1116. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JUNE 29, 2010

Affirmed on Appeal

No. 09–1287. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from D. C. D. C. affirmed. JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS would note probable jurisdiction and set the case for oral argument. Reported below: 698 F. Supp. 2d 150.

Certiorari Granted—Vacated and Remanded. (See also No. 09–8854, *ante,* p. 945.)

No. 08–1509. CLASSEN IMMUNOTHERAPIES, INC. *v.* BIOGEN IDEC ET AL. C. A. Fed. Cir. Reported below: 304 Fed. Appx. 866; and

No. 09–490. MAYO COLLABORATIVE SERVICES, DBA MAYO MEDICAL LABORATORIES, ET AL. *v.* PROMETHEUS LABORATORIES, INC. C. A. Fed. Cir. Reported below: 581 F. 3d 1336. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bilski* v. *Kappos*, *ante,* p. 593.

No. 08–1592. MALONEY *v.* RICE, DISTRICT ATTORNEY, NASSAU COUNTY, NEW YORK. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McDonald* v. *Chicago*, *ante,* p. 742. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 554 F. 3d 56.

No. 09–167. SCRUSHY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 561 F. 3d 1215;

No. 09–182. SIEGELMAN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 561 F. 3d 1215;

No. 09–929. HARGROVE *v.* UNITED STATES. C. A. 7th Cir. Reported below: 579 F. 3d 752; and

No. 09–1035. HEREIMI *v.* UNITED STATES. C. A. 9th Cir. Reported below: 357 Fed. Appx. 82. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Skilling* v. *United States*, *ante*, p. 358.

No. 09–6425. RICHARDS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Reported below: 313 Fed. Appx. 969;

No. 09–6516. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 313 Fed. Appx. 969; and

No. 09–7560. REDZIC *v.* UNITED STATES. C. A. 8th Cir. Reported below: 569 F. 3d 841. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Skilling* v. *United States*, *ante*, p. 358.

Certiorari Granted—Remanded

No. 08–1497. NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. The court reversed the judgment below in *McDonald* v. *Chicago*, *ante*, p. 742. Therefore, certiorari granted, and case remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings. Reported below: 567 F. 3d 856.

Miscellaneous Order. (For the Court's order making allotment of Justices, see *ante*, p. VI.)

Certiorari Granted

No. 09–291. THOMPSON *v.* NORTH AMERICAN STAINLESS, LP. C. A. 6th Cir. Certiorari granted. Reported below: 567 F. 3d 804.

Certiorari Denied

No. 08–1501. FERGUSON ET AL. *v.* PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 558 F. 3d 1359.

No. 09–9365. WALLACE *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 807.

No. 09–34. PFIZER INC. *v.* ABDULLAHI ET AL. C. A. 2d Cir. Motion of Washington Legal Foundation et al. for leave to file a

brief as *amici curiae* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 562 F. 3d 163.

JULY 1, 2010

Certiorari Denied

No. 10–5064 (10A8). PERRY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 16, 2010

Miscellaneous Orders

No. 10A52. MOHAMMED *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

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

I would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf* v. *Geren*, 553 U. S. 674 (2008).

No. 10A70. NAJI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JULY 21, 2010

Miscellaneous Order

No. 10A89. BURNS *v.* MISSISSIPPI. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

JULY 22, 2010

Miscellaneous Order

No. 09–6822. PEPPER *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1024.] Adam G. Ciongoli, Esq., of New York, N. Y., is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below.

JULY 26, 2010

Miscellaneous Orders

No. 09A531. VICARIO *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 09A939. KARKOUR *v.* UNITED STATES. C. A. 9th Cir. Application for injunction, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 09A1235 (09–11209). IN RE DAILEY. Application for bail, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 10A24 (09–1250). FINE *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Application for bail, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–2451. IN RE DISBARMENT OF ZANDER. Disbarment entered. [For earlier order herein, see 552 U. S. 1175.]

No. D–2474. IN RE DISCIPLINE OF MARSHALL. Bradley R. Marshall, of Seattle, Wash., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2475. IN RE DISCIPLINE OF BLAU. Howard L. Blau, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2476. IN RE DISCIPLINE OF LAPIDUS. Steven R. Lapidus, of Wainscott, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2477. IN RE DISCIPLINE OF WEST. Brian Grayson West, of Brooklandville, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days,

requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2478. IN RE DISCIPLINE OF GOLDEN. La Quetta Maria Golden, of Gulfport, Miss., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2479. IN RE DISCIPLINE OF SELIGSOHN. Irwin B. Seligsohn, of West Orange, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2480. IN RE DISCIPLINE OF BARON. Joseph Nathaniel Baron, of Orlando, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2481. IN RE DISCIPLINE OF MICKLER. Martin Joseph Mickler, of Jacksonville, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2482. IN RE DISCIPLINE OF KIPI. Jeffrey Thomas Kipi, of Oviedo, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2483. IN RE DISCIPLINE OF MINTMIRE. Donald F. Mintmire, of Palm Beach, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2484. IN RE DISCIPLINE OF SCHAINKER. William A. Schainker, of Chevy Chase, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2485. IN RE DISCIPLINE OF MITTENDORFF. Robert E. Mittendorff, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2486. IN RE DISCIPLINE OF LEE. Garrett L. Lee, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2487. IN RE DISCIPLINE OF BERGRIN. Paul W. Bergrin, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2488. IN RE DISCIPLINE OF WEAVER. David P. Weaver, of San Francisco, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2489. IN RE DISCIPLINE OF MORAN. John M. Moran, of Dorchester, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2490. IN RE DISCIPLINE OF ARLEDGE. Robert C. Arledge, of Vicksburg, Miss., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2491. IN RE DISCIPLINE OF SHOMBER. Melissa Anne Shomber, of Edmond, Okla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2492. IN RE DISCIPLINE OF MCNEAL. Patrick D. McNeal, of Santa Ana, Cal., is suspended from the practice of law

in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2493. IN RE DISCIPLINE OF EHRLICH. David A. Ehrlich, of Cohoes, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 08–1470. BERGHUIS, WARDEN *v.* THOMPKINS, 560 U. S. 370;
No. 09–862. MAGYAR *v.* MISSISSIPPI, 560 U. S. 903;
No. 09–1081. MURESAN ET UX. *v.* FISH ET AL., 560 U. S. 904;
No. 09–1092. WILLIAMS *v.* LOUISIANA, 560 U. S. 905;
No. 09–1166. AHMADI *v.* STATIC CONTROL COMPONENTS, INC., 560 U. S. 939;
No. 09–1202. KIM *v.* CITY OF FEDERAL WAY, WASHINGTON, 560 U. S. 952;
No. 09–1207. CARSON *v.* MERIT SYSTEMS PROTECTION BOARD, 560 U. S. 906;
No. 09–1239. JUELS *v.* UNITED STATES POSTAL SERVICE, 560 U. S. 926;
No. 09–1250. FINE *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA, ET AL., 560 U. S. 927;
No. 09–1304. RAO *v.* CITY OF EVANSTON, ILLINOIS, 560 U. S. 940;
No. 09–1306. MONTALVO *v.* UNITED STATES, 560 U. S. 940;
No. 09–8674. BENFORD *v.* UNITED STATES, 560 U. S. 928;
No. 09–9149. REID *v.* FLINT CIVIL SERVICE COMMISSION, 559 U. S. 1094;
No. 09–9184. STANKOWSKI *v.* ABRAMSON ET AL., 559 U. S. 1095;
No. 09–9235. WOODSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 1096;
No. 09–9318. DREW *v.* MULLINS ET AL., 559 U. S. 1108;
No. 09–9319. DREW *v.* JABE ET AL., 559 U. S. 1108;
No. 09–9329. CURRY *v.* GABLES RESIDENTIAL SERVICES, INC., 559 U. S. 1108;
No. 09–9442. YSAIS *v.* REYNOLDS ET AL., 559 U. S. 1111;
No. 09–9452. GAITHER *v.* UNITED STATES, 559 U. S. 1056;
No. 09–9458. NORTON *v.* FANNIE MAE, 560 U. S. 907;

No. 09–9466. CUTAIA *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 560 U. S. 907;

No. 09–9493. PAIGE *v.* CUOMO, ATTORNEY GENERAL OF NEW YORK, ET AL., 560 U. S. 908;

No. 09–9503. BOBB *v.* UNITED STATES, 559 U. S. 1079;

No. 09–9573. CHAMBERS *v.* TEXAS ET AL., 560 U. S. 910;

No. 09–9630. LANCASTER *v.* TEXAS, 560 U. S. 910;

No. 09–9651. TERRY *v.* WALKER ET AL., 560 U. S. 911;

No. 09–9681. SMITH *v.* UNITED STATES, 559 U. S. 1083;

No. 09–9725. SERRANO *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY, 560 U. S. 929;

No. 09–9731. SMITH *v.* ATLANTA POSTAL CREDIT UNION, 560 U. S. 912;

No. 09–9757. BAYS *v.* HOLMES ET AL., 560 U. S. 929;

No. 09–9758. IN RE BAYS, 560 U. S. 923;

No. 09–9779. NITZ *v.* HARVEY ET AL., 560 U. S. 930;

No. 09–9800. HUDSON *v.* VASBINDER, WARDEN, 560 U. S. 912;

No. 09–9820. OSBORNE *v.* AMERICAN MULTI-CINEMA, INC., DBA AMC THEATERS PARKWAY POINT 15, ET AL., 560 U. S. 941;

No. 09–9841. COOK *v.* NEBRASKA, 560 U. S. 913;

No. 09–9842. SCHMIDT *v.* HUBERT, WARDEN, 560 U. S. 913;

No. 09–9910. PINSON ET UX. *v.* EQUIFAX CREDIT INFORMATION SERVICES, INC., ET AL., 560 U. S. 943;

No. 09–9918. ALBERTS *v.* WHEELING JESUIT UNIVERSITY ET AL., 560 U. S. 913;

No. 09–9984. ELLIOTT *v.* UNITED STATES, 559 U. S. 1115;

No. 09–10055. WILLIAMS *v.* NORTH CAROLINA, 560 U. S. 944;

No. 09–10069. TOWNSEND *v.* BANG ET AL., 560 U. S. 957;

No. 09–10099. PARDO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 560 U. S. 931;

No. 09–10135. GRAY *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, 560 U. S. 931;

No. 09–10190. DAVIS *v.* UNITED STATES, 560 U. S. 917;

No. 09–10364. CARTWRIGHT *v.* UNITED STATES, 560 U. S. 934;

No. 09–10391. WILLIAMS *v.* UNITED STATES, 560 U. S. 935;

No. 09–10410. GLASS *v.* UNITED STATES, 560 U. S. 935;

No. 09–10442. PODLOG *v.* UNITED STATES, 560 U. S. 946;

No. 09–10563. COX *v.* SCHWARTZ, WARDEN, 560 U. S. 972;

No. 09–10581. GILLARD *v.* NORTHWESTERN UNIVERSITY, 560 U. S. 973;

No. 09–10602. DOYLE *v.* ARCHULETA ET AL., 560 U. S. 973; and

No. 09–10613. IN RE DAVIS, 560 U. S. 938. Petitions for rehearing denied.

No. 08–775. VILLEGAS DURAN *v.* ARRIBADA BEAUMONT, 560 U. S. 921. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

AUGUST 4, 2010

Dismissal Under Rule 46

No. 10–5041. CANNADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 384 Fed. Appx. 253.

AUGUST 6, 2010

Miscellaneous Order

No. 10A155. KHADR *v.* UNITED STATES. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

AUGUST 9, 2010

Dismissal Under Rule 46

No. 10–5691. IN RE KHADR. Petition for writ of mandamus dismissed under this Court's Rule 46.

AUGUST 12, 2010

Miscellaneous Order

No. 10–5858 (10A173). IN RE LAND. 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.

AUGUST 16, 2010

Miscellaneous Orders

No. 10A3 (09–1332). SAIN *v.* SNYDER ET AL. C. A. 10th Cir. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 10A56. TAITZ *v.* MACDONALD, GARRISON COMMANDER, FORT BENNING, ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied.

No. D–2477. IN RE WEST. Brian Grayson West, of Brooklandville, Md., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on July 26, 2010 [*ante*, p. 1043], is discharged.

No. 09–150. MICHIGAN *v.* BRYANT. Sup. Ct. Mich. [Certiorari granted, 559 U. S. 970.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Richard D. Friedman for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE KAGAN took no part in the consideration or decision of these motions.

No. 09–400. STAUB *v.* PROCTOR HOSPITAL. C. A. 7th Cir. [Certiorari granted, 559 U. S. 1066.] Motion of American Association for Justice for leave to file a brief as *amicus curiae* granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 09–893. AT&T MOBILITY LLC *v.* CONCEPCION ET UX. C. A. 9th Cir. [Certiorari granted, 560 U. S. 923.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 09–1036. HENDERSON *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1024.] Motion of petitioner to dispense with printing the joint appendix granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

Rehearing Denied

No. 03–10833. BURNS *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, 543 U. S. 853;

No. 08–9911. CAMPBELL *v.* STEIN ET AL., 557 U. S. 924;

No. 09–1074. JUSTICE ET AL. *v.* TOWN OF CICERO, ILLINOIS, ET AL., 560 U. S. 965;

No. 09–1219. BAILEY *v.* CALDWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF BAILEY, 560 U. S. 965;

No. 09–1263. MADYUN *v.* LINJER, 560 U. S. 940;

No. 09–1291. CAPACI *v.* FOLMAR KENNER, LLC, *ante*, p. 1007;

No. 09–1350. SEGUIN *v.* CIRCUIT COURT OF VIRGINIA, FAIRFAX COUNTY, ET AL., *ante*, p. 1008;

No. 09–7117. ADAMS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1008;

No. 09–7725. WRIGHT *v.* STEELE, WARDEN, 559 U. S. 909;

No. 09–8700. WHITE *v.* FAIRFAX COUNTY, VIRGINIA, ET AL., 560 U. S. 907;

No. 09–9579. SEALS *v.* RUSSELL ET AL., 560 U. S. 910;

No. 09–9711. CLINTON *v.* BRENNER, *ante*, p. 1028;

No. 09–9740. MARSH *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL., 560 U. S. 929;

No. 09–9744. ROBERTS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 560 U. S. 929;

No. 09–9770. SCHMIDT *v.* FROEDTERT MEMORIAL LUTHERAN ET AL., 560 U. S. 930;

No. 09–9775. AMIR-SHARIF *v.* TEXAS, 560 U. S. 930;

No. 09–9819. GOLTSMAN *v.* ALMQUIST & GILBERT, P. C., ET AL., 560 U. S. 941;

No. 09–9829. JOHNSON *v.* WERTANEN, 560 U. S. 912;

No. 09–9853. JAMERSON *v.* CALIFORNIA, 560 U. S. 942;

No. 09–9969. KAUFMAN *v.* TEXAS, 560 U. S. 955;

No. 09–10010. INGLE *v.* DEUTSCHE BANK NATIONAL TRUST CO., 560 U. S. 956;

No. 09–10025. YSAIS *v.* NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT ET AL., 560 U. S. 956;

No. 09–10074. FRANCIS *v.* KENTUCKY RIVER COAL CORP., 560 U. S. 915;

No. 09–10210. ELLIS *v.* MARIETTA ET AL., 560 U. S. 970;

No. 09–10242. GETZ *v.* TAYLOR ET AL., *ante*, p. 1012;

No. 09–10285. COLLADO *v.* FLORIDA, *ante*, p. 1013;

No. 09–10300. COLE *v.* HILAND ET AL., *ante*, p. 1029;

No. 09–10305. YSAIS *v.* YSAIS, *ante*, p. 1013;

No. 09–10343. MCDAVIS *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL., *ante*, p. 1019;

No. 09–10363. IN RE MAYWEATHER, 560 U. S. 952;

No. 09–10585. ELLIOTT *v.* DEPARTMENT OF AGRICULTURE, 560 U. S. 973;

No. 09–10597. RHODE *v.* HALL, WARDEN, 560 U. S. 958;

No. 09–10656. CRAIN *v.* NEVADA PAROLE AND PROBATION ET AL., *ante*, p. 1032;

No. 09–10735. DELGADO *v.* UNITED STATES, 560 U. S. 976;

No. 09–10745. IN RE MARCUM, 560 U. S. 951;

No. 09–10776. HALLFORD *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL., *ante*, p. 1032;

No. 09–10856. ALJABRI *v.* UNITED STATES, *ante*, p. 1016;

No. 09–10897. CLARK *v.* SHERRILL, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, *ante*, p. 1033;

No. 09–10958. DAVIS *v.* DEPARTMENT OF JUSTICE, *ante*, p. 1034; and

No. 09–10960. IN RE CASILLAS, 560 U. S. 964. Petitions for rehearing denied.

No. 09–9960. ESCOBAR DE JESUS *v.* UNITED STATES, 559 U. S. 1114;

No. 09–10115. PALMER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, 560 U. S. 944;

No. 09–10455. HICKS *v.* UNITED STATES, 560 U. S. 947; and

No. 09–10466. ALEXANDER *v.* UNITED STATES, *ante*, p. 1015. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

AUGUST 19, 2010

Dismissal Under Rule 46

No. 09–247. OHIO VALLEY ENVIRONMENTAL COALITION ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 556 F. 3d 177.

AUGUST 26, 2010

Dismissals Under Rule 46

No. 09–1061. NOVELL, INC. *v.* SCO GROUP, INC. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 578 F. 3d 1201.

No. 10–5134. BURTON *v.* SPOKANE POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 383 Fed. Appx. 671.

SEPTEMBER 3, 2010

Miscellaneous Orders

No. 10A74 (10–5040). ALBRIGHT-LAZZARI ET VIR *v.* CONNECTICUT. App. Ct. Conn. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 10A109 (09–10544). YSAIS *v.* NEW MEXICO ET AL. C. A. 10th Cir. Application for injunction, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 10A110 (09–11225). YSAIS *v.* RICHARDSON, GOVERNOR OF NEW MEXICO, ET AL. C. A. 10th Cir. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2470. IN RE DISBARMENT OF MARTIN. Disbarment entered. [For earlier order herein, see *ante,* p. 1003.]

No. D–2471. IN RE DISBARMENT OF ISAAC. Disbarment entered. [For earlier order herein, see *ante,* p. 1004.]

No. D–2472. IN RE DISBARMENT OF ROZAN. Disbarment entered. [For earlier order herein, see *ante,* p. 1004.]

No. D–2473. IN RE DISBARMENT OF AMATO. Disbarment entered. [For earlier order herein, see *ante,* p. 1004.]

No. D–2494. IN RE DISCIPLINE OF FORD. Robert Hunter Ford, of Birmingham, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 08–1438. SOSSAMON *v.* TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 560 U. S. 923.] Motion of petitioner to dispense with printing the joint appendix granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 09–152. BRUESEWITZ ET AL. *v.* WYETH LLC, FKA WYETH, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 559 U. S. 991.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 09–329. CHASE BANK USA, N. A. *v.* MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1005.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 09–479. ABBOTT *v.* UNITED STATES. C. A. 3d Cir.; and

No. 09–7073. GOULD *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 559 U. S. 903.] Motion of petitioners for divided argument granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

Rehearing Denied

No. 09–1299. LANCE *v.* HALL, WARDEN, *ante*, p. 1026;

No. 09–1309. NIZIO *v.* COOK ET AL., *ante*, p. 1026;

No. 09–1330. NEWSOM *v.* TENNESSEE ET AL., *ante*, p. 1027;

No. 09–8318. TELLEZ *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 560 U. S. 940;

No. 09–9865. TOWNSEND *v.* MICHIGAN, 560 U. S. 942;

No. 09–9881. SEMLER *v.* KLANG ET AL., 560 U. S. 954;

No. 09–9898. TEMPLE *v.* RILEY, WARDEN, 560 U. S. 943;

No. 09–9913. LYE HUAT ONG *v.* SOWERS, WARDEN, ET AL., 560 U. S. 943;

No. 09–9982. CROSS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 560 U. S. 955;

No. 09–10008. CARVER *v.* BENNETT ET AL., 560 U. S. 914;

No. 09–10084. HINDAOUI *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 560 U. S. 967;

No. 09–10095. HALL *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 560 U. S. 967;

No. 09–10122. HARRISON *v.* HARTLEY, WARDEN, ET AL., 560 U. S. 931;

No. 09–10136. HERNANDEZ *v.* HARTLEY, WARDEN, 560 U. S. 968;

No. 09–10183. WISE *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, 560 U. S. 970;

No. 09–10255. JONES *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL INSTITUTION, *ante*, p. 1012;

No. 09–10267. WILLIS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1013;

No. 09–10338. SPURLOCK *v.* NORTHRIP ET AL., *ante*, p. 1029;

No. 09–10380. REBERGER *v.* NEVADA, 560 U. S. 971;

No. 09–10398. BUNCH *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 1030;

No. 09–10445. MENDENHALL *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1031;

No. 09–10578. ARIEGWE *v.* FERRITER, DIRECTOR, MONTANA DEPARTMENT OF CORRECTIONS, ET AL., 560 U. S. 973;

No. 09–10676. IN RE TORRENCE, *ante*, p. 1023;

No. 09–10760. SMITH *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante*, p. 1032;

No. 09–10813. HAUGHTON *v.* UNITED STATES, *ante*, p. 1016;

No. 09–10816. HICKS *v.* FEDERAL BUREAU OF PRISONS ET AL., 560 U. S. 978; and

No. 09–10953. HINES *v.* RICHARDS ET AL., *ante*, p. 1034. Petitions for rehearing denied.

No. 09–980. BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD. *v.* UNITED STATES ET AL., *ante*, p. 1025; and

No. 09–7963. WILSON *v.* UNITED STATES, *ante*, p. 1009. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

No. 09–10320. TAFARI *v.* ANNETTS ET AL., *ante*, p. 1019. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

SEPTEMBER 9, 2010

Certiorari Denied

No. 10–6275 (10A249). BROWN *v.* VAIL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 10–6300 (10A254). WOOD *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE SOTOMAYOR would grant the application for stay of execution.

SEPTEMBER 10, 2010

Certiorari Denied

No. 10–6343 (10A267). BROWN *v.* WASHINGTON. Super. Ct. Wash., King County. Application for stay of execution of sen-

tence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 14, 2010

Dismissals Under Rule 46

No. 09–1429. DILACQUA *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.

No. 09–10588. RANGEL-IBARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 376 Fed. Appx. 455.

SEPTEMBER 16, 2010

Dismissals Under Rule 46

No. 09–1248. NARRICOT INDUSTRIES, L. P. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 09–1397. LEWIS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 587 F. 3d 654.

SEPTEMBER 21, 2010

Certiorari Denied

No. 10–5692 (10A242). LEWIS *v.* HOBBS, 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 GINSBURG and JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 609 F. 3d 291.

SEPTEMBER 22, 2010

Dismissal Under Rule 46

No. 10–5205. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 368 Fed. Appx. 866.

SEPTEMBER 24, 2010

Certiorari Denied

No. 10–6647 (10A315). RHODE *v.* UPTON, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence

of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 27, 2010

Miscellaneous Order

No. 10A325. RHODE *v.* UPTON, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

Certiorari Denied

No. 10–6690 (10A323). RHODE *v.* UPTON, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 10–6691 (10A324). RHODE *v.* UPTON, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 10–6692 (10A326). RHODE *v.* UPTON, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 28, 2010

Dismissal Under Rule 46

No. 09–1069. ASTRAZENECA PHARMACEUTICALS LP *v.* BLUE CROSS BLUE SHIELD OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 582 F. 3d 156.

Miscellaneous Orders. (For the Court's order making allotment of Justices, see *ante,* p. VII.)

No. 09–571. CONNICK, DISTRICT ATTORNEY, ET AL. *v.* THOMPSON. C. A. 5th Cir. [Certiorari granted, 559 U. S. 1004.] Motion of Former Federal Civil Rights Officials and Prosecutors for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 09–834. KASTEN *v.* SAINT-GOBAIN PERFORMANCE PLASTICS CORP. C. A. 7th Cir. [Certiorari granted, 559 U. S. 1004.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 09–907. RANSOM *v.* FIA CARD SERVICES, N. A., FKA MBNA AMERICA BANK, N. A. C. A. 9th Cir. [Certiorari granted, 559 U. S. 1066.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 09–9000. SKINNER *v.* SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS. C. A. 5th Cir. [Certiorari granted, 560 U. S. 924.] Motion of petitioner for appointment of counsel granted. Robert C. Owen, Esq., of Austin, Tex., is appointed to serve as counsel for petitioner in this case.

Certiorari Granted

No. 09–1205. SMITH ET AL. *v.* BAYER CORP. C. A. 8th Cir. Certiorari granted. Reported below: 593 F. 3d 716.

No. 09–1272. KENTUCKY *v.* KING. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 302 S. W. 3d 649.

No. 09–1273. ASTRA USA, INC., ET AL. *v.* SANTA CLARA COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 588 F. 3d 1237.

No. 09–1279. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* AT&T INC. ET AL. C. A. 3d Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 582 F. 3d 490.

No. 09–1298. GENERAL DYNAMICS CORP. *v.* UNITED STATES; and

No. 09–1302. BOEING CO., SUCCESSOR TO MCDONNELL DOUGLAS CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari in No. 09–1298 granted limited to Question 1 presented by the petition. Certiorari in No. 09–1302 granted limited to Question 2

presented by the petition. Cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 567 F. 3d 1340.

No. 09–1343. J. McIntyre Machinery, Ltd. *v.* Nicastro et ux. Sup. Ct. N. J. Certiorari granted, and case to be argued in tandem with No. 10–76, *Goodyear Luxembourg Tires, S. A., et al.* v. *Brown et ux., Co-Administrators of the Estate of Brown, et al., infra.* Reported below: 201 N. J. 48, 987 A. 2d 575.

No. 09–1498. United States *v.* Tinklenberg. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Justice Kagan took no part in the consideration or decision of this motion and this petition. Reported below: 579 F. 3d 589.

No. 09–10245. Freeman *v.* United States. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 355 Fed. Appx. 1.

No. 09–10876. Bullcoming *v.* New Mexico. Sup. Ct. N. M. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 147 N. M. 487, 226 P. 3d 1.

No. 09–11311. Sykes *v.* United States. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 598 F. 3d 334.

No. 10–76. Goodyear Luxembourg Tires, S. A., et al. *v.* Brown et ux., Co-Administrators of the Estate of Brown, et al. Ct. App. N. C. Certiorari granted, and case to be argued in tandem with No. 09–1343, *J. McIntyre Machinery, Ltd.* v. *Nicastro et ux., supra.* Reported below: 199 N. C. App. 50, 681 S. E. 2d 382.

No. 10–179. Stern, Executor of the Estate of Marshall *v.* Marshall, Executrix of the Estate of Marshall. C. A. 9th Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 600 F. 3d 1037.

No. 10–188. Schindler Elevator Corp. *v.* United States ex rel. Kirk. C. A. 2d Cir. Certiorari granted. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 601 F. 3d 94.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1058 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.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

PHILIP MORRIS USA INC. ET AL. *v.* SCOTT ET AL.

ON APPLICATION FOR STAY

No. 10A273. Decided September 24, 2010

The application to stay a Louisiana state court's judgment—which required applicant tobacco companies to pay more than $250 million to fund a 10-year smoking-cessation program for respondent class members on the ground that applicants defrauded the class by misrepresenting nicotine's addictive effects—is granted pending applicants' timely filing, and this Court's disposition, of a petition for certiorari. Applicants have shown a reasonable probability that certiorari will be granted, a significant possibility that the judgment will be reversed, and a likelihood of irreparable harm if the judgment is not stayed. Their claim that the Louisiana court erred in holding that class plaintiffs are not required to prove detrimental reliance on a defendant's misrepresentations raises an important question: to what extent class treatment may constitutionally alter normal process requirements. Applicants may also suffer irreparable harm, for it appears that a substantial portion of the fund established will be irrevocably expended before this Court is able to consider and resolve their claims. In contrast, granting the stay will apparently do no permanent injury to respondents. Thus, the equitable balance favors issuing the stay.

JUSTICE SCALIA, Circuit Justice.

Respondents brought this class action against several tobacco companies on behalf of all Louisiana smokers. The suit alleged that the companies defrauded the plaintiff class by "distort[ing] the entire body of public knowledge" about the addictive effects of nicotine. *Scott* v. *American Tobacco Co.*, 2004–2095, p. 14 (La. App. 2/7/07), 949 So. 2d 1266, 1277. The Fourth Circuit Court of Appeal of Louisiana granted relief on that theory, and entered a judgment requiring applicants to pay $241,540,488 (plus accumulated interest of about

$29 million) to fund a 10-year smoking-cessation program for the benefit of the members of the plaintiff class. *Scott* v. *American Tobacco Co.*, 2009–0461, pp. 21–23 (5/5/10), 36 So. 3d 1046, 1059–1060. (Still to be determined are the allowable attorney's fees, which will likely be requested in the tens of millions of dollars.) The Supreme Court of Louisiana declined review. *Scott* v. *American Tobacco Co.*, 2010–1361 (9/3/10), 44 So. 3d 707. Applicants have asked me, in my capacity as Circuit Justice for the Fifth Circuit, to stay the judgment until this Court can act on their intended petition for a writ of certiorari.

A single Justice has authority to enter such a stay, 28 U. S. C. § 2101(f), but the applicant bears a heavy burden. It is our settled practice to grant a stay only when three conditions are met: First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed. *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (SCALIA, J., in chambers). I conclude that this standard is met.

Applicants complain of many violations of due process, including (among others) denial of the opportunity to cross-examine the named representatives of the class, factually unsupported estimations of the number of class members entitled to relief, and constant revision of the legal basis for respondents' claim during the course of litigation. Even though the judgment that is the alleged consequence of these claimed errors is massive—more than $250 million—I would not be inclined to believe that this Court would grant certiorari to consider these fact-bound contentions that may have no effect on other cases.

But one asserted error in particular (and perhaps some of the others as well) implicates constitutional constraints on

the allowable alteration of normal process in class actions. This is a fraud case, and in Louisiana the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations. 949 So. 2d, at 1277. Accordingly, the Court of Appeal indicated that members of the plaintiff class who wish to seek individual damages, rather than just access to smoking-cessation measures, would have to establish their own reliance on the alleged distortions. *Ibid.* But the Court of Appeal held that this element need *not* be proved insofar as the class seeks payment into a fund that will *benefit* individual plaintiffs, since applicants are guilty of a "distort[ion of] the entire body of public knowledge" on which the "class as a whole" has relied. *Id.*, at 1277–1278. Thus, the court eliminated any need for respondents to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.

Applicants allege that this violates their due-process right to "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932); internal quotation marks omitted). Respondents concede that due process requires such an opportunity, but they contend that the intermediate state court's pronouncement means that, as a matter of Louisiana's substantive law, applicants *have* no nonreliance defense. That response may ultimately prove persuasive, but at this stage it serves to describe the issue rather than resolve it. The apparent consequence of the Court of Appeal's holding is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action.

The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question. National concern over abuse of the class-

action device induced Congress to permit removal of most major class actions to federal court, see 28 U. S. C. § 1332(d), where they will be subject to the significant limitations of the Federal Rules. Federal removal jurisdiction has not been accorded, however, over many class actions in which more than two-thirds of the plaintiff class are citizens of the forum State. See § 1332(d)(4). Because the class here was drawn to include only residents of Louisiana, this suit typifies the sort of major class action that often will not be removable, and in which the constraints of the Due Process Clause will be the only federal protection. There is no conflict between federal courts of appeals or between state supreme courts on the principal issue I have described; but the former seems impossible, since by definition only state class actions are at issue; and the latter seems implausible, unless one posits the unlikely case where the novel approach to class-action liability is a legislative rather than judicial creation, or the creation of a lower state court disapproved by the state supreme court on federal constitutional grounds. This constitutional issue ought not to be permanently beyond our review.

Given those considerations, I conclude applicants have satisfied the prerequisites for a stay. I think it reasonably probable that four Justices will vote to grant certiorari, and significantly possible that the judgment below will be reversed. As for irreparable harm: Normally the mere payment of money is not considered irreparable, see *Sampson* v. *Murray*, 415 U. S. 61, 90 (1974), but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable. See, *e. g.*, *Mori* v. *Boilermakers*, 454 U. S. 1301, 1303 (1981) (Rehnquist, J., in chambers). Here it appears that, before this Court will be able to consider and resolve applicants' claims, a substantial portion of the fund established by their payment will be irrevocably expended. Funds spent to provide antismoking counseling and devices

will not likely be recoverable; nor, it seems, will the $11,501,928 fee immediately payable toward administrative expenses in setting up the funded program.

That does not end the matter. A stay will not issue simply because the necessary conditions are satisfied. Rather, "sound equitable discretion will deny the stay when 'a decided balance of convenience'" weighs against it. *Barnes*, 501 U. S., at 1304–1305 (SCALIA, J., in chambers) (quoting *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 164 (1923)). Here, however, the equities favor granting the application. Refusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents. Applicants allege that similar smoking-cessation measures are freely and readily available from other sources in Louisiana, and respondents have not disputed that. Under those circumstances, the equitable balance favors issuance of the stay.

The application for a stay of the execution of the judgment of the Court of Appeal of Louisiana, Fourth Circuit, is granted pending applicants' timely filing, and this Court's disposition, of a petition for a writ of certiorari.

It is so ordered.

Opinion in Chambers

LUX ET AL. *v.* RODRIGUES ET AL., AS MEMBERS OF VIRGINIA STATE BOARD OF ELECTIONS

ON APPLICATION FOR INJUNCTION

No. 10A298. Decided September 30, 2010

Lux's application for an injunction pending appeal is denied. Lux seeks to require the Virginia State Board of Elections to count signatures he collected in an attempt to place himself on the ballot as an independent candidate for Congress in Virginia's Seventh Congressional District. Under Virginia law, signatures must be obtained from voters registered in the relevant district, and each signature must be witnessed by a resident of the district. Lux is a resident of the First District but witnessed 1,063 signatures collected from Seventh District residents. The board refused to count those signatures, and both the Federal District Court and the Fourth Circuit declined to order the board to do so. To obtain injunctive relief here, Lux must demonstrate that "the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (Rehnquist, C. J., in chambers). This he cannot do, even if his claim is supported by *Meyer* v. *Grant*, 486 U. S. 414, and *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, which both addressed the validity of petition circulation restrictions. This Court was careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were at issue there, and residency requirements, which were not. And Lux himself notes that the courts of appeals appear to be reaching divergent results concerning the validity of state residency requirements.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Herb Lux has filed with me as Circuit Justice for the Fourth Circuit an application for an injunction pending appeal. Lux seeks an injunction requiring the Virginia State Board of Elections to count signatures that he collected in an effort to place himself on the congressional ballot. The application is denied.

Lux is an independent candidate for the U. S. House of Representatives in Virginia's Seventh Congressional District. Under Virginia law, an independent candidate for

Congress must obtain 1,000 signatures from voters registered in the relevant congressional district in order to appear on the ballot. Va. Code Ann. § 24.2–506 (2010 Cum. Supp.). That same provision requires, among other things, that each signature be witnessed by a resident of that district. *Ibid.*

Although Lux is a candidate for the Seventh District, he is a resident of Virginia's First District. As a result, he cannot serve as a witness for signatures from Seventh District residents. Despite that fact, Lux witnessed 1,063 of the 1,224 signatures collected on his behalf. The State Board of Elections refused to count those signatures. Lux unsuccessfully sought an injunction requiring the Board to do so from the District Court for the Eastern District of Virginia and from the Court of Appeals for the Fourth Circuit.

To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that "the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers) (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U. S. 1235 (1972) (Rehnquist, J., in chambers)). A Circuit Justice's issuance of an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore "demands a significantly higher justification" than that required for a stay. *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers).

Lux does not meet this standard. He may very well be correct that the Fourth Circuit precedent relied on by the District Court—*Libertarian Party of Va.* v. *Davis*, 766 F. 2d 865 (1985)—has been undermined by our more recent decisions addressing the validity of petition circulation restrictions. See *Meyer* v. *Grant*, 486 U. S. 414, 422, 428 (1988) (invalidating a law criminalizing circulator compensation and describing petition circulation as "core political speech" (in-

ternal quotation marks omitted)); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 186–187 (1999) (holding unconstitutional a requirement that initiative petition circulators be registered voters). At the same time, we were careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were before the Court, and residency requirements, which were not. *Id.*, at 197. Lux himself notes that the courts of appeals appear to be reaching divergent results in this area, at least with respect to the validity of state residency requirements. Application 13–14. Accordingly, even if the reasoning in *Meyer* and *American Constitutional Law Foundation* does support Lux's claim, it cannot be said that his right to relief is "indisputably clear."

The application for an injunction is denied.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2007, 2008, AND 2009

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2007	**2008**	**2009**	**2007**	**2008**	**2009**	**2007**	**2008**	**2009**	**2007**	**2008**	**2009**
Number of cases on dockets	5	4	6	1,969	1,941	1,908	7,628	7,021	7,388	9,602	8,966	9,302
Number disposed of during term	1	1	2	1,624	1,612	1,572	6,749	6,209	6,520	8,374	7,822	8,093
Number remaining on dockets	4	3	4	345	329	337	879	812	868	1,228	1,144	1,209

	TERMS		
	2007	**2008**	**2009**
Cases argued during term	[1] 75	87	[3] 82
Number disposed of by full opinions	72	83	77
Number disposed of by per curiam opinions	2	3	4
Number set for reargument	0	1	0
Cases granted review this term	95	87	77
Cases reviewed and decided without oral argument	208	95	95
Total cases to be available for argument at outset of following term	47	[2] 48	40

[1] Includes No. 06–1275 which was argued on October 29, 2007, and dismissed on December 28, 2007.

[2] Includes No. 08–205 which was scheduled to be reargued on September 9, 2009.

[3] Includes No. 08–205 which was reargued on September 9, 2009.

JULY 7, 2010

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